

**EXECUTIVE SUMMARY**  
**Status Report of Current Regulatory and Legal Proceedings**  
**as of October 2, 2019**

The following activity, as more fully described in the attached litigation report, has occurred since the report dated September 10, 2019 was circulated. New matters/proceedings since the last Report are preceded by an asterisk '\*'. Page numbers precede the matter description.

**I. Complaints/Section 206 Proceedings**

2	206 Proceeding: RNS/LNS Rates and Rate Protocols (EL16-19-002)	Sep 11	TOs request procedural schedule by extended an additional 10 days
		Sep 12	
		Sep 23	TOs request procedural schedule by extended an additional 30 days
		Sep 24	Chief Judge Cintron extends procedural schedule dates by an additional 30 days

**II. Rate, ICR, FCA, Cost Recovery Filings**

8	FCA13 Results Filing (ER19-1166)	Sep 20	Capacity Suppliers move to lodge Sep 12 SparkSpread article	
		Sep 25		FERC issues notice that FCA13 Results Filing became effective by operation of law pursuant to FPA section 205, eff. Jun 28, 2019
		Sep 27		Glick and Joint Chatterjee/McNamee statements posted
10	MPD OATT 2018 Annual Informational Filing (ER15-1429-010)	Sep 11	Settlement conf. held; third conf. (by telephone) scheduled for Oct 7	
		Sep 26		Settlement Judge Dring issues status report recommending the continuation of settlement negotiations

**III. Market Rule and Information Policy Changes, Interpretations and Waiver Requests**

12	ISO-NE eTariff Corrections: section I.2 (ER19-2685)	Sep 26	FERC accepts changes, eff. Sep 17, 2019
12	Import Transaction Requirements & Clean Up Changes (ER19-2565)	Sep 19	FERC accepts changes, eff. Oct 23, 2019
14	Order 841 Compliance Filing (ER19-470)	Sep 18	ISO-NE and PTO AC request that the effective date for revisions to Section II.21 and Schedules 9 and 21 of the OATT be advanced two days, to Dec 1, 2019; comments date Oct 9, 2019

**IV. OATT Amendments / TOAs / Coordination Agreements**

19	Reactive Capability Audit Provisions Changes (ER19-2528)	Sep 18	FERC accepts changes, eff. Oct 1, 2019
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**V. Financial Assurance/Billing Policy Amendments**

21	ISO-NE FAP Corrections (ER19-2815)	Sep 16	ISO-NE files corrections to eTariff so that Financial Assurance Policy reflects both CASPR and Monthly (BoPP) FTR Auction changes; comment date Oct 7
		Sep 24	

**VI. Schedule 20/21/22/23 Changes**

* 21	Schedule 21-EM: Brookfield LSA (ER19-2907)	Sep 30	ISO-NE and Emera submit First Revised Brookfield LSA; comment date Oct 21
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|------|--------------------------------------------------------------------------|--------|-------------------------------------|
| * 21 | Schedule 21-NEP National Grid/Mini-Watt Hydroelectric SGAs (ER19-2464/5) | Sep 16 | FERC accepts SGAs, eff. Jul 1, 2019 |
|------|--------------------------------------------------------------------------|--------|-------------------------------------|

**VII. NEPOOL Agreement/Participants Agreement Amendments**

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|----|-----------------------------------------------------------------------|--------|------------------------------------------------------------|
| 22 | PA Amendment No. 11 (JNC Age Limit Waiver) (ER19-2616)                | Sep 17 | FERC accepts PA11, eff. Oct 15, 2019                       |
| 23 | 133 <sup>rd</sup> Agreement (Fuels Industry Participants) (ER19-2520) | Sep 16 | FERC accepts 133 <sup>rd</sup> Agreement, eff. Oct 1, 2019 |

**VIII. Regional Reports**

- |      |                                                                |        |                                               |
|------|----------------------------------------------------------------|--------|-----------------------------------------------|
| 24   | Capital Projects Report - 2019 Q2 (ER19-2569)                  | Sep 24 | FERC accepts 2019 Q2 Report, eff. Jul 1, 2019 |
| * 24 | Reserve Market Compliance (27th) Semi-Annual Report (ER06-613) | Oct 1  | ISO-NE submits 27th semi-annual report        |

**IX. Membership Filings**

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|------|--------------------------------------------|--------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| * 25 | October 2019 Membership Filing (ER19-2902) | Sep 30 | <b>Memberships:</b> API, Dantzig Energy, Energy Storage Resources, Great American Gas & Electric, Madison BTM, QPH Capital, and Verde Group;<br><b>Terminations:</b> BIPCO, Constellation Energy Power Choice, EverPower Commercial Services, Inertia Power III, and Tidal Energy Marketing |
|------|--------------------------------------------|--------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

**X. Misc. - ERO Rules, Filings; Reliability Standards**

No Activity to Report

**XI. Misc. - of Regional Interest**

- |      |                                                                      |                            |                                                                                                                                                                                                                      |
|------|----------------------------------------------------------------------|----------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 28   | 203 Application: Footprint, Hartree Partners / Brookfield (EC19-104) | Sep 30                     | FERC conditionally approves application                                                                                                                                                                              |
| 29   | New England Ratepayers Association Complaint (EL19-10)               | Sep 19                     | FERC grants complaint, finding the rate established by NH SB 365 is preempted by the FPA and inconsistent with PURPA                                                                                                 |
| * 33 | 3rd Supp. to Stony Brook IA (ER19-2897)                              | Sep 27                     | NSTAR files third extension, to Dec 31, 2020, of MMWEC's Stonybrook Interconnection Agreement; comment date Oct 18                                                                                                   |
| * 33 | IA: Emera Maine/ Liberty Utilities (Tinker Transmission) (ER19-2788) | Sep 11                     | Emera Maine files a two-party IA with Liberty Utilities (Tinker Transmission)                                                                                                                                        |
| 34   | FERC Enforcement Action: Vitrol and F. Corteggiano (IN14-4)          | Sep 17<br>Sep 20<br>Sep 25 | Respondents file notice that Jul 18 motion regarding the designation of non-decisional staff was moot and need not be addressed<br>FERC Staff answers Respondents' Aug 23 answer<br>FERC Staff revises Sep 20 answer |

**XII. Misc. - Administrative & Rulemaking Proceedings**

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|------|-----------------------------------------------------------------------------------------|-----------|----------------------------------------------------------------------------------------|
| 35   | Joint Staff White Paper on Notices of Penalty for Violations of CIP Standards (AD19-18) | Sep 11-30 | Over 30 parties file comments                                                          |
| * 36 | NOPR: QF Rates and Requirements; Implementation Issues under PURPA (RM19-15)            | Sep 19    | FERC issues NOPR; comment date [60 days after publication in <i>Federal Register</i> ] |

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|----|--------------------------------------------------------------------------------------------|--------|----------------------------------------------------------------------------------------------------------------------------------------|
| 38 | <i>Order 861</i> : Refinements to Horizontal Market Power Analysis Requirements (RM19-2)   | Sep 16 | FERC issues tolling order affording it additional time to consider the requests for rehearing of <i>Order 861</i>                      |
| 39 | <i>Order 860</i> : Data Collection for Analytics & Surveillance and MBR Purposes (RM16-17) | Sep 16 | FERC issues tolling order affording it additional time to consider the requests for clarification and/or rehearing of <i>Order 860</i> |

**XIII. Natural Gas Proceedings**



No Activity to Report

**XIV. State Proceedings & Federal Legislative Proceedings**



No Activity to Report

**XV. Federal Courts**



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|----|--------------------------------------|-------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 48 | PennEast Project (18-1128) (DC Cir.) | Oct 1 | Court removes case from oral argument calendar; case to be held in abeyance “pending final disposition of any post-dispositional proceedings in the Third Circuit or proceedings before the United States Supreme Court resulting from the Third Circuit’s decision in Case No. 19-1191 (In re: PennEast Pipeline Company, LLC) |
|----|--------------------------------------|-------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

## M E M O R A N D U M

**TO:** NEPOOL Participants Committee Member and Alternates

**FROM:** Patrick M. Gerity, NEPOOL Counsel

**DATE:** October 2, 2019

**RE:** Status Report on Current Regional Wholesale Power and Transmission Arrangements Pending Before the Regulators, Legislatures and Courts

We have summarized below the status of key ongoing proceedings relating to NEPOOL matters before the Federal Energy Regulatory Commission (“FERC”),<sup>1</sup> state regulatory commissions, and the Federal Courts and legislatures through October 2, 2019. If you have questions, please contact us.

<b>I. Complaints/Section 206 Proceedings</b>
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- **RTO Insider Press Policy Complaint (EL18-196)**

As reported in the April 10 Report, the FERC dismissed, on April 10, 2019, *RTO Insider’s* August 31 Complaint.<sup>2</sup> The Complaint had requested that the FERC either (i) find that NEPOOL’s press policy “unlawful, unjust and unreasonable, unduly discriminatory and contrary to the public interest, and direct NEPOOL to cease and desist” from implementing its policy; or (ii) “if the [FERC] finds that NEPOOL can sustain such a ban as a “private” entity, [] direct that NEPOOL’s special powers, privileges and subsidies be terminated and that an open stakeholder process be used by [ISO-NE]” (“RTO Insider Complaint”). In dismissing the RTO Insider Complaint, the FERC agreed with NEPOOL that the claims asserted by RTO Insider did not relate to matters over which the FERC has jurisdiction, finding that the “rules governing attendance at NEPOOL meetings do not directly affect the filings brought before the Commission in the way that membership rules that allow members to vote do ... the challenged NEPOOL policies here concern passive attendance at NEPOOL meetings by non-voting entities and dissemination of written accounts of NEPOOL deliberations. The contested attendance and reporting policies are too attenuated from NEPOOL’s voting process to directly affect jurisdictional rates.” On May 10, Public Citizen requested rehearing of the *RTO Insider Complaint Order*. On June 7, the FERC issued a tolling order affording it additional time to consider the request for rehearing, which remains pending. If you have any questions concerning this matter, please contact Pat Gerity (860-275-0533; [pmgerity@daypitney.com](mailto:pmgerity@daypitney.com)) or Sebastian Lombardi (860-275-0663; [slombardi@daypitney.com](mailto:slombardi@daypitney.com)).

- **Energy Security Improvements (Chapter 3) (EL18-182)**

As previously reported, the July 2, 2018 *Mystic Waiver Order*<sup>3</sup> (reported on in more detail in ER18-1509 in Section III below) in part instituted this Section 206 proceeding in light of the FERC’s preliminarily finding that the ISO-NE Tariff may be unjust and unreasonable in that it fails to address specific regional fuel security concerns identified in the record in ER18-1509 that could result in reliability violations as soon as 2022. Accordingly, the *Mystic Waiver Order* directed ISO-NE, in part, to submit permanent Tariff revisions reflecting improvements to its market design to better address regional fuel security concerns (the “Chapter 3 Proposal”). Following an ISO-NE request for an extension of time to file its Chapter 3 Proposal, the FERC issued a notice granting an extension of

<sup>1</sup> Capitalized terms used but not defined in this filing are intended to have the meanings given to such terms in the Second Restated New England Power Pool Agreement (the “Second Restated NEPOOL Agreement”), the Participants Agreement, or the ISO New England Inc. (“ISO” or “ISO-NE”) Transmission, Markets and Services Tariff (the “Tariff”).

<sup>2</sup> *RTO Insider LLC v. New England Power Pool Participants Comm.*, 167 FERC ¶ 61,021 (Apr. 10, 2019) (“*RTO Insider Complaint Order*”).

<sup>3</sup> *ISO New England Inc.*, 164 FERC ¶ 61,003 (July 2, 2018), *reh’g requested* (“*Mystic Waiver Order*”).

time, to and including October 15, 2019, a month earlier than requested, for the filing of that Proposal. As noted below, the deadline has now been further extended – to **April 15, 2020**.

**July 15 Technical Conference.** On July 15, the FERC held a public, staff-led meeting in response to the April 22 joint request by ISO-NE, NECPUC and NEPOOL for such a meeting to create a forum for pre-filing discussions without violating the *ex parte* limitations. The technical conference was webcast and will be available for viewing for three 3 months at <http://ferc.capitolconnection.org>. Speaker materials are posted in the FERC’s eLibrary.

**6-Month Extension of Time for ISO-NE’s Long-Term Fuel Security Mechanism Filing (Apr 15, 2020).** On August 30, the FERC extended by 6 months (to April 15, 2020) the deadline for the filing of ISO-NE’s long-term fuel security mechanism. Markets Committee consideration of ISO-NE’s Energy Security Improvements (“ESI”) project is on-going.

If you have any questions concerning this proceeding, please contact Dave Doot (860-275-0102; [dtodoot@daypitney.com](mailto:dtodoot@daypitney.com)) or Sebastian Lombardi (860-275-0663; [slombardi@daypitney.com](mailto:slombardi@daypitney.com)).

- **206 Proceeding: RNS/LNS Rates and Rate Protocols (EL16-19-002)**

Concluding that the contested 2018 Joint Offer of Settlement (the “Settlement”),<sup>4</sup> filed to resolve all issues in the Section 206 proceeding instituted by the FERC on December 28, 2015,<sup>5</sup> lacked sufficient detailed information to enable it to apply any of the approaches available to it to approve a contested settlement,<sup>6</sup> the FERC rejected the Settlement and remanded this proceeding (EL16-19) to Chief Judge Cintron to resume hearing procedures.<sup>7</sup> The *RNS Rate/Rate Protocol Settlement Order* terminated Docket No. ER18-2235.

As previously reported, the Settlement was supported by *NESCOE* but opposed by Municipal PTF Owners<sup>8</sup> and FERC Trial Staff. The *Municipal PTF Owners* (“Munis”) asserted that the Settlement would worsen, rather than improve, the issues of “lack of transparency, clarity and specificity that led the Commission [to] find the existing Attachment F formula unjust and unreasonable”, discriminate against load directly connected to PTF and exempted by Section II.12(c) of the ISO-NE Tariff from paying costs associated with service across non-PTF

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<sup>4</sup> As previously reported, the Settling Parties filed the Settlement on Aug. 17, 2018, in ER18-2235. The Settlement proposed changes to Section II.25, Schedules 8 and 9, Attachment F (including the addition of Interim Formula Rate Protocols (“Interim Protocols”)), and the Schedule 21s to the ISO-NE OATT. Had they been approved, the changes to Attachment F would have become effective mid-June, 2019, with the remaining changes to be effective January 1, 2020. The Interim Protocols, as well as the changes to Section II.25 and Schedules 8 and 9, were supported by the Participants Committee at its July 24, 2018 meeting.

<sup>5</sup> *ISO New England Inc. Participating Transmission Owners Admin. Comm.*, 153 FERC ¶ 61,343 (Dec. 28, 2015), *reh’g denied*, 154 FERC ¶ 61,230 (Mar. 22, 2016) (“*RNS/LNS Rates and Rate Protocols Order*”). The *RNS/LNS Rates and Rate Protocols Order* found the ISO-NE Tariff unjust, unreasonable, and unduly discriminatory or preferential because the Tariff “lacks adequate transparency and challenge procedures with regard to the formula rates” for Regional Network Service (“RNS”) and Local Network Service (“LNS”). The FERC also found that the RNS and LNS rates themselves “appear to be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful” because (i) “the formula rates appear to lack sufficient detail in order to determine how certain costs are derived and recovered in the formula rates” and “could result in an over-recovery of costs” due to the “the timing and synchronization of the RNS and LNS rates”. The FERC encouraged the parties to make every effort to settle this matter before hearing procedures are commenced. The FERC-established refund date is January 4, 2016.

<sup>6</sup> The FERC outlined in a seminal case the following four alternative approaches for approving contested settlements: (1) where the FERC can render a binding merits decision on each contested issue, (2) where the FERC can approve the settlement based on a finding that the overall settlement *as a package* is just and reasonable, (3) where the FERC can determine that the benefits of the settlement outweigh the nature of the objections and the interests of the contesting party are too attenuated, and (4) where the FERC can approve the settlement as uncontested for the consenting parties, and can sever the contesting parties to allow them to litigate the issues raised. See *Trailblazer Pipeline Co.*, 85 FERC ¶ 61,345, at 62,342-44 (1998).

<sup>7</sup> *ISO New England Inc. Participating Transmission Owners Admin. Comm., et al.*, 167 FERC ¶ 61,164 (May 22, 2019) (“*RNS Rate/Rate Protocol Settlement Order*”). The Parties were reminded that they could seek further settlement judge procedures as well. *Id.* at fn. 49.

<sup>8</sup> “Municipal PTF Owners” are: Braintree, Chicopee, Middleborough, Norwood, Reading, Taunton, and Wallingford.

facilities, contravened numerous settled rate principles without explanation or justification,<sup>9</sup> and would have imposed an unacceptable moratorium and burden on parties inclined to challenge Attachment F. **FERC Trial Staff** asserted that the Settlement, as filed, was not fair and reasonable nor in the public interest “because it would result in unreasonable rates and contains fundamental defects”,<sup>10</sup> and opposed the Settlement terms which would bind non-settling parties to the terms of the Settlement and establish a standard of review for changes to the Settlement. FERC Trial Staff suggested that these defects could be corrected in a comprehensive compliance filing. **Reply comments** were submitted by NEPOOL, NESCOE and the MA AG. In its limited comments, **NEPOOL** noted that it supported the Interim Protocols and that it had no objection to the Settlement. **NESCOE** reiterated its support for the Settlement in its reply comments, urging the FERC to reject any arguments that consumer-interested parties “were not familiar with the issues relating to the Settlement or that they reached a settlement for any reason other than their view that it is in the best interests of consumers.”<sup>11</sup> **MA AG** urged the FERC to approve the Settlement as submitted, despite the objections of FERC Trial Staff and Municipal PTF Owners, because it complies with the *RNS/LNS Rates and Rate Protocols Order* and represents a carefully negotiated resolution to numerous complex ratemaking and transparency issues.<sup>12</sup>

**Hearings.** Having rejected the Settlement, the FERC remanded this proceeding to Chief ALJ Cintron to resume hearing procedures. On May 23, Chief Judge Cintron designated Judge David H. Coffman as the Presiding Judge for the purpose of hearings and issuance of an initial decision within Track III procedural time standards.<sup>13</sup> A prehearing conference was held on June 6, 2019. Following that conference, orders establishing a procedural schedule and adopting rules of conduct for the hearing were issued. That schedule has since been extended by a total of 85 days. Hearings are now scheduled to begin June 8, 2020, with an initial decision to be issued by November 2, 2020. Interim deadlines may be adjusted in accordance with the Chief Judge’s order. Discovery is on-going.

**Procedural Schedule dates extended additional 40 days.** On September 11 and September 24, the TOs submitted unopposed motions to further extend the deadlines, for an additional 40 days in total, again to “allow the Active Participants to pursue settlement negotiations in the most efficient manner.” The requests for a further 10-day and then a further 30-day extension were granted by Chief Judge Cintron on September 12 and 24, 2019, respectively. Absent settlement, the next procedural milestone is the submission of direct testimony on November 19, 2019.

If you have any questions concerning this matter, please contact Eric Runge (617-345-4735; [ekrunge@daypitney.com](mailto:ekrunge@daypitney.com)) or Jamie Blackburn (202-218-3905; [jblackburn@daypitney.com](mailto:jblackburn@daypitney.com)).

<sup>9</sup> The elements of the Settlement that Municipal PTF Owners assert contravene settled rate principles include: provision for a fixed accrual for Post-Employment Benefits Other than Pension (“PBOPs”); continued TO use of net proceeds of debt, rather than gross proceeds of debt, in establishing capital structures under their proposed revenue requirement formula; inappropriate allocation of rental revenues from secondary uses of transmission facilities; the addition of miscellaneous intangible plant (Account 303), and depreciation and amortization of intangibles, to rate base; and the creation of a Regulatory Asset for an unspecified Massachusetts state tax rate change (without explanation).

<sup>10</sup> Included in the “fundamental defects” of the Settlement identified by FERC Trial Staff are that it: (1) enables the TOs to conduct extra-formulaic, ad hoc ratemaking for all externally-sourced inputs every year; (2) enables certain PTOs to over-recover certain plant costs; (3) enables certain PTOs to recover greater than 50% of Construction Work in Progress (“CWIP”) in rate base (4) violates prior FERC orders about which customer groups can be made to pay incentive returns; (5) fails to appropriately calculate federal and state income taxes and, in particular, fails to account for excess Accumulated Deferred Income Taxes (“ADIT”) created by the Tax Cuts and Jobs Act; (6) does not contain a fixed and stated ROE; and (7) does not contain a fixed and stated PBOPs expense.

<sup>11</sup> Reply Comments of NESCOE, Docket Nos. ER18-2235 and EL16-19, at p. 2 (filed Sep. 28, 2018).

<sup>12</sup> Reply Comments of the Mass. Att’y General in Support of Settlement, Docket Nos. EL16-19 and ER18-2235 (filed Sep. 28, 2018).

<sup>13</sup> Track III time standards require a hearing be convened within 42 weeks and an initial decision issued within 63 weeks.

- **Base ROE Complaints I-IV: (EL11-66, EL13-33; EL14-86; EL16-64)**

There are four proceedings pending before the FERC in which consumer representatives seek to reduce the TOs' return on equity ("Base ROE") for regional transmission service.

- **Base ROE Complaint I (EL11-66).** In the first Base ROE Complaint proceeding, the FERC concluded that the TOs' ROE had become unjust and unreasonable,<sup>14</sup> set the TOs' Base ROE at 10.57% (reduced from 11.14%), capped the TOs' total ROE (Base ROE *plus* transmission incentive adders) at 11.74%, and required implementation effective as of October 16, 2014 (the date of *Opinion 531-A*).<sup>15</sup> However, the FERC's orders were challenged, and in *Emera Maine*,<sup>16</sup> the DC Circuit Court vacated the FERC's prior orders, and remanded the case for further proceedings consistent with its order. The FERC's determinations in *Opinion 531* are thus no longer precedential, though the FERC remains free to re-adopt those determinations on remand as long as it provides a reasoned basis for doing so.
- **Base ROE Complaints II & III (EL13-33 and EL14-86) (consolidated).** The second (EL13-33)<sup>17</sup> and third (EL14-86)<sup>18</sup> ROE complaint proceedings were consolidated for purposes of hearing and decision, though the parties were permitted to litigate a separate ROE for each refund period. After hearings were completed, ALJ Sterner issued a 939-paragraph, 371-page *Initial Decision*, which lowered the base ROEs for the EL13-33 and EL14-86 refund periods from 11.14% to 9.59% and 10.90%, respectively.<sup>19</sup> The *Initial Decision* also lowered the ROE ceilings. Parties to these proceedings filed briefs on exception to the FERC, which has not yet issued an opinion on the ALJ's *Initial Decision*.
- **Base ROE Complaint IV (EL16-64).** The fourth and final ROE proceeding<sup>20</sup> also went to hearing before an ALJ, Judge Glazer, who issued his initial decision on March 27, 2017.<sup>21</sup> The *Base ROE IV*

<sup>14</sup> The TOs' 11.14% pre-existing Base ROE was established in *Opinion 489. Bangor Hydro-Elec. Co.*, Opinion No. 489, 117 FERC ¶ 61,129 (2006), *order on reh'g*, 122 FERC ¶ 61,265 (2008), *order granting clarific.*, 124 FERC ¶ 61,136 (2008), *aff'd sub nom.*, Conn. Dep't of Pub. Util. Control v. FERC, 593 F.3d 30 (D.C. Cir. 2010) ("*Opinion 489*").

<sup>15</sup> *Coakley Mass. Att'y Gen. v. Bangor Hydro-Elec. Co.*, 147 FERC ¶ 61,234 (2014) ("*Opinion 531*"), *order on paper hearing*, 149 FERC ¶ 61,032 (2014) ("*Opinion 531-A*"), *order on reh'g*, 150 FERC ¶ 61,165 (2015) ("*Opinion 531-B*").

<sup>16</sup> *Emera Maine v. FERC*, 854 F.3d 9 (D.C. Cir. 2017) ("*Emera Maine*"). *Emera Maine* vacated the FERC's prior orders in the Base ROE Complaint I proceeding, and remanded the case for further proceedings consistent with its order. The Court agreed with both the TOs (that the FERC did not meet the Section 206 obligation to first find the existing rate unlawful before setting the new rate) and "Customers" (that the 10.57% ROE was not based on reasoned decision-making, and was a departure from past precedent of setting the ROE at the midpoint of the zone of reasonableness).

<sup>17</sup> The 2012 Base ROE Complaint, filed by Environment Northeast (now known as Acadia Center), Greater Boston Real Estate Board, National Consumer Law Center, and the NEPOOL Industrial Customer Coalition ("NICC", and together, the "2012 Complainants"), challenged the TOs' 11.14% ROE, and seeks a reduction of the Base ROE to 8.7%.

<sup>18</sup> The 2014 Base ROE Complaint, filed July 31, 2014 by the Massachusetts Attorney General ("MA AG"), together with a group of State Advocates, Publicly Owned Entities, End Users, and End User Organizations (together, the "2014 ROE Complainants"), seeks to reduce the current 11.14% Base ROE to 8.84% (but in any case no more than 9.44%) and to cap the Combined ROE for all rate base components at 12.54%. 2014 ROE Complainants state that they submitted this Complaint seeking refund protection against payments based on pre-incentives Base ROE of 11.14%, and a reduction in the Combined ROE, relief as yet not afforded through the prior ROE proceedings.

<sup>19</sup> *Environment Northeast v. Bangor Hydro-Elec. Co. and Mass. Att'y Gen. v. Bangor Hydro-Elec. Co.*, 154 FERC ¶ 63,024 (Mar. 22, 2016) ("*2012/14 ROE Initial Decision*").

<sup>20</sup> The 4th ROE Complaint asked the FERC to reduce the TOs' current 10.57% return on equity ("Base ROE") to 8.93% and to determine that the upper end of the zone of reasonableness (which sets the incentives cap) is no higher than 11.24%. The FERC established hearing and settlement judge procedures (and set a refund effective date of April 29, 2016) for the 4th ROE Complaint on September 20, 2016. Settlement procedures did not lead to a settlement, were terminated, and hearings were held subsequently held December 11-15, 2017. The September 26, 2016 order was challenged on rehearing, but rehearing of that order was denied on January 16, 2018. *Belmont Mun. Light Dept. v. Central Me. Power Co.*, 156 FERC ¶ 61,198 (Sep. 20, 2016) ("*Base ROE Complaint IV Order*"), *reh'g denied*, 162 FERC ¶

*Initial Decision* concluded that the currently-filed base ROE of 10.57%, which may reach a maximum ROE of 11.74% with incentive adders, was **not** unjust and unreasonable for the Complaint IV period, and hence was not unlawful under section 206 of the FPA.<sup>22</sup> Parties in this proceeding filed briefs on exception to the FERC, which has not yet issued an opinion on the *Base ROE IV Initial Decision*.

**October 16, 2018 Order Proposing Methodology for Addressing ROE Issues Remanded in Emera Maine and Directing Briefs.** On October 16, 2018, the FERC, addressing the issues that were remanded in *Emera Maine*, proposed a new methodology for determining whether an existing ROE remains just and reasonable.<sup>23</sup> The FERC indicated its intention that the methodology be its policy going forward, including in the four currently pending New England proceedings. The FERC established a paper hearing on how its proposed methodology should apply to the four pending ROE proceedings.<sup>24</sup>

At highest level, the new methodology will determine whether (1) an existing ROE is unjust and unreasonable under the first prong of FPA section 206 and (2) if so, what the replacement ROE should be under the second prong of FPA section 206. In determining whether an existing ROE is unjust and under the first prong of Section 206, the FERC stated that it will determine a "composite" zone of reasonableness based on the results of three models: the Discounted Cash Flow ("DCF"), Capital Asset Pricing Model ("CAPM"), and Expected Earnings models. Within that composite zone, a smaller, "presumptively reasonable" zone will be established. Absent additional evidence to the contrary, if the utility's existing ROE falls within the presumptively reasonable zone, it is not unjust and unreasonable. Changes in capital market conditions since the existing ROE was established may be considered in assessing whether the ROE is unjust and unreasonable.

If the FERC finds an existing ROE unjust and unreasonable, it will then determine the new just and reasonable ROE using an averaging process. For a diverse group of average risk utilities, FERC will average four values: the midpoints of the DCF, CAPM and Expected Earnings models, and the results of the Risk Premium model. For a single utility of average risk, the FERC will average the medians rather than the midpoints. The FERC said that it would continue to use the same proxy group criteria it established in *Opinion 531* to run the ROE models, but it made a significant change to the manner in which it will apply the high-end outlier test.

The FERC provided preliminary analysis of how it would apply the proposed methodology in the Base ROE I Complaint, suggesting that it would affirm its holding that an 11.14% Base ROE is unjust and unreasonable. The FERC suggested that it would adopt a 10.41% Base ROE and cap any preexisting incentive-based total ROE at 13.08%.<sup>25</sup> The new ROE would be effective as of the date of *Opinion 531-A*, or October 16, 2014. Accordingly, the issue to be addressed in the Base ROE Complaint II proceeding is whether the ROE established on remand in the first complaint proceeding remained just and reasonable based on financial data for the six-month period September 2013 through February 2014 addressed by the evidence presented by the participants in the second proceeding. Similarly, briefing in the third and fourth complaints will have to address whether whatever ROE is in effect as a result of the immediately preceding complaint proceeding continues to be just and reasonable.

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61,035 (Jan. 18, 2018) (together, the "*Base ROE Complaint IV Orders*"). The *Base ROE Complaint IV Orders*, as described in Section XV below, have been appealed to, and are pending before, the DC Circuit.

<sup>21</sup> *Belmont Mun. Light Dept. v. Central Me. Power Co.*, 162 FERC ¶ 63,026 (Mar. 27, 2018) ("*Base ROE Complaint IV Initial Decision*").

<sup>22</sup> *Id.* at P 2.; Finding of Fact (B).

<sup>23</sup> *Coakley v. Bangor Hydro-Elec. Co.*, 165 FERC ¶ 61,030 (Oct. 18, 2018) ("*Order Directing Briefs*" or "*Coakley*").

<sup>24</sup> *Id.* at 19.

<sup>25</sup> *Id.* at P 59.

The FERC directed participants in the four proceedings to submit briefs regarding the proposed approaches to the FPA section 206 inquiry and how to apply them to the complaints (separate briefs for each proceeding). Additional financial data or evidence concerning economic conditions in any proceeding must relate to periods before the conclusion of the hearings in the relevant complaint proceeding. Following a FERC notice granting a request by the TOs and Customers<sup>26</sup> for an extension of time to submit briefs, the latest date for filing initial and reply briefs was extended to January 11 and March 8, 2019, respectively. On January 11, initial briefs were filed by EMCOS, Complainant-Aligned Parties, TOs, EEI, Louisiana PSC, Southern California Edison, and AEP. As part of their initial briefs, each of the Louisiana PSC, SEC and AEP also moved to intervene out-of-time. Those interventions were opposed by the TOs on January 24. The Louisiana PSC answered the TOs' January 24 motion on February 12. Reply briefs were due March 8, 2019 and were submitted by the TOs, Complainant-Aligned Parties, EMCOS, FERC Trial Staff. This matter remains pending before the FERC.

These matters are pending before the FERC. If you have any questions concerning these matters, please contact Eric Runge (617-345-4735; [ekrunge@daypitney.com](mailto:ekrunge@daypitney.com)), Joe Fagan (202-218-3901; [jfagan@daypitney.com](mailto:jfagan@daypitney.com)) or Jamie Blackburn (202-218-3905; [jblackburn@daypitney.com](mailto:jblackburn@daypitney.com)).

## II. Rate, ICR, FCA, Cost Recovery Filings

- **FCA14 De-List Bids Filing (ER19-2312)**

Pursuant to Market Rule 1 § 13.8.1(a), ISO-NE submitted on June 28 a filing describing the Permanent De-List Bids and Retirement De-List Bids that were submitted on or prior to the FCA14 Existing Capacity Retirement Deadline. ISO-NE reported that it received 22 Permanent De-List, 11 Retirement De-List Bids, and 3 substitution auction test prices from 11 Lead Market Participants prior to the March 15, 2019 FCA14 Existing Capacity Retirement Deadline. The bids were for resources located in the CT, ME, NEMA/Boston, and Western Central MA Load Zones, with 279.256 MWs of aggregate capacity. All but two of the Bids were for resources under 20 MW or that did not meet the affiliation requirements that would have required IMM review, with five (representing 157.321 MWs) requiring substitution auction test price reviews because the Bids were for greater than 3 MWs. The IMM did review the remaining two Bids (from one supplier) for 98.198 MWs of capacity. The IMM's determination regarding those 2 bids is described in the version of the filing that was filed confidentially as required under §13.8.1(a) of Market Rule 1.

ISO-NE reported that, because the FERC's determination on its Chapter 2B Interim Winter Energy Security Proposal described in Section III below (ER19-1428), which creates a new revenue stream for resources participating in the program for the FCA14 Capacity Commitment Period, was still pending, the IMM provided conditional retirement notifications to Participants, with a price under both the current rules, and a price to be used if the Chapter 2B rules are approved by the FERC.

Comments on this filing were due on or before July 19. On July 17, Public Citizen (which had already doc-lessly intervened) protested the filing, asserting that the FERC must order the filing deficient for its failure to provide, and should order ISO-NE to provide, intervenors with a proposed non-disclosure certificate to access the privileged components of this filing. Doc-less interventions were filed by NEPOOL, Dominion, Eversource, Exelon, National Grid, NESCOE, and NRG.

**August 7, 2019 Deficiency Letter.** On August 7, the FERC issued a deficiency letter in this proceeding indicating that the filing was "deficient insofar as it does not include a proposed form of a Non-Disclosure Agreement [{"NDA"}]." ISO-NE was directed to submit that form to the FERC and each entity on the Commission's service list. ISO-NE submitted that form on August 9, but insisted that the information provided to the FERC in its Retirements Filing should not be subject to disclosure under an NDA in that the Filing contained "competitively sensitive, resource-specific information and confidential market data", and for which the FERC, in a previous

<sup>26</sup> For purposes of the motion seeking clarification, "Customers" are CT PURA, MA AG and EMCOS.

proceeding addressing the NDA requirement related to a FCA De-List Bids information filing, had previously waived the NDA requirement.<sup>27</sup> Accordingly, ISO-NE requested that the FERC waive the Section 388.112 NDA requirement. ISO-NE advised the FEC that it would object to disclosure of any confidential portion of the FCA14 De-List Bids Filing, and would not provide any such material to any requesting entity unless otherwise directed by an order of the FERC. ISO-NE's submission re-set the 60-day clock for FERC action on this filing. On August 23, Public Citizen opposed ISO's August 7 waiver request and, on August 30, ISO-NE objected specifically to Public Citizen's request for disclosure of non-public information in this proceeding, confirming that it would not release any such information unless otherwise directed by FERC order.

This matter remains pending before the FERC. If you have any questions concerning this matter, please contact Pat Gerity (860-275-0533; [pmgerity@daypitney.com](mailto:pmgerity@daypitney.com)).

- **Transmission Rate Incentive Request: UI's Pequonnock Substation Project (ER19-1359)**

Rehearing of the FERC's May 14, 2019 order granting two of the three transmission rate incentives<sup>28</sup> requested by UI in connection with its Pequonnock Substation Project<sup>29</sup> remains pending. As previously reported, the FERC granted both the requested Abandoned Plant Incentive<sup>30</sup> and the CWIP Incentive,<sup>31</sup> but denied UI's request for an ROE Incentive Adder.<sup>32</sup> In denying the ROE Incentive Adder request, the FERC agreed with State Parties<sup>33</sup> and found that (i) the smart grid technology that UI plans to use for the Project was not sufficiently novel or innovative to satisfy the required showing under the FERC's 2012 Policy Statement and (ii) its "hardened resilient design" was a conventional design, and did not demonstrate risks and challenges not otherwise accounted for in UI's base ROE or addressed through risk-reducing incentives.<sup>34</sup> The incentives granted were granted under *Order 679*. In response to the procedural arguments challenging

<sup>27</sup> See *ISO New England Inc.*, 161 FERC ¶ 61,061 (2017) (granting ISO-NE's request for a waiver of Section 388.112 to the extent it requires submission of a form of NDA concerning resource-specific, commercially sensitive Permanent De-List Bids and Retirement De-List Bids in a FCM information filing).

<sup>28</sup> Pursuant to section 219 of the FPA, the FERC, in *Order 679*, set forth processes by which a public utility may seek incentive-based rate treatments to promote capital investment in certain transmission infrastructure. Incentive rate treatment is available to applicants that show that the facilities for which incentives are sought "either ensure reliability or reduce the cost of delivered power by reducing transmission congestion." There is a rebuttable presumption that the showing has been made if: (1) the transmission project results from a fair and open regional planning process that considers and evaluates the project for reliability and/or congestion and is found to be acceptable to the FERC; or (2) a project has received construction approval from an appropriate state commission or state siting authority. The FERC a project-specific demonstration of the nexus between the requested incentives and the risks and challenges of the project. In November 2012, the FERC issued the 2012 Policy Statement providing additional guidance regarding its evaluation of applications for transmission rate incentives under section 219 and *Order 679*.

<sup>29</sup> *United Illuminating Co.*, 167 FERC ¶ 61,126 (May 14, 2019) ("*UI Pequonnock Rate Incentive Order*"). As previously reported, UI's Pequonnock Substation Project will replace the existing Pequonnock substation and will include (1) a new 115-kV/13.8-kV gas insulated substation; (2) the relocation and installation of five existing 115-kV overhead transmission lines including seventeen new galvanized steel monopole structures (ten single circuit, two double circuit, and five "walk down" 11 structures); and 3) the relocation and installation of two 115-kV underground high-pressure gas filled cables and one underground XLPE cable, each ranging in length from about 500 to 730 feet. The Pequonnock Substation Project is approximately a \$101.6 million electric transmission investment and is expected to be placed in service on or before Dec. 1, 2022.

<sup>30</sup> 100% recovery of prudently incurred costs in the event the Pequonnock Substation Project is abandoned, in whole or in part, for reasons outside of UI's reasonable control.

<sup>31</sup> Inclusion of 100% of Construction Work in Progress ("CWIP") in rate base.

<sup>32</sup> The ROE Incentive Adder would have been a 50 basis point return on common equity for increased risks and challenges prompted by UI's deployment of smart grid communications-enabled technology and construction and operation of a substation that includes a resilient design. The FERC also declined to grant the ROE Incentive Adder under its section 205 authority (which it has previously held it can do under certain circumstances, such as to promote important public policy goals. See, e.g., *Transource Wisconsin, LLC*, 149 FERC ¶ 61,180, at PP 16, 19 (2014) ), finding that UI had not demonstrated that the circumstances under which such action could be taken (e.g. to promote important public policy goals) were present in this case.

<sup>33</sup> "State Parties" are: the MA AG, CT AG, CT DEEP, CT PURA, and the CT OCC.

<sup>34</sup> *UI Pequonnock Rate Incentive Order* at PP 63-64.

Public Citizen's intervention, the FERC found that "good cause exists to grant Public Citizen's motion to intervene, based on Public Citizen's representations".<sup>35</sup> The FERC accepted the Abandoned Plant and CWIP Incentives effective as of May 15, 2019.

UI requested rehearing of the *UI Pequonnock Rate Incentive Order* on June 14, 2019, and focused specifically on the FERC's denial of the request for an ROE Incentive Adder. On July 15, the FERC issued a tolling order affording it additional time to consider UI's request, which remains pending. If you have any questions concerning this proceeding, please contact Pat Gerity (860-275-0533; [pmgerity@daypitney.com](mailto:pmgerity@daypitney.com)).

- **FCA13 Results Filing (ER19-1166)**

On September 25, 2019, the FERC issued a notice that, because it did not act on ISO-NE's filing on or before September 24<sup>36</sup> ("because of a lack of quorum in this proceeding at this time"), ISO-NE's FCA13 Results Filing<sup>37</sup> became effective by operation of law on Jun 28, 2019.<sup>38</sup> Commissioner Glick did not participate in this proceeding because the ethics pledge that he signed at the beginning of his tenure as a Commissioner precludes him, until November 29, 2019, from working on any matters in which Avangrid or any of its affiliates or subsidiaries is a party. As previously reported, Vineyard Wind, which is an Avangrid affiliate,<sup>39</sup> filed a protest and answer in this proceeding, thus precluding Commissioner Glick's participation and leaving just two Commissioners (not sufficient for a quorum) available to participate.

In their joint statement issued pursuant to FPA section 205(g)(1)(B), Chairman Chatterjee and Commission McNamee explained that they would have voted to accept the proposed FCA13 Results Filing to become effective June 28, 2019. In addition, they would have voted to grant ISO-NE's requested waiver of the requirement to file a form of non-disclosure agreement covering the confidential information submitted with ISO-NE's first deficiency letter response finding, consistent with prior (FCA8) precedent, that the need for confidential treatment of the information provided in the deficiency response outweighed Capacity Suppliers' need to receive that information. Chairman Chatterjee and Commissioner McNamee would have rejected all of the remaining arguments raised opposing the FCA13 Results, including the arguments related to Vineyard Wind's participation in the auction subject to the Minimum Offer Price Rule ("MOPR") and not exempt as a Renewable Technology Resource ("RTR").<sup>40</sup>

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<sup>35</sup> Citing prior FERC precedent where the FERC previously allowed Public Citizen to cure a deficient motion to intervene in an answer by stating its members' interest in the proceedings and public interest role. See *Southwest Airlines Co. v. Colonial Pipeline Co.*, 166 FERC ¶ 61,094, at PP 10, 16 (2019).

<sup>36</sup> The September 24 deadline for FERC action was set following ISO-NE's July 26, 2019 responses to FERC Staff's second deficiency in this proceeding.

<sup>37</sup> ISO-NE filed the results of the thirteenth FCA ("FCA13") on March 1, 2019. As previously reported, FCA13 highlights included: (i) three Capacity Zones (Southeastern New England ("SENE"); Northern New England ("NNE"); and the Rest-of-Pool; (ii) resources to be paid \$3.800/kW-mo. in all Capacity Zones, for NY AC Ties imports (522 MW) and Highgate (57 MW) and at the Phase I/II HQ Excess external interface (431 MW), and \$2.681/kW-mo. for New Brunswick imports (184 MW); (iii) a single clearing price of \$0.000 for all Capacity Zones in the substitution auction; (iv) no resources cleared as Conditional Qualified New Generating Capacity Resources; (v) no Long Lead Time Generating Facilities secured a Queue Position to participate as a New Generating Capacity Resource; and (vi) no de-list bids rejected for reliability reasons.

<sup>38</sup> Notice of Filing Taking Effect by Operation of Law, *ISO New England Inc.*, Docket No. ER19-1166 (Sep. 25, 2019).

<sup>39</sup> Vineyard Wind is a joint venture between Copenhagen Infrastructure Partners and Avangrid Renewables, a subsidiary of Avangrid, Inc.

<sup>40</sup> The Joint Statement explained that the Commissioners would have found that ISO-NE treated Vineyard Wind's capacity appropriately and in accordance with the Tariff when it conducted FCA13 and without merit, therefore, arguments that Vineyard Wind's inability to participate in FCA13 as an RTR yielded unjust and unreasonable results. The Commissioners would also have (i) rejected NTE's objections with respect to the issuance of the deficiency letters and the date the filing became effective by operation of law; (ii) found that Killingly was appropriately mitigated; (iii) that the IMM was not *required* to submit documentation certifying the competitiveness of the FCA; and (iv) the comments regarding various FCM rules to be outside the scope of the proceeding and a collateral attack on past FERC orders accepting the FCM rules.

The September 25 notice will be treated for purposes of rehearing to be an order issued by the FERC accepting the results. Any request for rehearing of the FCA13 Results Filing Notice will be due on or before October 24, 2019. While NEPOOL intervened in the FCA13 Results Filing proceeding, it took no substantive position and, absent express direction from the Committee, will not challenge the Notice. If you have any questions concerning this matter, please contact Sebastian Lombardi (860-275-0663; [slombardi@daypitney.com](mailto:slombardi@daypitney.com)) or Pat Gerity (860-275-0533; [pmgerity@daypitney.com](mailto:pmgerity@daypitney.com)).

- **Mystic 8/9 Cost of Service Agreement (ER18-1639)**

As previously reported, on December 20, 2018, in a 2-1 decision (Commissioner Glick dissenting; Commissioner McIntyre not voting; Commissioner McNamee not participating), which followed an evidentiary proceeding and two rounds of briefing, the FERC conditionally accepted the Cost-of-Service Agreement (“COS Agreement”)<sup>41</sup> among Constellation Mystic Power (“Mystic”), Exelon Generation Company (“ExGen”) and ISO-NE.<sup>42</sup> The COS Agreement will provide compensation for the continued operation of the Mystic 8 & 9 units from June 1, 2022 through May 31, 2024. The *Mystic Order* directed Mystic to submit a compliance filing (intended to modify aspects of the COS Agreement that FERC rejected or directed be changed) on or before February 18, 2019, and established a paper hearing to ascertain whether and how the ROE methodology that FERC proposed in *Coakley* should apply in the case. Initial briefs on the ROE issue are due on or before April 19, 2019, and reply briefs are due on or before July 18, 2019.<sup>43</sup> Requests for clarification and/or rehearing of the *Mystic Order* were filed by Constellation Mystic Power, CT Parties, EDF, ENECOS, MA AG, NESCOE, NextEra, and Repsol. On February 6, Constellation answered the other parties’ requests for rehearing. CT Parties answered Constellation’s request for rehearing on February 8. On February 14, NESCOE answered Constellation’s February 6 answer. On February 15, the FERC issued a tolling order affording it additional time to consider the requests for clarification and/or rehearing, which remain pending.

***Mystic’s Compliance Filing.*** On March 1, 2019, Mystic submitted its required compliance filing. The compliance filing included the following modifications:

- ◆ Modification to Section 2.2 (Termination) which provides ISO-NE will be required to seek FERC authorization to extend the term of the COS Agreement beyond May 31, 2024; deletion of Section 2.2.1 in its entirety;
- ◆ Inclusion of a clawback provision;
- ◆ Modification to Section 4.4 related to settlement of over- and underperformance credits;
- ◆ A clarification that fuel opportunity costs will not be included as part of the Stipulated Variable Costs used to calculate the revenue credits;
- ◆ Modifications to information access provisions (§ 6.2) both to allow ISO-NE full access to information and to support verification of third-party sales;
- ◆ Modifications to Schedule 3 supporting multiple compensation-related directives (e.g. cost of capital/cost of service, fuel supply charge, settlement of over- and under-performance credits);
- ◆ Schedule 3A modifications related to Mystic’s true-up process; and
- ◆ Non-substantive conforming changes.

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<sup>41</sup> The COS Agreement, submitted on May 16, 2018, is between Mystic, Exelon Generation Company, LLC (“ExGen”) and ISO-NE. The COS Agreement is to provide cost-of-service compensation to Mystic for continued operation of Mystic 8 & 9, which ISO-NE has requested be retained to ensure fuel security for the New England region, for the period of June 1, 2022 to May 31, 2024. The COS Agreement provides for recovery of Mystic’s fixed and variable costs of operating Mystic 8 & 9 over the 2-year term of the Agreement, which is based on the pro forma cost-of-service agreement contained in Appendix I to Market Rule 1, modified and updated to address Mystic’s unique circumstances, including the value placed on continued sourcing of fuel from the Distrigas liquefied natural gas (“LNG”) facility, and on the continued provision of surplus LNG from Distrigas to third parties.

<sup>42</sup> *Constellation Mystic Power, LLC*, 165 FERC ¶ 61,267 (Dec. 20, 2018) (“*Mystic Order*”).

<sup>43</sup> *Id.* at PP 31-34.

In addition, Mystic's compliance filing included for informational purposes changes to the Fuel Supply and Terminal Services Agreements. Comments on Mystic's compliance filing were due on or before March 22, 2019. Protests and comments were filed by CT Parties, ENECOS, MA AG, National Grid, Public Systems (MMWEC/NHEC), and NESCOE. Mystic answered the March 22 protests on April 8. Also, on March 22, Concord, Reading and Wellesley moved for the release from Protective Order a documentary response regarding the net book value of Mystic 8 and 9 from the 2006 Mystic 8/9 RMR proceeding (ER06-427). Mystic's compliance filing and the pleadings related thereto remain pending before the FERC.

**ROE Paper Hearing.** The *Mystic Order* established a paper hearing to determine the just and reasonable ROE to be used in setting charges under Mystic's COS Agreement. On April 19, Mystic, Connecticut Parties, ENECOS, MA AG, and FERC Trial Staff filed initial briefs. On July 18, Constellation Mystic Power, CT Parties, ENECOS, MA AG, National Grid, FERC Trial Staff filed reply briefs. The ROE Paper Hearing is now pending before the FERC.

**July Mystic COS Agreement Order.** Rehearing remains pending of the FERC's July order. As previously reported, the FERC issued an initial order regarding the COS Agreement, accepting the COS Agreement but suspending its effectiveness and setting it for accelerated hearings and settlement discussions.<sup>44</sup> The *Mystic COS Agreement Order* was approved by a 3-2 vote, with dissents by Commissioners Powelson and Glick. Challenges to the *July Mystic COS Agreement Order* were filed by NESCOE, ENECOS, MA AG, and the NH PUC. Constellation answered the NESCOE request for reconsideration on August 21. On September 10, 2018, the FERC issued a tolling order affording it additional time to consider the requests for rehearing, which remain pending.

If you have questions on this proceeding, please contact Joe Fagan (202-218-3901; [jfagan@daypitney.com](mailto:jfagan@daypitney.com)); or Sebastian Lombardi (860-275-0663; [slombardi@daypitney.com](mailto:slombardi@daypitney.com)).

- **MPD OATT 2019 Annual Informational Filing (ER15-1429-000)**

On May 1, 2019, as corrected by its filing on May 16, 2019, Emera Maine submitted its 2019 annual informational filing setting forth, for the June 1, 2019 to May 31, 2020 rate year, the charges for transmission service under the MPD OATT ("MPD Charges") and an updated transmission real power loss factor. Although this filing and the May 16 correction were not noticed for public comment, it will nevertheless be subject to the process established in the "Protocols for Implementing and Reviewing Charges Established by the MPD OATT Attachment J Rate Formulas" and may result in further proceedings (*see, e.g.*, ER15-1429-010 below). On June 11, Maine Customer Group ("MCG") moved to strike a portion of Emera Maine's May 1 filing. Specifically, MCG moved to strike the trueup to actuals portion of Emera's Annual Update filing to the extent that true-up proposes a change in the formula rate from a direct assignment of Maine Public District ("MPD") post-retirement benefits other than pensions ("PBOPs") to an allocation of company-wide PBOPs (which MCG argued would be a retroactive change to Emera Maine's formula rate, otherwise required to effect only prospectively). On June 26, Emera Maine answered MCG's June 11 motion to strike. If there are questions on this matter, please contact Pat Gerity (860-275-0533; [pmgerity@daypitney.com](mailto:pmgerity@daypitney.com)).

- **MPD OATT 2018 Annual Informational Filing (ER15-1429-010)**

As previously reported, the FERC granted, in part, on April 30, 2019, the formal challenge filed on December 31, 2018 by the Maine Customer Group<sup>45</sup> (the "2018 Challenge") to Emera Maine's May 15, 2018

<sup>44</sup> *Constellation Mystic Power*, 164 FERC ¶ 61,022 (July 13, 2018) ("*July Mystic COS Agreement Order*"), *reh'g requested*.

<sup>45</sup> For purposes of this proceeding, "Maine Customer Group" or "MCG" is the MPUC, MOPA, Houlton Water Co., and Van Buren Light & Power District, and Eastern Maine Electric Cooperative.

annual informational filing<sup>46</sup> and set the remaining issues for hearing and settlement judge procedures.<sup>47</sup> As previously reported, the 2018 Challenge sought certain cost reductions/ exclusions<sup>48</sup> to be effective June 1, 2018 following unsuccessful efforts to obtain the relief sought directly from Emera Maine MPD through informal resolution procedures in accordance with the Protocols. In granting in part the 2018 Challenge, the FERC found that Emera Maine's formula rate should be corrected for the current rate year and Emera Maine must submit a compliance filing on or before May 30 that revises its 2018-2019 formula rate charges to correct certain acknowledged errors, exclusion of certain costs for land associated with a project not in service, the exclusion of certain costs for distribution equipment from transmission rates, and the flowback of excess ADIT. As to the remaining issues, addressing Administrative and General ("A&G") expenses, merger-related prior losses, exclusion of costs attributed to Line 6901, and exclusion of land rights cost, the FERC found that the 2018 Annual Update raises issues of material fact that cannot be resolved based on the record and set those issues for hearing and settlement judge procedures. Hearings will be held in abeyance to provide time for settlement judge procedures.

**Settlement Judge Procedures.** Chief Judge Cintron designated John P. Dring as the Settlement Judge for these proceedings. Judge Dring has held two settlement conferences, one on July 18, 2019 and the second on September 11, 2019. A third settlement conference is scheduled to occur, by telephone, on October 7. On September 26, Judge Dring issued a report recommending the continuation of settlement negotiations.

If there are questions on this matter, please contact Pat Gerity (860-275-0533; [pmgerity@daypitney.com](mailto:pmgerity@daypitney.com)).

- **MPD OATT 2018 Annual Info Compliance Filing (ER15-1429-011)**

On May 16, 2019, Emera Maine submitted a filing in response to the requirements of the 2018 *Challenge Order* that revises the MPD 2018-19 formula rate charges to correct three errors raised by Maine Customer Group. Emera Maine stated that it calculated refunds due to wholesale (both network and point-to-point) customers as a result of these corrections and will issue such refunds, with interest, to those customers by May 31, 2019. As for the \$46,095 plus interest refund to retail customers, Emera Maine asked for a waiver of the need to issue direct refunds to each of its retail customers and in lieu of such direct refunds, reduced the retail annual transmission revenue requirement for 2019-2020. With respect to excess accumulated deferred income tax ("ADIT") issues, Emera Maine stated that no changes or adjustments were needed to charges levied under the MPD OATT for the June 1, 2018 to May 31, 2019 rate year. On May 22, MCG protested the compliance filing for Emera Maine's failure to provide for flowback to customers of excess ADIT effective June 1, 2018. MCG requested that the FERC order Emera to adjust and re-file its Compliance Filing so as to effectuate what it described as "the Commission's clear mandate that flowback of excess ADIT should be made effective June 1, 2018." On June 7, Emera Maine answered MCG's May 22 protest. MCG submitted a brief reply to that answer on June 14, which Emera Maine answered on June 24. This matter is pending before the FERC.

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<sup>46</sup> The May 15 filing, submitted in accordance with the Protocols for Implementing and Reviewing Charges Established by the MPD OATT Attachment J Rate Formulas ("Protocols"), set forth for the June 1, 2018 to May 31, 2019 rate year, the charges for transmission service under the MPD OATT ("MPD Charges"). See May 31, 2018 Litigation Report.

<sup>47</sup> *Emera Maine*, 167 FERC ¶ 61,090 (Apr. 30, 2019) ("2018 Challenge Order").

<sup>48</sup> The formal challenge sought (i) exclusion of certain regulatory expenses allocated or directly assigned to the MPD transmission customers; (ii) exclusion of costs that would otherwise constitute a double-recovery for amortization of losses incurred as a result of a merger; (iii) correction of MPD-acknowledged errors in its Annual Update Filing; (iv) exclusion of certain costs for land associated with a project not in service; (v) exclusion from transmission rates certain costs for distribution equipment; (vi) exclude of costs improperly attributed to line 6901; and (vii) a flowback of excess ADIT resulting from the corporate tax reduction, and a requirement for Emera MPD to include a worksheet in its tariff to track excess/deficient ADIT.

- **TOs' Opinion 531-A Compliance Filing Undo (ER15-414)**

Rehearing remains pending of the FERC's October 6, 2017 order rejecting the TOs' June 5, 2017 filing in this proceeding.<sup>49</sup> As previously reported, the June 5 filing was designed to reinstate TOs' transmission rates to those in place prior to the FERC's orders later vacated by the DC Circuit's *Emera Maine*<sup>50</sup> decision. In its *Order Rejecting Filing*, the FERC required the TOs to continue collecting their ROEs currently on file, subject to a future FERC order.<sup>51</sup> The FERC explained that it will "order such refunds or surcharges as necessary to replace the rates set in the now-vacated order with the rates that the Commission ultimately determines to be just and reasonable in its order on remand" so as to "put the parties in the position that they would have been in but for [its] error." For the time being, so as not to "significantly complicate the process of putting into effect whatever ROEs the Commission establishes on remand" or create "unnecessary and detrimental variability in rates," the FERC has temporarily left in place the ROEs set in *Opinion 531-A*, pending an order on remand.<sup>52</sup> On November 6, the TOs requested rehearing of the *Order Rejecting Filing*. On December 4, 2017, the FERC issued a tolling order providing it additional time to consider the TOs' request for rehearing of the *Order Rejecting Filing*, which remains pending. If you have any questions concerning this matter, please contact Joe Fagan (202-218-3901; [jfagan@daypitney.com](mailto:jfagan@daypitney.com)) or Eric Runge (617-345-4735; [ekrunge@daypitney.com](mailto:ekrunge@daypitney.com)).

### III. Market Rule and Information Policy Changes, Interpretations and Waiver Requests

- **ISO-NE eTariff Corrections (ER19-2685)**

On September 26, the FERC accepted updates to ISO-NE's eTariff that ensure that the eTariff versions properly reflect the versioning and effective version of the ISO-NE Tariff.<sup>53</sup> ISO-NE stated that no changes were made to accepted language or to previously accepted effective dates. Rather, the Tariff sheets were submitted simply to conform the eTariff versioning. Specifically, the filing corrects the eTariff so that changes to section I.2 that were filed after but accepted as of dates prior to the September 17, 2019 effectiveness of changes to section I.2 associated with the September 17, 2019 monthly (BoPP) FTR auctions effective date, are properly reflected in the eTariff. The updates were accepted effective as of September 17, as requested. Unless the September 26 order is challenged, this proceeding will be concluded. If you have any questions concerning this matter, please contact Pat Gerity (860-275-0533; [pmgerity@daypitney.com](mailto:pmgerity@daypitney.com)).

- **Import Transaction Requirements & Clean Up Changes (ER19-2565)**

On September 19, the FERC accepted changes that (i) update the requirements for submitting External Transactions associated with Import Capacity Resources; and (ii) remove certain outdated Tariff provisions related to dynamic scheduling ("Import Transaction Requirements & Clean Up Changes").<sup>54</sup> The Import Transaction Requirements & Clean Up Changes were accepted effective as of October 23, 2019, as requested. Unless the September 19 order is challenged, this proceeding will be concluded. If you have any questions concerning this proceeding, please contact Sebastian Lombardi (860-275-0663; [slombardi@daypitney.com](mailto:slombardi@daypitney.com)) or Jamie Blackburn (202-218-3905; [jblackburn@daypitney.com](mailto:jblackburn@daypitney.com)).

<sup>49</sup> *ISO New England Inc.*, 161 FERC ¶ 61,031 (Oct. 6, 2017) ("*Order Rejecting Filing*"), *reh'g requested*.

<sup>50</sup> *Emera Maine v. FERC*, 854 F.3d 9 (D.C. Cir. 2017) ("*Emera Maine*").

<sup>51</sup> *Order Rejecting Filing* at P 1.

<sup>52</sup> *Id.* at P 36.

<sup>53</sup> *ISO New England Inc.*, Docket No. ER19-2685 (Sep. 26, 2019) (unpublished letter order).

<sup>54</sup> *ISO New England Inc. and New England Power Pool Participants Comm.*, Docket No. ER19-2565 (Sep. 19, 2019) (unpublished letter order).

- **ISO-NE's Inventoried Energy Program (Chapter 2B) Proposal (ER19-1428)**

As previously reported, pursuant to a [notice](#) issued August 6, 2019 ("Chapter 2B Notice"), ISO-NE's Chapter 2B Proposal<sup>55</sup> took effect by operation of law, with an effective date of May 28, 2019. In the Chapter 2B Notice, the FERC indicated that it could not act on ISO-NE's filing on or before its August 5 deadline "because of a lack of quorum" (Commissioners McNamee and LaFleur not participating). As required under Section 205 of the FPA, Chairman Chatterjee and Commissioners Glick, McNamee and now-former Commissioner LaFleur posted written statements on August 8 explaining their views with respect to the Chapter 2B changes. Requests for rehearing of the Chapter 2B Notice were due on or before September 4, 2019<sup>56</sup> and were filed by the MA AG, Clean Energy Advocates, NECOS/ENE, NESCOE, MPUC, NH PUC/NH OCA. The requests for rehearing, which challenge the notice on substantive and procedural grounds, are pending before the Commission.

If you have any questions concerning this proceeding, please contact Sebastian Lombardi (860-275-0663; [slombardi@daypitney.com](mailto:slombardi@daypitney.com)) or Jamie Blackburn (202-218-3905; [jblackburn@daypitney.com](mailto:jblackburn@daypitney.com)).

- **Waiver Request: Vineyard Wind FCA13 Participation (ER19-570)**

Vineyard Wind's December 14, 2018 petition for a waiver of the ISO-NE Tariff provisions necessary to allow Vineyard Wind to participate in FCA13 as an RTR remains pending. As previously reported, Vineyard Wind's request for RTR designation was earlier rejected by ISO-NE on the basis that the resource is to be located in federal waters. Under the CASPR Conforming Changes, Vineyard Wind would not have been precluded from utilizing the RTR exemption. Consistent with the discussion in the CASPR Conforming Changes filing, Vineyard Wind asked that the proration requirement that would be triggered by Vineyard Wind's participation in FCA13 as an RTR be limited for FCA13 to it and any other similarly-situated entities (i.e. new offshore wind resources located in federal waters seeking RTR treatment); there would be no impact on resources currently qualified to use the RTR exemption in FCA13. Comments on Vineyard Wind's request were due on or before January 4, 2019. ISO-NE filed comments not opposing the Waiver Request, but requesting FERC action by January 29, 2019 if the waiver was to be effective for FCA13. NEPGA protested the Waiver Request. Answers to NEPGA's protest were filed by Vineyard Wind and NESCOE. On January 15, the Massachusetts Department of Energy Resources ("MA DOER") intervened out-of-time and submitted comments supporting the Waiver Request. Doc-less interventions were filed by NEPOOL, Avangrid, Dominion, ENE, National Grid, and NextEra.

On January 31, 2019, Vineyard Wind requested the immediate issuance of order on its request. Massachusetts Governor Baker submitted a request on February 1 that the FERC grant Vineyard Wind's waiver request that day. Also on February 1, ISO-NE reported at that day's Participants Committee meeting, and confirmed later that evening that, in the absence of a FERC order issued early that afternoon, it would proceed to run the auction without granting Vineyard Wind's MWs treatment under the RTR exemption. Early on February 4, Vineyard Wind submitted an emergency motion for immediate stay of FCA13 or, in the alternative, a requirement that FCA13 be re-run following FERC action. The FERC took no action ahead of FCA13 and FCA13 was run without Vineyard Wind receiving RTR treatment. Following FCA13, answers opposing Vineyard Wind's emergency motion were submitted by ISO-NE and NEPGA. A joint statement addressing the FERC's failure to act was issued by Commissioners LaFleur and Glick (to which Chairman Chatterjee responded via

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<sup>55</sup> ISO-NE's "Inventoried Energy Program" (a/k/a its "Chapter 2B Proposal") for the Winters of 2023-2024 and 2024-2025 (FCA14 and FCA15 Capacity Commitment Periods) "will provide incremental compensation to resources that maintain inventoried energy during cold periods when winter energy security is most stressed" and "fulfills a commitment ... to identify an interim solution that could complement efforts currently underway to develop a long-term, market-based solution to the region's energy security challenges." The Chapter 2B Proposal was not supported by the Participants Committee when considered at its March 13 meeting.

<sup>56</sup> The inability of the FERC to act on an ISO-NE filing had happened previously but Congress has since stepped in to allow such non-action by the FERC to be challenged on rehearing and appeal. Specifically, the "Fair Ratepayer Accountability, Transparency, and Efficiency Standards Act" was included as part of "America's Water Infrastructure Act of 2018" (Oct. 23, 2018), the result of which will be to treat the Chapter 2B Notice for purposes of rehearing to be an order issued by the FERC accepting the changes.

Twitter). The Massachusetts Attorney General filed a statement addressing the FERC's failure to act on February 13. On February 15, ISO-NE submitted a letter that addressed two concerns raised in Commissioner Glick's dissent from the *CASPR Conforming Changes Order*. On February 19, Vineyard Wind answered the NEPGA and ISO-NE protests to its motion to vacate and re-run FCA13 upon FERC approval of the waiver sought.

As noted, this matter remains pending before the FERC, with no activity since the last Report. If you have any questions concerning this matter, please contact Pat Gerity ([pmgerity@daypitney.com](mailto:pmgerity@daypitney.com); 860-275-0533).

- **Order 841 Compliance Filing (ER19-470)**

On December 3, 2018, ISO-NE and NEPOOL jointly filed changes to Market Rule 1 and the OATT (and the PTO AC joined in the filing of the OATT revisions) in response to the requirements of *Order 841*.<sup>57</sup> For the majority of the revisions, ISO-NE requested a December 3, 2019 effective date; for a limited number of revisions, ISO-NE requested a January 1, 2024 effective date. The *Order 841* compliance changes were supported by the Participants Committee at its November 2, 2018 meeting. Following a request for a 45-day extension of time,<sup>58</sup> comments on this filing were due February 7, 2019. Doc-less interventions were filed by Exelon, LS Power, NESCOE, APPA, EPSA, NRECA, GlidePath Development, Lincoln Clean Energy, and Voith Hydro. Protests and comments were filed by Calpine, EDF Renewables, RENEW Northeast ("RENEW"), AEE, ESA, and Tesla. On February 22, NEPOOL, ISO-NE and NRECA filed answers to the comments and protests. On March 1, Voith Hydro submitted comments regarding advanced pumped storage hydro technology. On March 21, ESA filed an answer to ISO-NE's February 22 answer (requesting that the FERC require the issues with the redeclaration process to be resolved prior to December 3, 2019 implementation deadline).

**ISO-NE Response to FERC Request for Additional Information (ER19-470-001).** As previously reported, on April 1, 2019, the FERC issued a letter advising ISO-NE that additional information was necessary to process the compliance filing and directing that responses to the questions posed in the letter order be submitted on or before May 1, 2019. ISO-NE filed additional information and Tariff changes in response to that letter order on May 1, 2019. The Tariff changes included in the ISO-NE March 1 response were supported by the Participants Committee at its May 3 meeting (Agenda Item #7). Comments on the ISO-NE responses were due on or before May 22, 2019 and were filed by **NEPOOL** (reporting that, while it did not vote on the May 1 responses themselves, it did unanimously support the clarifying changes to the ISO-NE Tariff, and requesting that the FERC approve those changes and allow any additional implementation details to be worked through the Participants Processes) and **AEE** (which, reiterating its initial comments, stated that ISO-NE did not demonstrate that its metering and accounting practices will ensure that all energy storage resources ("ESR") can participate in the New England Markets and not be subject to inaccurate charges. AEE also challenged ISO-NE's limitation of ESR aggregations to a single point of interconnection).

**ISO-NE/PTO AC Request for Earlier Effective Date (Dec. 1, 2019) (ER19-470-002).** On September 18, 2019, ISO-NE and the PTO AC requested that, to ease implementation and avoid challenges associated with implementing changes on a day other than the first of a month, the effective date for the revisions to Section II.21, Schedule 9 (Regional Network Service), and Schedule 21 (Local Service) of the OATT be advanced two days, to December 1, 2019, rather than December 3, 2019. Comments, if any, on this request are due on or before October 9, 2019.

<sup>57</sup> See *Elec. Storage Participation in Mkts. Operated by Regional Transmission Orgs. and Indep. Sys. Operators*, Order No. 841, 162 FERC ¶ 61,127 (Feb. 15, 2018) ("*Order 841*").

<sup>58</sup> The request for an extension of the previously noticed Dec. 24 comment deadline was requested by the Energy Storage Association ("ESA") and by a group comprised of Advanced Energy Economy ("AEE"), American Wind Energy Association ("AWEA"), Solar Energy Industries Association ("SEIA"), Solar RTO Coalition, and The Wind Coalition. The request was supported by the Acadia Center, NRDC, UCS, and the Sierra Club Environmental Law Program ("Public Interest Organizations").

If you have any questions concerning this proceeding, please contact Sebastian Lombardi (860-275-0663; [slombardi@daypitney.com](mailto:slombardi@daypitney.com)).

- **Fuel Security Retention Proposal (ER18-2364)**

Requests for rehearing and/or clarification of the *Fuel Security Retention Proposal Order*<sup>59</sup> remain pending before the FERC. As previously reported, the *Fuel Security Retention Proposal Order* accepted ISO-NE's Proposal<sup>60</sup> in all respects, despite the various protests and alternative proposals filed. There was a concurring decision from Commissioner Glick, and a partial dissent from Chairman Chatterjee on the FCA price treatment issue. Challenges to the *Fuel Security Retention Proposal Order* were filed by NEPGA, NRG, Verso, Vistra/Dynegy Marketing & Trade, MPUC, and PIOs.<sup>61</sup> On February 1, 2019, the FERC issued a tolling order affording it additional time to consider the requests for rehearing, which remain pending. If you have further questions concerning this proceeding, please contact Sebastian Lombardi (860-275-0663; [slombardi@daypitney.com](mailto:slombardi@daypitney.com)).

- **Economic Life Determination Revisions (ER18-1770)**

Rehearing of the FERC's November 9 order,<sup>62</sup> accepting the revised Tariff language that changed the determination of economic life under Section III.13.1.2.3.2.1.2.C of the Tariff, remains pending before the FERC. As previously reported, the Economic Life Revisions provide that the economic life of an Existing Capacity Resource is calculated as the evaluation period in which the net present value of the resource's expected future profit is maximized. The Economic Life Revisions were accepted effective as of August 10, 2018, as requested. In accepting the revisions, the FERC found that "it is just and reasonable to consider as part of the Economic Life calculation that a rational resource, in exercising competitive bidding behavior, would seek to exit the market, or retire, before it starts incurring consecutive losses."<sup>63</sup> The FERC found, contrary to NEPGA's assertions, that the "Economic Life Revisions do not represent a violation of the filed rate doctrine or constitute retroactive ratemaking."<sup>64</sup> Further, while the FERC was "mindful of the importance of not disrupting settled expectations

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<sup>59</sup> *ISO New England Inc.*, 165 FERC ¶ 61,202 (Dec. 3, 2018), *reh'g requested* ("*Fuel Security Retention Proposal Order*"). In accepting the ISO-NE Proposal, the FERC, among other things: (i) found ISO-NE's trigger and assumptions for the fuel security reliability review for retention of resources be reasonable, but required ISO-NE at the end of each winter to "to submit an informational filing comparing the study assumptions and triggers from the modeling analysis to actual conditions experienced in the winter of 2018/19; (ii) found cost allocation on a regional basis to Real-Time Load Obligation just and reasonable and consistent with precedent regarding the past Winter Reliability Programs; (iii) found that entering retained resources into the FCAs as price takers would be just and reasonable to ensure that they clear and are counted towards resource adequacy so that customers do not pay twice for the resource; and (iv) found that it was appropriate to include FCAs 13, 14 and 15 in the term. The FERC agreed that it is necessary to implement a longer-term market solution as soon as possible, and required ISO-NE to file its longer-term market solution no later than June 1, 2019. The FERC declined to provide guidance on what the long-term solution(s) should be.

<sup>60</sup> As previously reported, ISO-NE filed, in response to the *Mystic Waiver Order*, "interim Tariff revisions that provide for the filing of a short-term, cost-of-service agreement to address demonstrated fuel security concerns". ISO-NE proposed three sets of provisions to expand its authority on a short-term basis to enter into out-of-market arrangements in order to provide greater assurance of fuel security during winter months in New England (collectively, the "Fuel Security Retention Proposal"). ISO-NE stated that the interim provisions would sunset after FCA15, with a longer-term market solution to be filed by July 1, 2019, as directed in the *Mystic Waiver Order*. In addition, the ISO-NE transmittal letter described (i) the generally-applicable fuel security reliability review standard that will be used to determine whether a retiring generating resource is needed for fuel security reliability reasons; (ii) the proposed cost allocation methodology (Real-Time Load Obligation, though ISO-NE indicated an ability to implement NEPOOL's alternative allocation methodology if determined appropriate by the FERC); and (iii) the proposed treatment in the FCA of a retiring generator needed for fuel security reasons that elects to remain in service. The ISO-NE Fuel Security Changes were considered but not supported by the Participants Committee at its August 24, 2018 meeting. There was, however, super-majority support for (1) the Appendix L Proposal with some important adjustments to make that proposal more responsive to the FERC's guidance in the *Mystic Waiver Order* and other FERC precedent, and (2) the PP-10 Revisions, also with important adjustments (together, the "NEPOOL Alternative").

<sup>61</sup> "PIOs" for purposes of this proceeding are Sierra Club, NRDC, Sustainable FERC Project, and Acadia Center.

<sup>62</sup> *ISO New England Inc. and New England Power Pool Participants Comm.*, 165 FERC ¶ 61,088 (Nov. 9, 2018) ("*Economic Life Determination Revisions Order*").

<sup>63</sup> *Economic Life Determination Revisions Order* at P 23.

<sup>64</sup> *Id.* at P 24.

based on existing market rules,” the FERC concluded “that under these specific facts, the benefits of the proposed Economic Life Revisions outweigh potential disruptions to market participants’ settled expectations and harm caused by reliance on the existing FCM rules.”<sup>65</sup> On December 10, 2018, NEPGA requested rehearing of the *Economic Life Determination Revisions Order*. On January 8, 2019, the FERC issued a tolling order affording it additional time to consider NEPGA’s request for rehearing, which remains pending. If you have any questions concerning this proceeding, please contact Sebastian Lombardi (860-275-0663; [slombardi@daypitney.com](mailto:slombardi@daypitney.com)).

- **ISO-NE Waiver Filing: Mystic 8 & 9 (ER18-1509; EL18-182)**

On July 2, 2018, the FERC issued an order<sup>66</sup> that (i) denied ISO-NE’s request for waiver of certain Tariff provisions that would have permitted ISO-NE to retain Mystic 8 & 9 for fuel security purposes (ER18-1509); and (ii) instituted an FPA Section 206 proceeding (EL18-182) (having preliminarily found that the ISO-NE Tariff may be unjust and unreasonable in that it fails to address specific regional fuel security concerns identified in the record that could result in reliability violations as soon as year 2022). The *Mystic Waiver Order* required ISO-NE, on or before August 31, 2018 to either: (a) submit interim Tariff revisions that provide for the filing of a short-term, cost-of-service agreement (COS Agreement) to address demonstrated fuel security concerns (and to submit by July 1, 2019 permanent Tariff revisions reflecting improvements to its market design to better address regional fuel security concerns “Chapter 3 Proposal”); or (b) show cause as to why the Tariff remains just and reasonable in the short- and long-term such that one or both of Tariff revisions filings is not necessary.

Addressing the waiver element, the FERC found the waiver request “an inappropriate vehicle for allowing Mystic 8 and 9 to submit a [COS Agreement] in response to the identified fuel security need” and further that the request “would not only suspend tariff provisions but also alter the existing conditions upon which a market participant could enter into a [COS Agreement] (for a transmission constraint that impacts reliability) and allow for an entirely new basis (for fuel security concerns that impact reliability) to enter into such an agreement.” The FERC concluded that “[s]uch new processes may not be effectuated by a waiver of the ISO-NE Tariff; they must be filed as proposed tariff provisions under FPA section 205(d).”<sup>67</sup> Even if it were inclined to apply its waiver criteria, the FERC stated that it would still have denied the waiver request as “not sufficiently limited in scope.”<sup>68</sup>

Although it denied the waiver request, the FERC was persuaded that the record supported “the conclusion that, due largely to fuel security concerns, the retirement of Mystic 8 and 9 may cause ISO-NE to violate NERC reliability criteria.” Finding ISO-NE’s methodology and assumptions in the Operational Fuel-Security Analysis (“OFSA”) and Mystic Retirement Studies reasonable, the FERC directed the filing of both interim and permanent Tariff revisions to address fuel security concerns (or a filing showing why such revisions are not necessary).<sup>69</sup> The FERC directed ISO-NE to consider the possibility that a resource owner may need to decide, prior to receiving approval of a COS Agreement, whether to unconditionally retire, and provided examples of how to address that possibility.<sup>70</sup> The FERC also directed ISO-NE include with any proposed Tariff revisions a mechanism that addresses how cost-of-service-retained resources would be treated in the FCM<sup>71</sup> and an *ex ante* cost allocation proposal that appropriately identifies beneficiaries and adheres to FERC cost causation precedent.<sup>72</sup>

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<sup>65</sup> *Id.* at P 27.

<sup>66</sup> *ISO New England Inc.*, 164 FERC ¶ 61,003 (July 2, 2018), *reh’g requested* (“*Mystic Waiver Order*”).

<sup>67</sup> *Id.* at P 47.

<sup>68</sup> *Id.* at P 48.

<sup>69</sup> *Id.* at P 55.

<sup>70</sup> *Id.* at PP 56-57.

<sup>71</sup> *Id.* at P 57.

<sup>72</sup> *Id.* at P 58.

**Requests for Rehearing and/or Clarification.** The following requests for rehearing and or clarification of the *Mystic Waiver Order* remain pending before the FERC:

- ◆ **NEPGA** (requesting that the FERC grant clarification that it directed, or on rehearing direct, ISO-NE to adopt a mechanism that prohibits the re-pricing of Fuel Security Resources in the FCA at \$0/kW-mo. or at any other uncompetitive offer price);
- ◆ **Connecticut Parties**<sup>73</sup> (requesting that the FERC clarify that (i) the discussion in the *Mystic Waiver Order* of pricing treatment in the FCM for fuel security reliability resources is not a final determination nor is it intended to establish FERC policy; (ii) the FERC did not intend to prejudge whether entering those resources in the FCM as price takers would be just and reasonable; and (iii) that ISO-NE may confirm its submitted position that price taking treatment for these resources would, in fact, be a just and reasonable outcome. Failing such clarification, Connecticut Parties request rehearing, asserting that the record fails to support a determination that resources retained for reliability to address fuel security concerns must be entered into the FCM at a price greater than zero);
- ◆ **ENECOS** (asserting that the *Mystic Waiver Order* (i) misplaces reliance on ISO-NE “assertions concerning ‘fuel security,’ which do not in fact establish a basis in evidence or logic for initiating” a Section 206(a) proceeding; (ii) impermissibly relies on extra-record material that the FERC did not actually review and that intervenors were afforded no meaningful opportunity to challenge; and (iii) speculation concerning potential future modifications to the FCM bidding rules as to retiring generation retained for fuel security misunderstands the problem it seeks to address, and prejudices the already truncated opportunities for stakeholder input in this proceeding), ENECOS suggest that the FERC should grant rehearing, vacate its show cause directive, strike its dictum concerning potential treatment of FCM bidding for retiring generation retained for “fuel security,” and direct ISO-NE to proceed either in accordance with its Tariff or under FPA Section 205 to address, with appropriate evidentiary support, whatever concerns it believes to exist concerning “fuel security”);
- ◆ **MA AG** (asserting that the decision to institute a Section 206 proceeding was insufficiently supported by sole reliance on highly contested OFSA and Mystic Retirement Studies; and the FERC should reconsider the timeline for the permanent tariff solution and set the deadline for implementation no later than February 2020);
- ◆ **MPUC** (challenging the Order’s (i) adoption of ISO-NE’s methodology and assumptions in the OFSA and Mystic Retirement Studies without undertaking any independent analysis; (ii) failure to address arguments and analysis challenging assumptions in the OFSA and Mystic Retirement Studies; (iii) failure to address the MPUC argument that the Mystic Retirement Studies adopted a completely new standard for determining a reliability problem three years in advance; (iv) unreasonably discounting of the ability of Pay-for-Performance to provide sufficient incentives to Market Participants to ensure their performance under stressed system conditions; and (v) failure to direct ISO-NE to undertake a Transmission Security Analysis consistent with the provisions in the Tariff);
- ◆ **New England EDCs**<sup>74</sup> (requesting clarification that (i) the central purpose of ISO-NE’s July 1, 2019 filing is to assure that New England adds needed new infrastructure to address the fuel supply shortfalls and associated threats to electric reliability that ISO-NE identified in its OFSA and (ii) that, in developing the July 1, 2019 filing, ISO-NE is to evaluate Tariff revisions (such as those the EDCs described in their request), through which ISO-NE customers would pay for the costs of natural gas pipeline capacity additions via rates under the ISO-NE Tariff);

<sup>73</sup> “Connecticut Parties” are the Conn. Pub. Utils. Regulatory Authority (“CT PURA”) and the Conn. Dept. of Energy and Environ. Protection (“CT DEEP”).

<sup>74</sup> The “EDCs” are the National Grid companies (Mass. Elec. Co., Nantucket Elec. Co., and Narragansett Elec. Co.) and Eversource Energy Service Co. (on behalf of its electric distribution companies – CL&P, NSTAR and PSNH).

- ◆ **PIOs**<sup>75</sup> (asserting that (i) the FERC failed to respond to or provide a reasoned explanation for rejecting the arguments submitted by numerous parties that key assumptions underlying and the results of the ISO-NE analyses were flawed; and (ii) the FERC's determination that ISO-NE's analyses were reasonable is not supported by substantial evidence in the record); and
- ◆ **AWEA/NGSA** (asserting that the FERC erred (i) in finding that ISO-NE's OFSA and subsequent impact analysis of fuel security was reasonable without further examination and (ii) in its preliminary finding that a short-term out-of-market solution to keep Mystic 8 & 9 in operation is needed to address fuel security issues).

On August 13, 2018, CT Parties opposed the NEPGA motion for clarification. On August 14, NEPOOL filed a limited response to Indicated New England EDCs, requesting that the FERC "reject the relief sought in [their motion] to the extent that relief would bypass or predetermine the outcome of the stakeholder process, without prejudice to [them] refiling their proposal, if appropriate, following its full consideration in the stakeholder process." Answers to the Indicated New England EDCs were also filed by the MA AG, NEPGA, NextEra, and CLF/NRDC/Sierra Club/Sustainable FERC Project. On August 29, the Indicated New England EDCs answered the August 14/16 answers. On August 27, 2018, the FERC issued a tolling order affording it additional time to consider the requests for rehearing, which remain pending.

If you have any questions concerning this proceeding, please contact Dave Doot (860-275-0102; [dtdoot@daypitney.com](mailto:dtdoot@daypitney.com)) or Sebastian Lombardi (860-275-0663; [slombardi@daypitney.com](mailto:slombardi@daypitney.com)).

- **CASPR (ER18-619)**

Rehearing of the FERC's order accepting ISO-NE's Competitive Auctions with Sponsored Policy Resources ("CASPR") revisions,<sup>76</sup> summarized in more detail in prior Reports, remains pending. Those requests were filed by (i) **NextEra/NRG** (which challenged the RTR Exemption Phase Out); (ii) **ENECOS**<sup>77</sup> (challenging the FERC's findings with respect to the definition of Sponsored Policy Resource and the allocation of CASPR side payment costs to municipal utilities); (iii) **Clean Energy Advocates**<sup>78</sup> (which challenged the CASPR construct in its entirety, asserting that state-sponsored resources should not be subject to the MOPR); and (iv) **Public Citizen** (which also challenged the CASPR construct in its entirety and the *CASPR Order's* failure to define "investor confidence"). On April 24, ISO-NE answered Clean Energy Advocates' answer. On May 7, 2018, the FERC issued a tolling order affording it additional time to consider the requests for rehearing, which remain pending. If you have any questions concerning this proceeding, please contact Dave Doot (860-275-0102; [dtdoot@daypitney.com](mailto:dtdoot@daypitney.com)) or Sebastian Lombardi (860-275-0663; [slombardi@daypitney.com](mailto:slombardi@daypitney.com)).

- **CONE & ORTP Updates (ER17-795)**

Rehearing remains pending of the FERC's October 6, 2017 order accepting updated FCM CONE, Net CONE and ORTP values.<sup>79</sup> In accepting the changes, the FERC disagreed with the challenges to ISO-NE's choice of reference technology (gas-fired simple cycle combustion-turbine) and on-shore wind capacity factor (32%). The changes were accepted effective as of March 15, 2017, as requested. On November 6, 2017, NEPGA requested rehearing of the *CONE/ORTP Updates Order*. On December 4, 2017, the FERC issued a tolling order

<sup>75</sup> "PIOs" are the Sierra Club, Natural Resources Defense Council ("NRDC"), and Sustainable FERC Project.

<sup>76</sup> *ISO New England Inc.*, 162 FERC ¶ 61,205 (Mar. 9, 2018) ("*CASPR Order*").

<sup>77</sup> The Eastern New England Consumer-Owned Systems ("ENECOS") are: Braintree Electric Light Department, Georgetown Municipal Light Department, Groveland Electric Light Department, Littleton Electric Light & Water Department, Middleton Electric Light Department, Middleborough Gas & Electric Department, Norwood Light & Broadband Department, Pascoag (Rhode Island) Utility District, Rowley Municipal Lighting Plant, Taunton Municipal Lighting Plant, and Wallingford (Connecticut) Department of Public Utilities. Wellesley Municipal Light Plant, which intervened in this proceeding as one of the ENECOS, did not join in the ENECOS' request for rehearing.

<sup>78</sup> "Clean Energy Advocates" are, collectively, the NRDC, Sierra Club, Sustainable FERC Project, CLF, and RENEW Northeast, Inc.

<sup>79</sup> *ISO New England Inc.*, 161 FERC ¶ 61, 035 (Oct. 6, 2017) ("*CONE/ORTP Updates Order*"), *reh'g requested*.

providing it additional time to consider NEPGA's request for rehearing of the *CONE/ORTP Updates Order*, which remains pending. If you have any questions concerning this proceeding, please contact Sebastian Lombardi (860-275-0663; [slombardi@daypitney.com](mailto:slombardi@daypitney.com)).

- **2013/14 Winter Reliability Program Remand Proceeding (ER13-2266)**

Still pending before the FERC is ISO-NE's compliance filing in response to the FERC's August 8, 2016 remand order.<sup>80</sup> In the *2013/14 Winter Reliability Program Remand Order*, the FERC directed ISO-NE to request from Program participants the basis for their bids, including the process used to formulate the bids, and to file with the FERC a compilation of that information, an IMM analysis of that information, and ISO-NE's recommendation as to the reasonableness of the bids, so that the FERC can further consider the question of whether the Bid Results were just and reasonable.<sup>81</sup> ISO-NE submitted its compliance filing on January 23, 2017, reporting the IMM's conclusion that "the auction was not structurally competitive and a 'small proportion' of the total cost of the program may be the result of the exercise of market power" but that the "vast majority of supply was offered at prices that appear reasonable and that, for a number of reasons, it is difficult to assess the impact of market power on cost." Based on the IMM and additional analysis, ISO-NE recommended that "there is insufficient demonstration of market power to warrant modification of program." In February 13 comments, both TransCanada and the MA AG protested ISO-NE's conclusion and recommendation that modification of the program was unwarranted. TransCanada requested that FERC establish a settlement proceeding where Market Participants could "exchange confidential information to determine what the rates should be" and refunds and "such other relief as may be warranted" provided. On February 28, ISO-NE answered the TransCanada and MA AG protests. On March 10, 2017, TransCanada answered ISO-NE's February 28 answer. This matter remains pending before the FERC. If you have any questions concerning these matters, please contact Sebastian Lombardi (860-275-0663; [slombardi@daypitney.com](mailto:slombardi@daypitney.com)).

#### IV. OATT Amendments / TOAs / Coordination Agreements

- **Reactive Capability Audit Provisions Changes (ER19-2528)**

On September 18, 2019, the FERC accepted changes that establish auditing requirements for non-generator dynamic Reactive Resources ("Reactive Capability Audit Provisions Changes").<sup>82</sup> The Reactive Capability Audit Provisions Changes were accepted effective October 1, 2019, as requested. Unless the September 18 order is challenged, this proceeding will be concluded. If you have any questions concerning this proceeding, please contact Eric Runge (617-345-4735; [ekrunge@daypitney.com](mailto:ekrunge@daypitney.com)).

- **Interconnection Studies Scope and Reasonable Efforts Timelines Changes (ER19-1952)**

On May 22, 2019, ISO-NE, NEPOOL and the PTO AC together filed changes to Schedule 22 of the OATT to: (i) reduce the scope of the Interconnection Feasibility Study ("Feasibility Study") and increase the Reasonable Efforts timeframe for completing that study; and (ii) increase the Reasonable Efforts timeframe for completing the Interconnection System Impact Study ("SIS"). The Filing Parties asked that these changes become effective on the same date that the *Order 845 Changes* (see ER19-1951 below) become effective. The

<sup>80</sup> *ISO New England Inc.*, 156 FERC ¶ 61,097 (Aug. 8, 2016) ("*2013/14 Winter Reliability Program Remand Order*"). As previously reported, the DC Circuit remanded the FERC's decision in ER13-2266, agreeing with TransCanada that the record upon which the FERC relied is devoid of any evidence regarding how much of the 2013/14 Winter Reliability Program cost was attributable to profit and risk mark-up (without which the FERC could not properly assess whether the Program's rates were just and reasonable), and directing the FERC to either offer a reasoned justification for the order in ER13-2266 or revise its disposition to ensure that the Program rates are just and reasonable. *TransCanada Power Mktg. Ltd. v. FERC*, 2015 U.S. App. LEXIS 22304 (D.C. Cir. 2015).

<sup>81</sup> *2013/14 Winter Reliability Program Remand Order* at P 17.

<sup>82</sup> *ISO New England Inc. and New England Power Pool Participants Comm.*, Docket No. ER19-2528 (Sep. 18, 2019) (unpublished letter order).

*Order 845* compliance changes were supported by the Participants Committee at its May 3, 2019 meeting (Consent Agenda Item No. 4).

On May 31, AWEA requested a 21-day extension of time to submit comments in this proceeding (and the ISO-NE *Order 845* Compliance Filing proceeding (ER19-1951 just below)). The FERC granted AWEA's request, in part, on June 7. Comments in these proceedings were due June 26, 2019. Doc-less interventions were filed by Avangrid, Calpine, Dominion, EDP, National Grid, and NRG. A joint protest was filed by EDF Renewables, E.ON Climate & Renewables North America ("E.ON") and Enel Green Power North America ("Enel"), who asked the FERC to reject the changes for four reasons: (i) ISO-NE is incapable of meeting the study deadline changes proposed; (ii) the proposed study deadlines do not improve ISO-NE's ability to exercise Reasonable Efforts to meet queue study deadlines; (iii) the extensions proposed will delay and perhaps limit the extent of the informational reports to be required under *Order 845*; and (iv) the changes will not promote the transparency or improve the processing of ISO-NE's interconnection queue. On July 11, ISO-NE answered the joint protest. This matter is pending before the FERC. If you have any questions concerning this matter, please contact Eric Runge (617-345-4735; [ekrunge@daypitney.com](mailto:ekrunge@daypitney.com)) or Jamie Blackburn (202-218-3905; [jblackburn@daypitney.com](mailto:jblackburn@daypitney.com)).

- **ISO-NE *Order 845* Compliance Filing (ER19-1951)**

On May 22, 2019, ISO-NE and the PTO AC ("Filing Parties") jointly filed proposed revisions to the Large Generator Interconnection Procedures ("LGIP") and Agreement ("LGIA") in Schedule 22 of the ISO-NE OATT in response to the requirements of *Order 845* ("ISO-NE/TO Proposal"). The Filing Parties asserted that the ISO-NE/TO Proposal "fully compl[ies] with the requirements in Order Nos. 845 and 845-A, and request that the Commission accept them as proposed herein, without modifications or conditions, effective upon issuance of its order accepting this filing." The ISO-NE/TO Proposal did not include the RENEW Amendment's revisions to the Surplus Interconnection Service provisions supported by the Participants Committee at its May 3 meeting ("NEPOOL Proposal"). The Participants Committee considered but did not support the ISO-NE/TO Proposal (without the RENEW Amendment) at its May 3 meeting.

Comments in these proceedings were due June 26, 2019. Doc-less interventions were filed by Avangrid, Calpine, Dominion, EDP, Eversource, MA AG, National Grid, NRG, and ESA. Comments and protests were filed by the following:

- ◆ **NEPOOL**, which in its protest urged the FERC to accept the ISO-NE/TO Proposal to the extent it is consistent with the NEPOOL Proposal, and reject those provisions for Surplus Interconnection Service that deviate both from the requirements of *Orders 845/845-A* and the NEPOOL Proposal. To the extent necessary or desirable, NEPOOL urged the FERC to direct ISO-NE to engage the NEPOOL stakeholder process to address any implementation concerns regarding Surplus Interconnection Service. NEPOOL went on to suggest that any additional provisions developed regarding such service that are properly considered rates, terms and conditions of service should be filed with the FERC and included in the ISO-NE Tariff. NEPOOL also urged the FERC to reject the PTOs' proposal for recovery of actual costs in the absence of a demonstration that their proposed deviation is consistent with or superior to the *Order 845* requirement for a negotiated and stated amount.
- ◆ **MA AG** (which urged the FERC to (i) reject the ISO-NE provisions for Surplus Interconnection Service that deviate from the NEPOOL Proposal and the requirements of *Order Nos. 845/845-A* and order ISO-NE to make changes to the ISO Tariff in accordance with the NEPOOL Proposal and (ii) reject the PTO AC amendment that seeks unlimited cost recovery for PTO oversight of the option to build rather than a fixed, negotiated amount as provided in the FERC's *pro forma*).
- ◆ **AWEA/RENEW/Solar Council** (supporting some of ISO-NE's revisions, but protesting ISO-NE's "unreasonably narrow definition of Surplus Interconnection Service" and ISO-NE's failure to establish an outside-the-queue process for reviewing Surplus Interconnection Service requests").
- ◆ **ESA** (objecting to ISO-NE's Surplus Interconnection Service proposal).

On July 11, ISO-NE and the PTO AC answered the comments and protests. This matter is pending before the FERC. If you have any questions concerning this matter, please contact Eric Runge (617-345-4735; [ekrunge@daypitney.com](mailto:ekrunge@daypitney.com)) or Jamie Blackburn (202-218-3905; [jblackburn@daypitney.com](mailto:jblackburn@daypitney.com)).

## V. Financial Assurance/Billing Policy Amendments

- **ISO-NE FAP Corrections (ER19-2815)**

On September 16, ISO-NE filed updates to its eTariff to ensure that eTariff versions of the Financial Assurance Policy (“FAP”) properly reflect previously accepted changes as of the actual effective date. ISO-NE stated that no changes were made to accepted language or to previously accepted effective dates. Rather, the Tariff sheets were submitted simply to conform eTariff versioning. Specifically, the filing corrects the eTariff so that changes to the FAP (CASPR-related changes) that were filed after but accepted prior to the September 17, 2019 effectiveness of changes the FAP associated with the September 17, 2019 monthly (BoPP) FTR auctions effective date, are properly reflected in the eTariff. Comments on this filing, if any, are due on or before October 7. Thus far, NEPOOL submitted a doc-less intervention on September 24. If you have any questions concerning this matter, please contact Pat Gerity (860-275-0533; [pmgerity@daypitney.com](mailto:pmgerity@daypitney.com)).

## VI. Schedule 20/21/22/23 Changes

- **Schedule 21-EM: Brookfield LSA (ER19-2907)**

On September 30, 2019, ISO-NE and Emera filed a First Revised non-conforming three-party Local Service Agreement (“LSA”) between Brookfield Renewable Trading and Marketing, LP (“BRTM”), Emera Maine and ISO-NE for Firm Local Point-to-Point Service under Schedule 21-EM. Under the First Revised LSA, Emera Maine will continue to provide 85 MW of firm, point-to-point transmission service to BRTM from its Powersville Road Substation at the \$13.82/kW-yr rate set forth in a 2018 LSA with Brookfield Energy Marketing (“BEM”). Effectively, BRTM will step into the shoes of BEM for all purposes under the 2019 LSA, including price and term. Comments on this filing are due on or before October 21. If you have any questions concerning this matter, please contact Pat Gerity ([pmgerity@daypitney.com](mailto:pmgerity@daypitney.com); 860-275-0533).

- **Schedule 21-NEP National Grid/Mini-Watt Hydroelectric SGIA (ER19-2464/5)**

On September 16, the FERC accepted two, non-conforming Small Generation Interconnection Agreements (“SGIA”) between National Grid and Mini-Watt Hydroelectric LLC (“Mini-Watt”) to cover the continued interconnection of Mini-Watt’s run-of-river hydro facilities located in Orange, Massachusetts.<sup>83</sup> The SGIAs replace an existing interconnection agreements entered into in 1986 in the case of Unit No. 1 (ER19-2464), and 1991 in the case of Unit Nos. 2 and 3 (ER19-2465). Since the SGIAs cover existing, interconnected facilities, new three-party interconnection agreements (that would have included ISO-NE) were not required. The SGIAs were accepted effective as of July 1, 2019, as requested. Unless the September 16 orders are challenged, these proceedings will be concluded. If you have any questions concerning these matters, please contact Pat Gerity ([pmgerity@daypitney.com](mailto:pmgerity@daypitney.com); 860-275-0533).

- **Schedule 21-EM: MPD Excess ADIT Changes (ER19-1400)**

On August 6, 2019, the FERC also accepted additional changes to the Emera Maine MPD Formula Rate filed by Emera Maine to ensure that excess ADITs are properly reflected in the calculations of charges under Schedule 21-EM (and thus inure to the benefit of customers).<sup>84</sup> The changes were accepted June 1, 2019, as requested. On September 5, 2019, however, Maine Customer Group requested clarification or in the alternative rehearing of the August 6 order. Specifically, MCG sought clarification that language in paragraph 35 of the August 6 order referred only to Emera’s filing in this proceeding and not to Emera’s May 16, 2019

<sup>83</sup> *Mass. Elec. Co.*, Docket No. ER19-2465 (Sep. 16, 2019) (unpublished letter order).

<sup>84</sup> *Emera Maine*, 168 FERC ¶ 61,077 (Aug. 6, 2019).

compliance filing in ER15-1429 (requiring the flow back to customers of excess ADIT to begin effective June 1, 2018). The MCG request for clarification and/or rehearing is pending, with FERC action required on or before October 7, 2019 or the request will be deemed denied by operation of law. If you have any questions concerning this matter, please contact Pat Gerity ([pmgerity@daypitney.com](mailto:pmgerity@daypitney.com); 860-275-0533).

- **Schedule 21-EM: 2018 Annual Update Settlement Agreement (ER15-1434-003)**

On May 24, Emera Maine submitted a joint offer of settlement between itself and the MPUC to resolve certain issues raised by the MPUC in response to Emera Maine’s annual charges update filed, as previously reported, on June 15, 2018 (the “Emera 2018 Annual Update Settlement Agreement”). Under Part V of Attachment P-EM, “Interested Parties shall have the opportunity to conduct discovery seeking any information relevant to implementation of the [Attachment P-EM] Rate Formula. . . .” and follow a dispute resolution procedure set forth there. In accordance with those provisions, the MPUC identified certain disputes with the 2018 Annual Update, a majority of which are resolved by the Emera 2018 Annual Update Settlement Agreement. Comments on the Emera 2018 Annual Update Settlement Agreement were due on or before June 14, 2019; none were filed. The Emera 2018 Annual Update Settlement Agreement is pending before the FERC. If you have any questions concerning these matters, please contact Pat Gerity (860-275-0533; [pmgerity@daypitney.com](mailto:pmgerity@daypitney.com)).

- **Schedule 21-EM: Recovery of Bangor Hydro/Maine Public Service Merger-Related Costs (ER15-1434-001 et al.)**

The MPS Merger Cost Recovery Settlement, filed by Emera Maine on May 8, 2018 to resolve all issues pending before the FERC in the consolidated proceedings set for hearing in the *MPS Merger-Related Costs Order*,<sup>85</sup> and certified by Settlement Judge Dring<sup>86</sup> to the Commission,<sup>87</sup> remains pending before the FERC. As previously reported, under the Settlement, permitted cost recovery over a period from June 1, 2018 to May 31, 2021 will be \$390,000 under Attachment P-EM of the BHD OATT and \$260,000 under the MPD OATT. If you have any questions concerning these matters, please contact Pat Gerity (860-275-0533; [pmgerity@daypitney.com](mailto:pmgerity@daypitney.com)).

## VII. NEPOOL Agreement/Participants Agreement Amendments

- **PA Amendment No. 11 (JNC Age Limit Waiver) (ER19-2616)**

On September 17, the FERC accepted limited amendments to Section 9.2.3 of the Participants Agreement (“PA”) that authorize the Joint Nominating Committee (“JNC”) to waive the provision of the PA that would otherwise prohibit the election of a person who is 70 years of age or over to a term as a voting

<sup>85</sup> *Emera Maine and BHE Holdings*, 155 FERC ¶ 61,230 (June 2, 2016) (“*MPS Merger-Related Costs Order*”). In the *MPS Merger-Related Costs Order*, the FERC accepted, but established hearing and settlement judge procedures for, filings by Emera Maine seeking authorization to recover certain merger-related costs viewed by the FERC’s Office of Enforcement’s Division of Audits and Accounting (“DAA”) to be subject to the conditions of the orders authorizing Emera Maine’s acquisition of, and ultimate merger with, Maine Public Service (“Merger Conditions”). The Merger Conditions imposed a hold harmless requirement, and required a compliance filing demonstrating fulfillment of that requirement, should Emera Maine seek to recover transaction-related costs through any transmission rate. Following an audit of Emera Maine, DAA found that Emera Maine “inappropriately included the costs of four merger-related capital initiatives in its formula rate recovery mechanisms” and “did not properly record certain merger-related expenses incurred to consummate the merger transaction to appropriate non-operating expense accounts as required by [FERC] regulations [and] inappropriately included costs of merger-related activities through its formula rate recovery mechanisms” without first making a compliance filing as required by the merger orders. The *MPS Merger-Related Costs Order* set resolution of the issues of material fact for hearing and settlement judge procedures, consolidating the separate compliance filing dockets.

<sup>86</sup> ALJ John Dring was the settlement judge for these proceedings. There were five settlement conferences -- three in 2016 and two in 2017. With the Settlement pending before the FERC, settlement judge procedures, for now, have not been terminated.

<sup>87</sup> *Emera Maine and BHE Holdings*, 163 FERC ¶ 63,018 (June 11, 2018).

director of the ISO-NE Board of Directors (the “Age Limit Waiver”).<sup>88</sup> The amendments were accepted effective as of October 15, 2019, as requested. Unless the September 17 order is challenged, this proceeding will be concluded. If you have any questions concerning this proceeding, please contact Pat Gerity (860-275-0533; [pmgerity@daypitney.com](mailto:pmgerity@daypitney.com)).

- **133rd Agreement (Fuels Industry Participants) (ER19-2520)**

On September 16, the FERC accepted limited amendments to the NEPOOL Agreement that revise the definition of, and references to, Gas Industry Participant (renamed “Fuels Industry Participant”).<sup>89</sup> As previously reported, the 133<sup>rd</sup> Agreement expands the Gas Industry Participant category of NEPOOL membership by authorizing the Participants Committee to determine on a case-by-case basis whether to approve a membership application for entities that are applying to NEPOOL for the same reasons as current Gas Industry Participants but do not meet that definition. The 133<sup>rd</sup> Agreement was accepted effective as of October 1, 2019, as requested. Unless the September 16 order is challenged, this proceeding will be concluded. If you have any questions concerning this proceeding, please contact Pat Gerity (860-275-0533; [pmgerity@daypitney.com](mailto:pmgerity@daypitney.com)).

- **132nd Agreement (Press Membership Provisions) (ER18-2208)**

As previously reported, the FERC rejected, on January 30, 2019, the changes to the NEPOOL Agreement that would have precluded press reporters from becoming NEPOOL End User Participants or representatives of NEPOOL Participants.<sup>90</sup> In rejecting the changes, the FERC concluded that NEPOOL had not supported that “barring members of the press from exercising the privileges unique to NEPOOL membership—i.e. attending, speaking, and voting at NEPOOL meetings—will meaningfully advance its aim for candid deliberation in light of” NEPOOL’s Bylaws and Standard Conditions Waivers & Reminders “currently in place—which this order does not affect—[that] already prohibit reporting on deliberations or attributing statements to other NEPOOL members.”<sup>91</sup> The FERC further indicated that the *Press Membership Provisions Order* only addressed NEPOOL’s proposed changes to the NEPOOL Agreement, and not the pending RTO Insider Complaint (see EL18-196 above) that it addressed (and dismissed) in a separate order.

On February 28, 2019, NEPOOL requested clarification, or in the alternative rehearing, of the *Press Membership Provisions Order* (the “Request”). In the Request, NEPOOL asked the FERC, particularly in light of issues that remained pending in EL18-196, to clarify the extent to which the FERC sought to assert jurisdiction over the NEPOOL Agreement, or in the alternative, grant rehearing of the *Press Membership Provisions Order* on the grounds that it reflects an impermissible exercise of the FERC’s jurisdiction. On March 4, Public Citizen submitted comments requesting that the FERC require NEPOOL to describe the notice and approval of its members sought in connection with the Request, insinuating that the request was unauthorized. On March 14 and 15, PIOs and RTO Insider responded to NEPOOL’s Request, respectively. On March 28, the FERC issued a tolling order affording it additional time to consider NEPOOL’s Request, which remains pending.

On May 1, 2019, NEPOOL submitted Michael Kuser’s membership for FERC acceptance and that filing was accepted on June 18. If you have any questions concerning this proceeding, please contact Pat Gerity (860-275-0533; [pmgerity@daypitney.com](mailto:pmgerity@daypitney.com)), Dave Doot (860-275-0102; [dtdoot@daypitney.com](mailto:dtdoot@daypitney.com)), or Sebastian Lombardi (860-275-0663; [slombardi@daypitney.com](mailto:slombardi@daypitney.com)).

<sup>88</sup> *ISO New England Inc. and New England Power Pool Participants Comm.*, Docket No. ER19-2616 (Sep. 17, 2019) (unpublished letter order).

<sup>89</sup> *New England Power Pool Participants Comm.*, Docket No. ER19-2520 (Sep. 16, 2019) (unpublished letter order).

<sup>90</sup> *New England Power Pool Participants Comm.*, 166 FERC ¶61,062 (Jan. 29, 2019) (“*Press Membership Provisions Order*”), *reh’g requested*. The rejected changes were identified in the One Hundred Thirty-Second Agreement Amending New England Power Pool Agreement (“132nd Agreement”), which was approved in balloting following the 2018 Summer Meeting.

<sup>91</sup> *Id.* at P 50.

## VIII. Regional Reports

- **Opinion 531-A Local Refund Report: FG&E (EL11-66)**

FG&E's June 29, 2015 refund report for its customers taking local service during *Opinion 531-A's* refund period remains pending. If there are questions on this matter, please contact Pat Gerity (860-275-0533; [pmgerity@daypitney.com](mailto:pmgerity@daypitney.com)).

- **Opinions 531-A/531-B Regional Refund Reports (EL11-66)**

The TOs' November 2, 2015 refund report documenting resettlements of regional transmission charges by ISO-NE in compliance with *Opinions No. 531-A*<sup>92</sup> and *531-B*<sup>93</sup> also remains pending. If there are questions on this matter, please contact Pat Gerity (860-275-0533; [pmgerity@daypitney.com](mailto:pmgerity@daypitney.com)).

- **Opinions 531-A/531-B Local Refund Reports (EL11-66)**

The *Opinions 531-A and 531-B* refund reports filed by the following TOs for their customers taking local service during the refund period also remain pending before the FERC:

- |                       |                 |                       |
|-----------------------|-----------------|-----------------------|
| ◆ Central Maine Power | ◆ National Grid | ◆ United Illuminating |
| ◆ Emera Maine         | ◆ NHT           | ◆ VTransco            |
| ◆ Eversource          | ◆ NSTAR         |                       |

If there are questions on this matter, please contact Pat Gerity (860-275-0533; [pmgerity@daypitney.com](mailto:pmgerity@daypitney.com)).

- **Capital Projects Report - 2019 Q2 (ER19-2569)**

On September 24, the FERC accepted ISO-NE's Capital Projects Report and Unamortized Cost Schedule covering the second quarter ("Q2") of calendar year 2019 (the "Report").<sup>94</sup> ISO-NE is required to file the Report under Section 205 of the FPA pursuant to Section IV.B.6.2 of the Tariff. Report highlights included the following new projects: (i) 2019 FCM Improvements (\$1.915 million); (ii) Update Security Application Framework Phase II (\$993,000); (iv) Energy Storage Device Phase II (\$966,000); and (v) Energy Market Opportunity Cost Phase II (\$510,000). Projects with a significant changes were (i) Forward Capacity Tracking System Infrastructure Conversion Part I (2019 Budget increase of \$0.5 million); (ii) Markets Database Upgrade (2019 Budget increase of \$0.5 million); (iii) Sub-accounts for FTRs Project (2019 Budget increase of \$0.55 million); (iv) External Website Portal and Infrastructure Upgrade (2019 Budget decrease of \$799,900); (v) Energy Management Platform 3.2 Upgrade Part I (2019 Budget decrease of \$225,000); and (vi) New England External Transaction Tool (2019 Budget decrease of \$135,000). Unless the September 24 order is challenged, this proceeding will be concluded. If you have any questions concerning this matter, please contact Paul Belval (860-275-0381; [pnbval@daypitney.com](mailto:pnbval@daypitney.com)).

- **Reserve Market Compliance (27<sup>th</sup>) Semi-Annual Report (ER06-613)**

As directed by the original ASM II Order,<sup>95</sup> as modified,<sup>96</sup> ISO-NE submitted its 27th semi-annual reserve market compliance report on October 1, 2019. In the 27th report, ISO-NE explained, as in its prior compliance reports, that work on the forward TMSR market issues continues to be on hold due to its efforts on other priority projects. If there are questions on this matter, please contact Dave Doot (860-275-0102; [dtdoot@daypitney.com](mailto:dtdoot@daypitney.com)).

<sup>92</sup> *Martha Coakley, Mass. Att'y Gen.*, 149 FERC ¶ 61,032 (Oct. 16, 2014) ("*Opinion 531-A*").

<sup>93</sup> *Martha Coakley, Mass. Att'y Gen.*, Opinion No. 531-B, 150 FERC ¶ 61,165 (Mar. 3, 2015) ("*Opinion 531-B*").

<sup>94</sup> *ISO New England Inc.*, Docket No. ER19-2569 (Sep. 24, 2019) (unpublished letter order).

<sup>95</sup> See *NEPOOL and ISO New England Inc.*, 115 FERC ¶ 61,175 (2006) ("*ASM II Order*") (directing the ISO to provide updates on the implementation of a forward TMSR market), *reh'g denied* 117 FERC ¶ 61,106 (2006).

<sup>96</sup> See *NEPOOL and ISO New England Inc.*, 123 FERC ¶ 61,298 (2008) (continuing the semi-annual reporting requirement with respect to the consideration and implementation of a forward market for Ten-Minute Spinning Reserve ("*TMSR*").

## IX. Membership Filings

- **October 2019 Membership Filing (ER19-2902)**

On September 30, NEPOOL requested that the FERC accept (i) the memberships of American Petroleum Institute (Fuels Industry Participant); Dantzig Energy [Related Person to Maple Energy (AR Sector, LR Sub-Sector)]; Energy Storage Resources [Related Person to Enel X (AR Sector; LR Sub-Sector)]; Great American Gas & Electric, LLC (Supplier Sector); Madison BTM, LLC (Related Person to EMI/New England Battery Storage, Generation Group Seat); QPH Capital (Supplier Sector); and Verde Group LLC (Provisional Member); and (ii) the termination of the Participant status of: Block Island Power Co. (predecessor to Block Island Utility District, Publicly Owned Entity Sector); Constellation Energy Power Choice, LLC (Exelon Related Person); EverPower Commercial Services LLC (Related Person to Howard Wind, Supplier Sector); Inertia Power III, LP (Supplier Sector); and Tidal Energy Marketing Inc. (Supplier Sector). Comments on this filing are due on or before October 21.

- **September 2019 Membership Filing (ER19-2724)**

On August 30, NEPOOL requested that the FERC accept (i) the memberships of Block Island Utility District (Publicly Owned Entity Sector); KCE CT 1 and KCE CT 2 (Provisional Member Group Seat); and RoxWind LLC (Provisional Member Group Seat); (ii) the termination of the Participant status of: Hampshire Council of Governments (End User Sector); and (iii) the name change of FirstLight Power Management, LLC (f/k/a FirstLight Power Resources Management, LLC). This filing is pending before the FERC.

## X. Misc. - ERO Rules, Filings; Reliability Standards

Questions concerning any of the ERO Reliability Standards or related rule-making proceedings or filings can be directed to Pat Gerity (860-275-0533; [pmgerity@daypitney.com](mailto:pmgerity@daypitney.com)).

- **Revised Reliability Standards: FAC-008-4; INT-006-5; INT-009-3; PRC-004-6; Retirement of 10 Standards (Standards Efficiency Review II) (RM19-17)**

On June 7, 2019, in connection with the first phase of work under NERC's Standards Efficiency Review,<sup>97</sup> NERC filed for approval (i) the retirement of individual requirements (not needed for reliability) in the following four Reliability Standards:

- ◆ FAC-008-4 (Facility Ratings);
- ◆ INT-006-5 (Evaluation of Interchange Transactions);
- ◆ INT-009-3 (Implementation of Interchange); and
- ◆ PRC-004-6 (Protection System Misoperation Identification and Correction).

and (ii) the retirement, in their entirety, of the following 10 Reliability Standards:

- ◆ FAC-013-2 (Assessment of Transfer Capability for the Near-term Transmission Planning Horizon);
- ◆ INT-004-3.1 (Dynamic Transfers);
- ◆ INT-010-2.1 (Interchange Initiation and Modification for Reliability);
- ◆ MOD-001-1a (Available Transmission System Capability);
- ◆ MOD-004-1 (Capacity Benefit Margin);
- ◆ MOD-008-1 (Transmission Readability Margin Calculation Methodology);
- ◆ MOD-020-0 (Providing Interruptible Demands and Direct Control Load Management Data to System Operators and Reliability Coordinators);
- ◆ MOD-028-2 (Area Interchange Methodology);

<sup>97</sup> The Standards Efficiency Review initiative, which began in 2017, reviewed the body of NERC Reliability Standards to identify those Reliability Standards and requirements that were administrative in nature, duplicative to other standards, or provided no benefit to reliability.

- ◆ MOD-029-2a (Rated System Path Methodology); and
- ◆ MOD-030-3 (Flowgate Methodology).

As of the date of this Report, the FERC has not noticed a proposed rulemaking proceeding or otherwise invited public comment.

- **Revised Reliability Standards: IRO-002-7; TOP-001-5; VAR-001-6 (Standards Efficiency Review I) (RM19-16)**

Also on June 7, 2019, and in connection with the first phase of work under NERC's Standards Efficiency Review,<sup>98</sup> NERC filed for approval (i) the retirement of individual requirements (not needed for reliability) in the following three Reliability Standards:

- ◆ IRO-002-7 (Reliability Coordination – Monitoring and Analysis);
- ◆ TOP-001-5 (Transmission Operations); and
- ◆ VAR-001-6 (Voltage and Reactive Control).

As of the date of this Report, the FERC has not noticed a proposed rulemaking proceeding or otherwise invited public comment.

- **NOPR - Revised Reliability Standard: TPL-001-5 (RM19-10)**

On June 20, 2019, the FERC issued a NOPR proposing to approve a revised Reliability Standard -- TPL-001-5 (Transmission System Planning Performance Requirements), and associated implementation plan, VRFs and VSLs (together, the "TPL-001 Changes").<sup>99</sup> As previously reported, NERC stated that the TPL-001 Changes improve upon the currently effective standard by enhancing Requirements for the study of Protection System single points of failure. Additionally, the TPL-001 Changes address two FERC directives from *Order 786*: (1) the TPL-001 Changes provide for a more complete consideration of factors for selecting which known outages will be included in Near-Term Transmission Planning Horizon studies, addressing the FERC's concern that the exclusion of known outages of less than six months in TPL-001-4 could result in outages of significant facilities not being studied; and (2) the TPL-001 Changes modify Requirements for Stability analysis to require an entity to assess the impact of the possible unavailability of long lead time equipment, consistent with the entity's spare equipment strategy. In addition, the FERC proposes in the *TPL-001-5 NOPR* to direct NERC to modify the Reliability Standards to require corrective action plans for protection system single points of failure in combination with a three-phase fault if planning studies indicate potential cascading. Comments on the *TPL-001-5 NOPR* were due on or before August 26, 2019,<sup>100</sup> and were filed by American Forest & Paper Association, Arizona Public Service Company, the Bonneville Power Administration ("BPA"), Joint Trade Associations,<sup>101</sup> MISO, NERC, Tennessee Valley Authority ("TVA"), Tri-State Generation and Transmission Association ("Tri-State"), and a couple of individuals. This matter is pending before the FERC.

- **NOPR - New Reliability Standard: CIP-012-1 (RM18-20)**

On April 18, 2019, the FERC issued a NOPR proposing to approve a new Reliability Standard -- CIP-012-1 (Cyber Security – Communications between Control Centers), and associated Glossary definitions, implementation

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<sup>98</sup> The Standards Efficiency Review initiative, which began in 2017, reviewed the body of NERC Reliability Standards to identify those Reliability Standards and requirements that were administrative in nature, duplicative to other standards, or provided no benefit to reliability.

<sup>99</sup> *Transmission Planning Rel. Standard TPL-001-5*, 167 FERC ¶ 61,249 (June 20, 2019) ("*TPL-001-5 NOPR*").

<sup>100</sup> The *TPL-001-5 NOPR* was published in the Fed. Reg. on June 27, 2019 (Vol. 84, No. 124) pp. 30,639-30,647.

<sup>101</sup> "Joint Trade Associations" are the Edison Electric Institute ("EEI"), the American Public Power Association ("APPA"), the Large Public Power Council ("LPPC"), and the National Rural Electric Cooperative Association ("NRECA").

plan, VRFs and VSLs (together, the “Control Center Cyber Security Communication Changes”).<sup>102</sup> The *CIP-012-1 NOPR* also proposes to direct NERC develop certain modifications to CIP-012-1 to require protections regarding the availability of communication links and data communicated between bulk electric system control centers and, further, to clarify the types of data that must be protected. When it filed CIP-012-1, NERC stated that the changes modify the Critical Infrastructure Protection (“CIP”) Reliability Standards to require Responsible Entities to implement controls to protect communication links and sensitive Bulk Electric System (“BES”) data communicated between BES Control Centers. CIP-012-1 requires Responsible Entities to develop a plan to mitigate the risks posed by unauthorized modification (integrity) and unauthorized disclosure (confidentiality) of Real-time Assessment and Real-time monitoring data. The plan must include the following three components: (1) identification of security protection used to meet the security objective; (2) identification of where the Responsible Entity applied the security protection; and (3) identification of the responsibilities of each Responsible Entity for applying the security protection. Comments on the *CIP-012-1 NOPR* were due on or before June 24, 2019.<sup>103</sup> Comments were filed by the ISO/RTO Council, APPA, MERC, Tri-State, BPA, J. Appelbaum, and C. Liu, VA Tech Power and Energy Center. This matter is pending before the FERC.

- **2020 NERC/NPCC Business Plans and Budgets (RR19-8)**

On August 23, 2019, NERC submitted its proposed Business Plan and Budget, as well as the Business Plans and Budgets for the Regional Entities, including NPCC, for 2020. FERC regulations<sup>104</sup> require NERC to file its proposed annual budget for statutory and non-statutory activities 130 days before the beginning of its fiscal year (January 1), as well as the annual budget of each Regional Entity for their statutory and non-statutory activities, including complete business plans, organization charts, and explanations of the proposed collection of all dues, fees and charges and the proposed expenditure of funds collected. NERC reports that its proposed 2020 Funding requirement represents an overall increase of approximately 3.9% over NERC’s 2019 Funding requirement. The NPCC U.S. allocation of NERC’s net funding requirement is \$4.56 million. NPCC has requested \$16.6 million in statutory funding (a U.S. assessment per kWh (2019 NEL) of \$0.0000497) and \$1.49 million for non-statutory functions. Comments on this filing were due on or before September 16, 2019; none were filed. This matter is pending before the FERC

- **5-Year ERO Performance Assessment Report (RR19-7)**

On July 22, 2019, NERC filed a performance assessment report that (i) identified how NERC and its Regional Entities’ activities and achievements during the Assessment Period (2014-2018) build upon the certification criteria of 18 C.F.R. § 39.3(b); (ii) evaluated the effectiveness of each Regional Entity in carrying out its Delegated Authority; and (iii) addressed stakeholder comments on NERC’s performance (specific comments attached as directed by the Commission in the 2014 Five Year Order).<sup>105</sup> The submission of the assessment was made in accordance with FERC regulations and directives.<sup>106</sup> Comments on this Report were due on or before August 22, 2019; none were filed. Public Citizen, APPA, Cooperative Energy, and NRECA filed a doc-less interventions. This matter is pending before the FERC.

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<sup>102</sup> *Critical Infrastructure Protection Rel. Standard CIP-012-1 – Cyber Security – Communications between Control Centers*, 167 FERC ¶ 61,055 (Apr. 18, 2019) (“*CIP-012-1 NOPR*”).

<sup>103</sup> The *CIP-012-1 NOPR* was published in the Fed. Reg. on Apr. 18, 2019 (Vol. 84, No. 79) pp. 17,105-17,112.

<sup>104</sup> 18 CFR § 39.4(b) (2014).

<sup>105</sup> *N. Amer. Elec. Reliability Corp.*, 149 FERC ¶ 61,141, at P 70 (2014) (“*2014 Five Year Order*”).

<sup>106</sup> 18 C.F.R. § 39.3(c) (2019); *Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards*, Order No. 672, 114 FERC ¶ 61,104, *order on reh’g*, Order No. 672-A, 114 FERC ¶ 61,328 (2006).

**XI. Misc. - of Regional Interest**

- **203 Application: Ambit/Vistra (EC19-129)**

On August 28, 2019, Ambit Northeast requested authorization for a transaction following which it will be indirectly wholly owned subsidiary of Vistra Energy Corp (and thereby a Related Person of Dynegy Marketing and Trade). Comments on this application were due on or before September 18; none were filed. Public Citizen intervened doc-lessly. This matter is pending before the FERC.

- **203 Application: Kendall Green Energy/Antin (EC19-121)**

On August 14, 2019, Kendall Green Energy requested authorization for a transaction following which it will be indirectly wholly owned subsidiary of Antin Infrastructure Partners, S.A.S, rather than Veolia Energy North America Holdings, Inc. This transaction will have no impact on Kendall Green's membership in the Generation Sector Group Seat. Comments on this application were due on or before September 4; none were filed. This matter is pending before the FERC.

- **203 Application: Footprint, Hartree Partners / Brookfield (EC19-104)**

On September 30, the FERC conditionally authorized a transaction following which Hartree Partners, Footprint Power Salem Harbor Development ("Footprint") and Brookfield Asset Management Inc. ("Brookfield") will become Related Persons.<sup>107</sup> The transaction contemplates Brookfield's acquisition of an approximate 62% interest in Oaktree Capital Group, LLC ("Oaktree"), the owner in turn of indirect, upstream interests of greater than 10% in the Seller Public Utilities. Based on the specific facts and circumstances described, the FERC agreed with Applicants that Brookfield and Oaktree are not affiliates of Vistra by virtue of the placement in a voting trust of the voting securities that Oaktree holds in Vistra, but conditioned its approval on Brookfield and Oaktree not having more than one representative on the Vistra Board in the future without obtaining the FERC's prior approval.<sup>108</sup> Pursuant to the September 30 order, notice must be filed within 10 days of consummation of the transaction. That notice has not yet been filed.

- **203 Application: Empire Generating Co, LLC (EC19-99)**

On June 4, 2019, as amended on June 17,<sup>109</sup> Empire Generating Co, LLC ("Empire") requested authorization for the disposition of its FERC-jurisdictional facilities by way of a bankruptcy-related upstream change in control. Subject to all required authorizations, including the FERC authorization requested in this proceeding, 100% of the ownership interests in Empire's indirect upstream owner, Empire Gen Holdings, LLC, will be transferred to Empire Acquisition, LLC, which in turn will be owned by certain secured creditors<sup>110</sup> of Empire's current owner, TTK Power, LLC. Comments on the Empire application were due on or before June 25; comments on its amendments, July 8. On July 3, ARES Management Corp., one of Empire's creditors, filed a limited protest requesting that the FERC require Empire to provide additional information concerning the post-Transaction governance of both Empire and Empire Acquisition. Objections to ARES' request were filed by Empire and Black Diamond Capital Holdings (which following the transaction will indirectly hold a majority of the interests in Empire Acquisition) on July 17 and 18, respectively.

**Deficiency Letter.** In addition, on June 21, the FERC issued a deficiency letter asking that Empire provide the workpapers used to calculate the total post-transaction generation capacity and a Horizontal Competitive

<sup>107</sup> *Hartree Partners, LP et al.*, 168 FERC ¶ 61,212 (Sep. 30, 2019).

<sup>108</sup> *Id.* at PP 24-25. The FERC added that future applicants asserting that a voting trust breaks an affiliate relationship should provide the FERC with information regarding their combined representation on relevant boards of directors (or similar governing bodies) and any other facts and circumstances that would indicate a lack of common control.

<sup>109</sup> The June 17 amendment reflected additional owners and affiliates (creditors) associated with the Transaction.

<sup>110</sup> Various investment funds and entities managed or controlled by Black Diamond Capital Holdings, L.L.C. (93.0%); Various investment funds and entities under management of MJX Asset Management LLC (6.3%); and HSBC Bank plc (0.7%).

Analysis Screen. Empire responded to the deficiency letter on July 17. Comments on Empire's deficiency letter response were due on or before September 3, 2019. Ares Management Corp. submitted an answer to Empire's response on August 2. Empire asked the FERC to reject that response on August 7, and Ares answered the motion to reject on August 13. This matter is again before the Commission.

- **203 Application: Kendall Green Energy (EC19-86)**

On June 28, 2019, the FERC authorized a transaction in which Veolia Energy North America Holdings, Inc. ("Veolia") will become the sole owner of Kendall Green Energy through the acquisition of ISQ Thermal Kendall's remaining 49% share.<sup>111</sup> Pursuant to the June 28 order, notice must be filed within 10 days of consummation of the transaction. That notice has not yet been filed.

- **203 Application: Emera Maine/ENMAX (EC19-80)**

On June 25, the FERC authorized a transaction pursuant to which Emera Maine (though not the Emera Energy Service Companies) will become a wholly-owned, indirect subsidiary of ENMAX Corporation, an Alberta corporation wholly-owned by the City of Calgary, Alberta, Canada ("ENMAX"), rather than Emera Inc.<sup>112</sup> Pursuant to the June 25 order, notice must be filed within 10 days of consummation of the transaction, which is expected to occur at the end of 2019.

- **New England Ratepayers Association Complaint (EL19-10) [UPDATE]**

On September 19, the FERC granted the complaint filed by the New England Ratepayers Association ("NERA") finding that New Hampshire Senate Bill 365 ("SB 365"),<sup>113</sup> which mandates a purchase price for wholesale sales by seven generators operating in NH, is inconsistent with Section 210 of the Public Utility Regulatory Policies Act of 1978 ("PURPA") and preempted by the FPA.<sup>114</sup> SB 365 required New Hampshire utilities to purchase power from eligible biomass and waste facilities at rates that were established by the legislation. FERC ruled that the legislatively established rate was inconsistent with PURPA requirements because it would likely exceed, and was not otherwise limited to a rate equal to or less than, the purchasing utilities' avoided cost. Further, FERC concluded that NH SB 365 contravened the FPA's "division of authority between state and federal regulators and was pre-empted by the FPA because SB 365 establishes a rate for, and thereby infringes on the FERC's exclusive jurisdiction over, the rates for wholesale sales of electric energy in interstate commerce." Challenges, if any, to the September 19 order must be filed on or before October 21, 2019. If you have any questions concerning this matter, please contact Pat Gerity ([pmgerity@daypitney.com](mailto:pmgerity@daypitney.com); 860-275-0533).

- **PJM MOPR-Related Proceedings (EL18-178; ER18-1314; EL16-49)**

On June 29, 2018, the FERC issued an order ("*PJM Order*")<sup>115</sup> regarding out-of-market support affecting the PJM capacity market.<sup>116</sup> Opening with the statement that "the integrity and effectiveness of the

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<sup>111</sup> *Kendall Green Energy LLC*, 167 FERC ¶ 62,203 (June 28, 2019).

<sup>112</sup> *Emera Maine*, 167 FERC ¶ 62,194 (June 25, 2019).

<sup>113</sup> SB 365, 2018 N.H. Laws Ch. 379, An Act relative to the use of renewable generation to provide fuel diversity, codified at N.H. Rev. Stat. Chapter 362-H.

<sup>114</sup> *New England Ratepayers Assoc.*, 168 FERC ¶ 61,169 (Sep. 1, 2019).

<sup>115</sup> *Calpine Corp. et al.*, 163 FERC ¶ 61,236 (June 29, 2018) ("*June 29, 2018 Order*"), *clarif. and/or reh'g requested*.

<sup>116</sup> The *PJM Order* addressed two separate, but related proceedings. The first, EL16-49, was initiated by a complaint originally filed by Calpine, joined by additional generation entities ("Calpine Complaint") on March 21, 2016, and later amended on January 9, 2017. The Calpine Complaint argued that PJM's MOPR was unjust and unreasonable because it did not address the impact of existing resources receiving out-of-market payments on the capacity market, and proposed interim tariff revisions that would extend the MOPR to a limited set of existing resources. The Calpine Complaint also requested the FERC to direct PJM to conduct a stakeholder process to develop and submit a long-term solution. The second proceeding was PJM's filing of its proposed revisions to its Tariff, pursuant to section 205 of the FPA in ER18-1314 ("*PJM Filing*"). The *PJM Filing* consisted of two alternate proposals designed to address the price impacts of state out-of-market support for certain resources. The first approach, preferred by PJM but not supported by its stakeholders, consisted of a two-stage

capacity market administered by [PJM] have become untenably threatened by out-of-market payments provided or required by certain states for the purpose of supporting the entry or continued operation of preferred generation resources,” the *PJM Order* determined that the PJM Tariff is currently unjust and unreasonable, rejected PJM’s Section 205 Filing, granted in part Calpine’s Complaint, and established a paper hearing to resolve the “price-suppressive” effects of out-of-market support for certain resources. Commissioners LaFleur and Glick both dissented, and Commissioner Powelson wrote a separate concurrence.

In the *PJM Order*, the FERC found “that it has become necessary to address the price suppressive impact of resources receiving out-of-market support.” The FERC agreed with Calpine and PJM that changes to the PJM Tariff were required, but did not accept the changes proposed in the Calpine Complaint or the PJM Filing, finding that neither had been shown to be just and reasonable, and not unduly discriminatory or preferential. The majority stated that it was unable to determine, based on the record of either proceeding, the just and reasonable rate to replace the rate in PJM’s Tariff. The *PJM Order* therefore found the PJM Tariff unjust and unreasonable, granted the Calpine Complaint, in part, and *sua sponte* initiated a new FPA section 206 proceeding (EL18-178), consolidating the record of the two earlier proceedings, and setting for paper hearing the issue of how to address a proposed alternative put forth in the *PJM Order*,<sup>117</sup> which would modify two existing aspects of the PJM Tariff, “or any other proposal that may be presented.”

16 requests for clarification and/or rehearing of the *PJM Order* were filed on July 30, 2018. On August 29, 2018, the FERC issued a tolling order affording it additional time to consider the requests for rehearing, which remain pending.

**Paper Hearing; Additional Briefing; PJM’s Extended RCO Proposal.** Following an August 22 notice of extension of time, interested parties were invited to submit their initial round of testimony, evidence, and/or argument by October 2, 2018. Initial briefs, comments and submissions were filed by over 50 parties. In its October 2 submission, PJM submitted a revised proposal, which includes an expanded MOPR coupled with a “Extended Resource Carve-Out” proposal (“Extended RCO”). The proposed MOPR would apply to all fuel and technology types and to both existing and new resources (a change from the original MOPR, which only applied to new gas-fired units). The Extended RCO would provide a means for states to support particular subsidized generation assets by removing them from certain aspects of the PJM capacity market and not subjecting them to MOPR in PJM’s capacity market.

Reply testimony, evidence, and/or argument was due on or before November 6, 2018. Over 60 sets of reply briefs, evidence, etc. were filed. Since that time, a few parties submitted answers and additional comments. On December 6, PJM and Direct Energy/NextEra filed limited answers to reply briefs. In addition, a letter from a group of companies representing competitive new generation built in the PJM region since 2010 (“Generator Letter”) urged the FERC to “to consider the broadest ramification of a fundamental change in the regulatory compact and the impact it would have on consumers, investors and even the fundamental

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annual auction, with capacity commitments first determined in stage one of the auction and the clearing price set separately in stage two (“Capacity Repricing”). The second alternative approach, proposed in the event that the FERC determined that Capacity Repricing was unjust and unreasonable, would have revised PJM’s MOPR to mitigate capacity offers from both new and existing resources, subject to certain proposed exemptions (“MOPR-Ex”).

<sup>117</sup> The proposed alternative approach would (i) modify PJM’s MOPR such that it would apply to new and existing resources that receive out-of-market payments, regardless of resource type, but would include few to no exemptions; and (ii) in order to accommodate state policy decisions and allow resources that receive out-of-market support to remain online, establish an option in PJM’s Tariff that would allow, on a resource-specific basis, resources receiving out-of-market support to choose to be removed from the PJM capacity market, along with a commensurate amount of load, for some period of time. That option, which is similar in concept to the Fixed Resource Requirement (“FRR”) that currently exists in PJM’s Tariff, is referred to as the “FRR Alternative.” Unlike the existing FRR construct, the FRR Alternative would apply only to resources receiving out-of-market support. Both aspects of the proposed replacement rate, along with a series of questions that need to be addressed, are more fully explained and raised in the *PJM Order*.

American belief that markets drive better outcomes than government.”<sup>118</sup> Answers to and comments on PJM’s answer were filed by “Clean Energy Entities”<sup>119</sup> and UCS. Responses to the December 6 Generators Letter were filed by APPA, ELCON, LPPC, NRECA, and NRDC. On December 28, PSEG submitted supplemental comments. On January 15, PSEG answered PSEG’s supplemental comments. These materials, together with all of the initial briefs and reply briefs, are still pending before the FERC.

The FERC committed in the *PJM Order* to make every effort to issue an order establishing the just and reasonable replacement rate no later than January 4, 2019 (a date which has long since passed). The FERC also established a refund effective date of March 21, 2016, the date of the original Calpine Complaint in EL16-49.

On March 11, 2019, PJM submitted an informational filing notifying the FERC that, given the lack of a final FERC order in this proceeding, it instructed Capacity Market Sellers to follow all relevant pre-auction deadlines under **both** the existing capacity market rules as well as PJM’s proposed Capacity Reform rules (with revised MOPR rules and the Extended RCO alternative), in connection with the upcoming 2022/2023 Delivery Year Base Residual Auction (“BRA”) scheduled to begin on August 14, 2019. PJM urged the FERC to issue an order expeditiously. On April 3, 2019, Joint Consumer Advocates<sup>120</sup> also urged the FERC rule in this matter.

***PJM Motion for Supplemental Clarification.*** On April 10, PJM submitted a Motion for Supplemental Clarification of the *June 29, 2018 Order* setting forth its intention to run the August 2019 BRA under its existing capacity market rules and seeking confirmation that, to the extent the FERC has not established a replacement rate prior to the August 2019 BRA, any replacement rate later established by the FERC would be applied prospectively and would not require PJM to re-run the August 2019 BRA. Answers to the Motion were filed by PJM Entities<sup>121</sup> (requesting the FERC establish a revised commencement date and schedule) and the IL AG (requesting that the FERC require PJM to replace the clearing price setting algorithm ahead of running the BRA and to release generator bidding data 30 days after the BRA). EPSA, Clean Energy Entities and Direct Energy each filed comments supporting the PJM Motion. EPSA protested the PJM Entities’ April 25 answer (because it is procedurally defective and would only serve to inject further uncertainty into the market).

On July 25, the FERC denied PJM’s Motion and directed PJM not to run the BRA in August 2019.<sup>122</sup> In denying PJM’s Motion, the FERC declined to “rule prematurely on the issue of any appropriate remedy prior to rendering a determination on the merits of a replacement rate.”<sup>123</sup> In directing PJM not to run the BRA, it “recognize[d] the importance of sending price signals sufficiently in advance of delivery to allow for resource investment decisions. However, we believe that in the circumstances presented here, on balance, delaying the auction until the Commission establishes a replacement rate will provide greater certainty to the market than conducting the auction under the existing rules.”<sup>124</sup> Each of Commissioners LaFleur, Glick and McNamee concurred with separate statements, which are well-worth the read.

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<sup>118</sup> Those companies included: Ares Power and Infrastructure Group, Caithness, Calpine, Carroll County and South Field Energy, CPV, J-POWER USA Development Co., Panda Power Funds, and Tenaska Energy.

<sup>119</sup> “Clean Energy Entities” are AWEA, the Solar RTO Coalition, Solar Energy Industries Assoc., AEE, the American Council on Renewable Energy (“ACORE”), and the Mid-Atlantic Renewable Energy Coalition (“MAREC”).

<sup>120</sup> “Joint Consumer Advocates” were the NJ Division of Rate Counsel, DE Division of the Public Advocate, the DC Office of the People’s Counsel, the PA Office of Consumer Advocate, MD Office of People’s Counsel and the IL Citizens Utility Board.

<sup>121</sup> “PJM Entities are AMP, Dominion, Exelon, EDP Renewables, FirstEnergy and the Talen PJM Companies.

<sup>122</sup> *Calpine et al. v. PJM*, 168 FERC ¶ 61,051 (July 25, 2019).

<sup>123</sup> *Id.* at P 13.

<sup>124</sup> *Id.* at P 14.

On August 16, LS Power filed a motion to lodge Ohio legislation that subsidizes nuclear and other facilities, as well as three orders of the New Jersey Board of Public Utilities (the “NJBP”), which similarly provide out-of-market financial support to certain generation resources, which it claimed “are just the latest examples of ‘ever increasing subsidy programs that give uneconomic resources the ability to submit artificially low offers that do not reflect their actual costs,’ and that are resulting in unjust and unreasonable prices in the [PJM] Reliability Pricing Model (“RPM”).” On August 20, PSEG filed comments “to ensure that the Commission has adequate background and understanding regarding the challenges that the policy makers and capacity suppliers will face during the transition to the replacement rate that the Commission will develop in this proceeding.” On August 23, a coalition of consumer advocates, environmental organizations, and industry stakeholders filed reply comments reiterating their “request that the Commission allow for a smooth transition by giving states enough time to work through implementation issues.” The AEP companies responded to LS Power’s motion to lodge on August 29. And finally, in an interesting motion, the Sierra Club and NRDC requested that Commission McNamee recuse himself from these dockets or, in the alternative, explain how his participation is “consistent with due process and ethics obligations” given his prior representation of at least three parties with significant economic interests in the outcome of this proceeding (Dominion, Duke and Direct Energy).

For further information on this proceeding, please contact Jamie Blackburn (202-218-3905; [jblackburn@daypitney.com](mailto:jblackburn@daypitney.com)).

- **PJM Clean MOPR Complaint (EL18-169)**

This proceeding, which could potentially impact New England’s markets, remains pending. As previously reported, CPV Power Holdings, L.P. (“CPV”), Calpine Corporation (“Calpine”), and Eastern Generation, LLC (“Eastern Generation”) (collectively, “PJM MOPR Complainants”) filed a complaint on May 31, 2018 requesting that the FERC protect PJM’s Reliability Pricing Model (“RPM”) market from below-cost offers for resources receiving out-of-market subsidies by requiring PJM to adopt a “Clean MOPR” (i.e. a MOPR applicable to all subsidized resources and without categorical exemptions like those in PJM’s MOPR-Ex proposal). PJM MOPR Complainants state that the Complaint offers the FERC a procedural vehicle to require adoption of the “Clean MOPR” that Complainants opine is not otherwise available in pending FERC proceedings (EL16-49 (PJM MOPR Complaint)<sup>125</sup> and ER18-1314 (PJM’s pending MOPR changes)). They assert that the “Clean MOPR” is required to effectively address the impacts of state subsidy programs, and is consistent with the FERC’s MOPR principles identified in the *CASPR Order*. Comments on the PJM Clean MOPR Complaint were due on or before June 20. PJM’s answer, as well as comments and protests from over 25 parties were filed. Given its potential to impact New England, NEPOOL filed a doc-less motion to intervene. More than 30 other parties also intervened. This matter is pending before the FERC. If you have any questions concerning this proceeding, please contact Sebastian Lombardi (860-275-0663; [slombardi@daypitney.com](mailto:slombardi@daypitney.com)).

- **NYISO MOPR Proceeding (EL13-62)**

As in the PJM MOPR Proceeding, NEPOOL filed limited comments requesting that any FERC action or decision be limited narrowly to the facts and circumstances as presented, and that any changes ordered by the FERC not circumscribe the results of NEPOOL’s stakeholder process or predetermine the outcome of that process through dicta or a ruling. The NYISO MOPR Proceeding remains pending before the FERC. If you have any questions concerning this proceeding, please contact Dave Doot (860-275-0102; [dtdoot@daypitney.com](mailto:dtdoot@daypitney.com)) or Sebastian Lombardi (860-275-0663; [slombardi@daypitney.com](mailto:slombardi@daypitney.com)).

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<sup>125</sup> The “PJM MOPR Complaint” seeks a FERC order expanding the PJM MOPR in the Base Residual Auction for the 2019/2020 Delivery Year to prevent the artificial suppression of prices in the Reliability Pricing Model (“RPM”) market by below-cost offers for existing resources whose continued operation is being subsidized by State-approved out-of-market payments. Complainants in the MOPR Complaint are Calpine, Dynegy, Eastern Generation, Homer City Generation, the NRG Companies, Carroll County Energy, C.P. Crane, the Essential Power PJM Companies, GDF SUEZ Energy Marketing NA, Oregon Clean Energy, and Panda Power Generation Infrastructure Fund.

- **PJM Retroactive Surcharges (EL08-14)**

In a decision which could impact the resolution of future cases in New England, the FERC reversed its prior position on the issue of ordering refunds in cost allocation and rate design cases, and found that it does in fact have authority under the FPA to order refunds to fix an error, even if refunds will require surcharges on other parties.<sup>126</sup> Although the FERC acknowledged that it had “in the past has referenced a general policy of not ordering refunds in cost allocation and rate design cases”, it found that it “has greater discretion with respect to this refund-related issue under sections 309 and 206(b) of the FPA than was indicated by those statements.”<sup>127</sup> Summarizing recent court precedent, the FERC concluded that retroactive surcharges were not prohibited in all circumstances, and refunds and surcharges are allowable in situations in which surcharges are necessary if the statutory refund provision of Section 206 of the FPA is to be honored.<sup>128</sup> Going forward, the FERC stated that it will consider whether to require refunds in cost allocation and rate design cases based on the specific facts and equities of each case, even where such refunds must be funded through surcharges on certain parties, to meet its obligation under section 206(b) of the FPA to restore the just and reasonable rate.<sup>129</sup> On July 22, 2019, American Municipal Power (“AMP”) requested rehearing of the *PJM Retroactive Surcharges Order*. On August 20, the FERC issued a tolling order affording it additional time to consider the AMP request for rehearing, which remains pending. On August 23, PJM urged the FERC to act promptly on the AMP request, before late October, “so as to provide greater certainty to the next—and hopefully last—round of resettlement in this case.”

- **3rd Supp. to Stony Brook IA (ER19-2897)**

On September 27, NSTAR filed a third extension to the Interconnection Agreement with MMWEC for MMWEC’s Stony Brook Generating Station located in Ludlow, Massachusetts. The extension provides that the IA, originally date August 1, 1979, will remain in effect until December 31, 2020 in order to allow the parties time to agree on terms and conditions for the continued interconnection of the Stony Brook generating facility to NSTAR’s transmission system (the original IA, as recently extended, was to have expired on October 1, 2019). Comments on the third extension are due on or before October 18, 2019. If you have any questions concerning this matter, please contact Pat Gerity ([pmgerity@daypitney.com](mailto:pmgerity@daypitney.com); 860-275-0533).

- **IA: Emera Maine/ Liberty Utilities (Tinker Transmission) (ER19-2788)**

On September 11, Emera Maine filed a two-party IA between itself and Liberty Utilities (Tinker Transmission) LP to replace a June 8, 199 IA to which the parties each succeeded. The IA sets forth their respective rights and obligations with regards to the interconnection of their transmission assets at the U.S.-Canada border. Comments on this filing were due on or before October 2, 2010; none were filed. This matter is pending before the FERC. If you have any questions concerning this matter, please contact Pat Gerity ([pmgerity@daypitney.com](mailto:pmgerity@daypitney.com); 860-275-0533).

- **Emera Maine Order 845 Compliance Filing (ER19-1887)**

On May 17, 2019, in response to the requirements of *Order 845*, Emera Maine submitted changes to the LGIP and LGIA in its Open Access Transmission Tariff for the Maine Public District (the “MPD OATT”). Emera Maine request a May 20, 2019 effective for the changes. Though no comments were filed, the FERC

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<sup>126</sup> *Black Oak Energy, EPIC Merchant Energy, and SESCO Enterprises v. PJM Interconnection*, 167 FERC ¶ 61,250 (June 20, 2019) (“*PJM Retroactive Surcharges Order*”).

<sup>127</sup> *Id.* at P 15. FPA section 206(a) authorizes the FERC to fix rates prospectively, after it concludes that a rate is inappropriate, and to order refunds where the previous rate was unfairly high. With respect to the retroactive correction of rates that were too low, FPA section 309 gives the FERC expansive remedial authority to advance remedies not expressly provided by the FPA, as long as they are consistent with the FPA. Reallocation of costs, including through surcharges, has been found to be within the FERC’s remedial authority under section 309, read in harmony with section 206 (the cost increase to a subgroup of ratepayers not being a retroactive rate increase because the aggregate rate remains the same, albeit divided differently among the constituent payers).

<sup>128</sup> *Id.* at P 26.

<sup>129</sup> *Id.* at P 27.

issued a letter in a number of utility filing proceedings, including this one, requesting additional information related to the provisions for surplus interconnection service be filed within 30 days (or July 15). Emera Maine filed a response to the FERC's letter on July 15. Comments on that filing were due on or before August 5; none were filed. This matter is pending before the FERC. If you have any questions concerning this matter, please contact Pat Gerity ([pmgerity@daypitney.com](mailto:pmgerity@daypitney.com); 860-275-0533).

- **Mystic COS Agreement Amendment No. 1 (ER19-1164)**

As previously reported, Constellation Mystic Power, LLC ("Mystic") filed on March 1, 2019 (separately from its contemporaneously-submitted compliance filing (see ER18-1639 above)) an amendment to its COS Agreement to provide "reciprocal early termination rights for ISO-NE and Mystic based on the results of ISO-NE's updated fuel security analysis, to be completed in September of 2019". Comments on this filing were due on or before March 22, 2019. Protests were filed by CT Parties, ENECOS, MMWEC/NHEC, and Verso. Doc-less interventions were filed by Avangrid, Environmental Defense Fund, Eversource, MA DPU, National Grid, NESCOE, Repsol, and the New England Local Distribution Companies. On April 8, Mystic answered the March 22 protests. This matter remains pending before the FERC. If you have any questions concerning this matter, please contact Sebastian Lombardi (860-275-0663; [slombardi@daypitney.com](mailto:slombardi@daypitney.com)).

- **FERC Enforcement Action: Order of Non-Public, Formal Investigation (IN15-10)**

**MISO Zone 4 Planning Resource Auction Offers.** On October 1, 2015, the FERC issued an order authorizing the Office of Enforcement ("OE") to conduct a non-public, formal investigation, with subpoena authority, regarding violations of FERC's regulations, including its prohibition against electric energy market manipulation, that may have occurred in connection with, or related to, MISO's April 2015 Planning Resource Auction for the 2015/16 power year. There has been no public update provided since that order.

- **FERC Enforcement Action: Show Cause Order – Vitol & F. Corteggiano (IN14-4)**

On July 10, 2019, the FERC issued an order<sup>130</sup> directing Vitol Inc. ("Vitol") and its co-head of FTR trading operations, Federico Corteggiano, to show cause why (i) they should not be found to have violated, from October 28-November 1, 2013, the FERC's Anti-Manipulation Rule by selling physical power at a loss in CAISO's market in order to eliminate congestion that they expected to cause losses on Vitol's congestion revenue rights ("CRRs");<sup>131</sup> (ii) why Vitol and Corteggiano should not pay civil penalties in the amount of \$6 million and \$800,000, respectively; and (iii) why Vitol should not disgorge \$1,227,143 plus interest in unjust profits, or a modification to these amounts as warranted.

On July 17, the FERC issued an updated notice that identified nine OE staff members who would not be included in the blanket designation of OE Staff as non-decisional. On July 18, Vitol and Corteggiano objected to the exceptions and urged the FERC to "designate as non-decisional all OE staff and all staff involved in the decision to issue the OSC and to bar them from having any *ex parte* communication with the Commission and decisional

<sup>130</sup> *Vitol Inc. and Federico Corteggiano*, 168 FERC ¶ 61,013 (July 10, 2019) ("*Vitol Show Cause Order*").

<sup>131</sup> Enforcement Staff alleges that Vitol and Corteggiano ("Respondents") sold physical power at a loss at the Cragview node in CAISO's day-ahead market from Oct. 28 through Nov. 1, 2013, in order to eliminate congestion costs that they expected would negatively affect Vitol's CRRs. On Vitol's behalf, Corteggiano purchased CRRs sourcing at Cragview in CAISO's annual CRR auction for 2013. In mid-October 2013, CAISO derated the Cascade intertie to "0" in only the export direction, while still allowing imports. During the derate, an unusually high LMP appeared at Cragview due to congestion costs. The congestion costs caused Respondents' CRRs to lose money. CAISO announced that identical derates would occur during the week of October 28 through November 1 and on additional dates later in November and in December. Respondents were able to protect against losses on their CRR positions for November and December by buying counter-flow CRRs in the CRR auctions for those months (i.e., "flattening" the CRR position). However, because the monthly CRR auction for October had closed, it was too late for Respondents to flatten their CRR position for the last week of October. Facing over \$1.2 million in potential losses on their CRRs during that week's scheduled partial derate, Respondents imported physical power in the day-ahead market at an offering price of \$1/MWh, which prevented a recurrence of the congestion costs that Respondents had observed during the October 18-19 derate. Staff alleges Respondents undertook the import transactions in disregard of market fundamentals and were indifferent to whether they made a profit on them. In fact, Respondents lost money on the imports, but avoided a far larger loss on their CRRs. *Id.* at P 3.

staff relating to this Docket.” However, on September 17, based on its August 9 election summarized immediately below, Respondents filed a notice that its July 18 motion was moot and need not be addressed by the FERC.

On August 9, 2019, Respondents’, pursuant to ordering paragraph (E) of the *Vitol Show Cause Order*, elected the FPA’s *de novo* review procedures, which permits a reviewing federal court “to review *de novo* the law and the facts involved” and “jurisdiction to enter a judgment . . . modifying . . . or setting aside [the assessment] in whole or in Part” should the FERC institute an action in federal district court for an order affirming any penalty assessed against Respondents.

Respondents’ answered the *Vitol Show Cause Order* on August 23,<sup>132</sup> providing reasons why the FERC should close the investigation and not issue a penalty assessment. FERC Staff’s answer to Respondents’ August 23 answer was filed on September 20 and revised on September 25.

## XII. Misc. - Administrative & Rulemaking Proceedings

- **Joint Staff White Paper on Notices of Penalty for Violations of CIP Standards (AD19-18)**

On August 27, 2019, the FERC published for public comment a White Paper prepared jointly with NERC staff setting out a proposed new format for NERC Notices of Penalty (“NOP”) involving violations of CIP Reliability Standards. The FERC explained that the revised format is intended to improve the balance between security and transparency in the filing of NOPs. Specifically, NERC CIP NOP submissions would consist of a proposed public cover letter that discloses the name of the violator, the Reliability Standard(s) violated (but not the Requirement), and the penalty amount. NERC would submit the remainder of the CIP NOP filing containing details on the nature of the violation, mitigation activity, and potential vulnerabilities to cyber systems as a nonpublic attachment, along with a request for the designation of such information as CEII.

Public comment on the proposal was sought with respect to the following: (i) the potential security benefits from the new proposed format; (ii) potential security concerns that could arise from the new format; (iii) any other implementation difficulties or concerns that should be considered; and (iv) whether the proposed format provides sufficient transparency to the public. Other suggested approaches to CIP NOP submissions were welcomed. Comments were due on or before September 26 and were filed by over 30 parties. No changes to the CIP NOP filing format will be made prior to consideration of public comment on the White Paper.

- **Grid Resilience in RTO/ISOs; DOE NOPR (AD18-7; RM18-1)**

On January 8, 2018, the FERC initiated a Grid Resilience in RTO/ISOs proceeding (AD18-7)<sup>133</sup> and terminated the DOE NOPR rulemaking proceeding (RM18-1).<sup>134</sup> In terminating the DOE NOPR proceeding, the FERC concluded that the Proposed Rule and comments received did not support FERC action under Section 206 of the FPA, but did suggest the need for further examination by the FERC and market participants of the risks that the bulk power system faces and possible ways to address those risks in the changing electric markets. On February 7,

<sup>132</sup> On July 24, Vitol and Corteggiano asked for a 30-day extension of time to submit their responses. OE Staff opposed that motion the next day. On August 5, the FERC issued a notice of extension of time that extended the response date by 14 days, to August 23.

<sup>133</sup> *Grid Rel. and Resilience Pricing*, 162 FERC ¶ 61,012 (Jan. 8, 2018), *reh’g requested*.

<sup>134</sup> As previously reported, the FERC opened the DOE NOPR proceeding in response to a September 28, 2017 proposal by Energy Secretary Rick Perry, issued under a rarely-used authority under §403(a) of the Department of Energy (“DOE”) Organization Act, that would have required RTO/ISOs to develop and implement market rules for the full recovery of costs and a fair rate of return for “eligible units” that (i) are able to provide essential energy and ancillary reliability services, (ii) have a 90-day fuel supply on site in the event of supply disruptions caused by emergencies, extreme weather, or natural or man-made disasters, (iii) are compliant with all applicable environmental regulations, and (iv) are not subject to cost-of-service rate regulation by any State or local authority. More than 450 comments were submitted in response to the DOE NOPR, raising and discussing an exceptionally broad spectrum of process, legal, and substantive arguments. A summary of those initial comments was circulated under separate cover and can be found with the posted materials for the November 3, 2017 Participants Committee meeting. Reply comments and answers to those comments were filed by over 100 parties.

FRS requested rehearing of the January 8 order terminating the DOE NOPR proceeding. The FERC issued a tolling order on March 8, 2018 affording it additional time to consider the FRS request for rehearing, which remains pending.

**Grid Resilience Administrative Proceeding (AD18-7).** AD18-7 was initiated to evaluate the resilience of the bulk power system in RTO/ISO regions. The FERC directed each RTO/ISO to submit information on certain resilience issues and concerns, and committed to use the information submitted to evaluate whether additional FERC action regarding resilience is appropriate. RTO submissions were due on or before March 9, 2018.

**ISO-NE Response.** In its response, ISO-NE identified fuel security<sup>135</sup> as the most significant resilience challenge facing the New England region. ISO-NE reported that it has established a process to discuss market-based solutions to address this risk, and indicated that it believed it will need through the second quarter of 2019 to develop a solution and test its robustness through the stakeholder process. In the meantime, ISO-NE indicated that it would continue to independently assess the level of fuel-security risk to reliable system operation and, if circumstances dictate, would take, with FERC approval when required, actions it determines to be necessary to address near-term reliability risks. ISO-NE's response was broken into three parts: (i) an introduction to fuel-security risk; (ii) background on how ISO-NE's work in transmission planning, markets, and operations support the New England bulk power system's resilience; and (iii) answers to the specific questions posed in the January 8 order.

**Industry Comments.** Following a 30-day extension issued on March 20, 2018, reply comments were due on or before May 9, 2018. NEPOOL's comments, which were approved at the May 4 meeting, were filed May 7, and were among over 100 sets of initial comments filed. A summary of the comments that seemed most relevant to New England and NEPOOL was circulated to the Participants Committee on May 15 and is posted on the [NEPOOL website](#). On May 23, NEPOOL submitted a limited response to four sets of comments, opposing the suggestions made in those pleadings to the extent that the suggestions would not permit full use of the Participant Processes. Supplemental comments and answers were also filed by FirstEnergy, MISO South Regulators, NEI, and EDF. Exelon and American Petroleum Institute filed reply comments. FirstEnergy included in this proceeding its motion for emergency action also filed in ER18-1509 (ISO-NE Waiver Filing: Mystic 8 & 9), which Eversource answered (in both proceedings). Reply comments were filed by APPA and AMP and the Nuclear Energy Institute ("NEI") moved to lodge presentations by the National Infrastructure Advisory Council. On December 6, the Harvard Electricity Law Initiative filed a comment suggesting that, as a matter of law, "Commission McNamee cannot be an impartial adjudicator in these proceedings" and "any proceeding about rates for 'fuel-secure' generators" and should recuse himself. Similarly, on December 18, "Clean Energy Advocates"<sup>136</sup> requested Commissioner McNamee recuse himself from these proceedings. These matters remain pending before the FERC.

**FirstEnergy DOE Application for Section 202(c) Order.** In a related but separate matter, FirstEnergy Solutions ("FirstEnergy") asked the Department of Energy ("DOE") in late March to issue an emergency order to provide cost recovery to coal and nuclear plants in PJM, saying market conditions there are a "threat to energy security and reliability". FirstEnergy made the appeal under Section 202(c) of the FPA, which allows the DOE to issue emergency orders to keep plants operating, but has previously been exercised only in response to natural disasters. Action on that 2018 request is pending.

- **NOPR: QF Rates and Requirements; Implementation Issues under PURPA (RM19-15)**

In an action that could have significant impacts on the development and financing of renewable resources, the FERC, on September 19, 2019, proposed rules to reform its long-standing regulations implementing sections

<sup>135</sup> ISO-NE defined fuel security as "the assurance that power plants will have or be able to obtain the fuel they need to run, particularly in winter – especially against the backdrop of coal, oil, and nuclear unit retirements, constrained fuel infrastructure, and the difficulty in permitting and operating dual-fuel generating capability."

<sup>136</sup> For purposes of these proceedings, "Clean Energy Advocates" are NRDC, Sierra Club and UCS.

201 and 210 of the Public Utility Regulatory Policies Act of 1978 (“PURPA”).<sup>137</sup> Those regulations address the obligation of electric utilities to purchase power produced by “qualifying facilities” or “QFs” at rates that must be “just and reasonable to the electric consumers of the electric utility and in the public interest, and not discriminate against” those QFs.<sup>138</sup>

The NOPR seeks public comment on draft rule changes “to rebalance the benefits and obligations of the [FERC’s] PURPA Regulations in light of the changes in circumstances since the PURPA Regulations were promulgated.”<sup>139</sup> The NOPR proposes the following changes that would revise how and when prices for QF power may be established and would reduce the circumstances under which a utility’s mandatory purchase obligation would be triggered:

- Provide states the flexibility to establish QF energy rates at the purchasing utility’s avoided costs at the time of energy *delivery*, rather than allowing the QFs to elect to *fix* the energy rate for an extended term at the time the utility becomes compelled to purchase the QF’s energy.
- Specify that an avoided cost rate for QF energy can be based on *market factors* (including locational market prices, indices, trading hubs, or competitive solicitation processes) or, at the state’s discretion, can continue to be set as they are under current PURPA Regulations.
- Reduce in states with a retail choice program an electric utility’s obligation to purchase from QFs to the extent that the utility’s provider of last resort (“POLR”) supply obligation has been reduced by the state’s program. If POLR supplies are obtained through solicitations having a specific contract term, the term of any PURPA purchase contract should match the term of the POLR supply contract.
- Decrease from 20 MW to 1 MW the maximum size of QFs that would be entitled to require utilities located in areas with demonstrably competitive markets (RTO/ISOs) to purchase their power. If QF facilities qualify as cogeneration, the 20 MW cap would not change.
- Replace the “one-mile rule” for determining whether generation facilities under common ownership should be considered to be part of a single facility (to be eligible for favorable QF treatment, a small power production facility must be 80 MW or less). Some have argued that the current one-mile rule has been gamed to permit QF certification of projects that if combined would otherwise exceed the 80 MW cap. The impact of this change, if made, would primarily affect projects in non-RTO/ISO markets (e.g., the bilateral markets of the southern and western United States).
- Clarify that a utility’s mandatory purchase obligation under PURPA does not arise until the QF can demonstrate commercial viability and financial commitment pursuant to objective and reasonable state-defined criteria.
- Allow for interested stakeholders to protest the self-certification of a QF.

Comments on the proposed rule changes are due 60 days after their publication in the *Federal Register*.

- **NOPR: Public Util. Trans. ADIT Rate Changes (RM19-5)**

On November 15, 2018, the FERC issued a NOPR (“*ADIT NOPR*”) proposing to require all public utility transmission providers with transmission rates under an OATT, a transmission owner tariff, or a rate schedule to revise those rates to account for changes caused by the 2017 Tax Cuts and Jobs Act (“2017 Tax Law”).<sup>140</sup> Specifically, for transmission formula rates, the FERC is proposing (i) to require that public utilities deduct excess ADIT from or add deficient ADIT to their rate bases and adjust their income tax allowances by amortized excess or deficient ADIT; (ii) to require all public utilities with transmission formula rates to incorporate a new permanent

<sup>137</sup> 16 U.S.C. § 2601 et seq. (2018). PURPA was enacted to help lessen the dependence on fossil fuels and promote the development of power generation from non-utility power producers.

<sup>138</sup> 16 U.S.C. § 824a–3; PURPA, Sec. 210(a)–(b).

<sup>139</sup> *Qualifying Facility Rates and Requirements; Implementation Issues Under the Public Utility Regulatory Policies Act of 1978*, Notice of Proposed Rulemaking, 168 FERC ¶ 61,184 (2019) (NOPR).

<sup>140</sup> *Public Util. Trans. Rate Changes to Address Accumulated Deferred Income Taxes*, 165 FERC ¶ 61,117 (Nov. 15, 2018).

worksheet into their transmission formula rates that will annually track ADIT information; (iii) to require all public utilities with transmission stated rates to determine the amount of excess and deferred income tax caused by the 2017 Tax Law's reduction to the federal corporate income tax rate and return or recover this amount to or from customers. As previously reported, comments on the *ADIT NOPR* were due on or before January 22, 2019. Comments were filed by over 14 parties, including Eversource, EEI, and NRECA. The *ADIT NOPR* is pending before the FERC.

- **Order 861: Refinements to Horizontal Market Power Analysis Requirements (RM19-2)**

On July 18, the FERC issued its final rule that relieves market-based rate ("MBR") sellers of the obligation, when seeking to obtain or retain MBR authority in any RTO/ISO market with RTO/ISO-administered energy, ancillary services, and capacity markets subject to FERC-approved RTO/ISO monitoring and mitigation, to submit indicative screens ("*Order 861*").<sup>141</sup> In RTOs and ISOs that lack an RTO/ISO-administered capacity market, MBR sellers will be relieved of the requirement to submit indicative screens if their MBR authority is limited to sales of energy and/or ancillary services. The FERC's regulations will continue to require RTO/ISO sellers to submit indicative screens for authorization to make capacity sales in any RTO/ISO markets that lack an RTO/ISO-administered capacity market subject to FERC-approved RTO/ISO monitoring and mitigation. The *NOPR* also proposes to eliminate the rebuttable presumption that FERC-approved RTO/ISO market monitoring and mitigation is sufficient to address any horizontal market power concerns regarding sales of capacity in RTOs/ISOs that do not have an RTO/ISO-administered capacity market. For those RTOs/ISOs that do not have an RTO/ISO-administered capacity market, FERC-approved RTO/ISO monitoring and mitigation is no longer presumed sufficient to address any horizontal market power concerns for capacity sales where there are indicative screen failures. *Order 861* will become effective September 24, 2019.<sup>142</sup> CAISO requested clarification and PG&E requested rehearing or in the alternative clarification of *Order 861*. On September 16, 2019, the FERC issued a tolling order affording it additional time to consider the requests for rehearing, which remain pending.

- **DER Participation in RTO/ISOs (RM18-9)**

In *Order 841*<sup>143</sup> (see RM16-23 below), the FERC initiated a new proceeding in order to continue to explore the proposed distributed energy resource ("DER") aggregation reforms it was considering in the *Storage NOPR*.<sup>144</sup> All comments filed in response to the *Storage NOPR* will be incorporated by reference into Docket No. RM18-9 and further comments regarding the proposed distributed energy resource aggregation reforms, including comments regarding the April 10-11 technical conference in AD18-10,<sup>145</sup> were also to be filed in RM18-9. On June 26, 2018, over 50 parties submitted post-technical conference comments in this proceeding, including comments from ISO-NE, Calpine, Direct, Eversource, Ictec, NRG, Utility Services, EEI, EPRI, EPSA, NARUC, NRECA, and SEI. On February 11, 2019, a group of 18 US Senators submitted a letter urging the FERC to adopt a final rule that enable all DERs the opportunity to participate in the RTO/ISO markets and requesting an update no later than March 1, 2019. Reply comments and answers were submitted by the Arkansas PUC, AEE, AEMA, and the Missouri PUC. APPA/NRECA submitted supplemental comments.

<sup>141</sup> *Refinements to Horizontal Market Power Analysis for Sellers in Certain Regional Trans. Org. and Indep. Sys. Op. Mkts.*, Order No. 861, 168 FERC ¶ 61,040 (July 18, 2019).

<sup>142</sup> *Order 861* was published *Fed. Reg.* on July 26, 2019 (Vol. 84, No. 144) pp. 36,374-36,387.

<sup>143</sup> *Elec. Storage Participation in Mkts. Operated by Regional Trans. Orgs. and Indep. Sys. Operators*, Order No. 841, 162 FERC ¶ 61,127 (Feb. 15, 2018), reh'g and/or clarif. requested ("*Order 841*").

<sup>144</sup> *Elec. Storage Participation in Mkts. Operated by Regional Trans. Orgs. and Indep. Sys. Operators*, 157 FERC ¶ 61,121 (Nov. 17, 2016) ("*Storage NOPR*").

<sup>145</sup> On April 10-11, 2018, the FERC held a technical conference to gather additional information to help the FERC determine what action to take on DER aggregation reforms proposed in the *Storage NOPR* and to explore issues related to the potential effects of DERs on the bulk power system. Technical conference materials are posted on the FERC's eLibrary. Interested persons were invited to file post-technical conference comments on the topics concerning the Commission's DER aggregation proposal discussed during the technical conference, including on follow-up questions from FERC Staff related to the panels. Comments related to DER aggregation were to be filed in RM18-9; comments on the potential effects of DERs on the bulk power system, in AD18-10.

On September 5, the FERC requested that each of the RTO/ISOs provide responses to data requests seeking information on their policies and procedures that affect DER interconnections. The RTO/ISO responses are due October 7, 2019. Those interested in filing comments in reply to ISO-NE's response must do so within 30 days from the date ISO-NE files its response with the FERC.

- **Order 860: Data Collection for Analytics & Surveillance and MBR Purposes (RM16-17)**

On July 18, 2019, the FERC issued *Order 860*.<sup>146</sup> *Order 860*, issued three years after the FERC's *Data Collection NOPR*,<sup>147</sup> (i) revises the FERC's MBR regulations by establishing a relational database of ownership and affiliate information for MBR Sellers (which, among other uses, will be used to create asset appendices and indicative screens), (ii) reduces the scope of information that must be provided in MBR filings, modifies the information required in, and format of, a MBR Seller's asset appendix, (iii) changes the process and timing of the requirements to advise the FERC of changes in status and affiliate information, and (iv) eliminates the requirement adopted in *Order 816* that MBR Sellers submit corporate organization charts. In addition, the FERC stated that it will not adopt the *Data Collection NOPR* proposal to collect Connected Entity data from MBR Sellers and entities trading virtuals or holding FTRs. The FERC will post on its website high-level instructions that describe the mechanics of the relational database submission process and how to prepare filings that incorporate information that is submitted to the relational database. While *Order 860* will become effective October 1, 2020, submitters will have until close of business on February 1, 2021 to make their initial baseline submissions. In the fall of 2020, submitters will be required to obtain FERC generated IDs for reportable entities that do not have CIDs or LEIs, as well as Asset IDs for reportable generation assets without an EIA code so that every ultimate upstream affiliate or other reportable entity has a FERC-assigned company identifiers ("CID"), Legal Entity Identifier,<sup>148</sup> or FERC-generated ID and that all reportable generation assets have an code from the Energy Information Agency ("EIA") Form EIA-860 database or a FERC-assigned Asset ID. Requests for rehearing and/or clarification of *Order 860* were submitted by EEI, Fund Management Parties, Joint Consumer Advocates, NRG/Vistra, Starwood Energy Group, and TAPS. On September 16, 2019, the FERC issued a tolling order affording it additional time to consider the requests for rehearing, which remain pending.

- **NOPR: NAESB WEQ Standards v. 003.2 - Incorporation by Reference into FERC Regs (RM05-5-027)**

On May 16, 2019, the FERC issued a NOPR proposing to incorporate by reference, with certain enumerated exceptions, the latest version (Version 003.2) of certain Standards for Business Practices and Communication Protocols for Public Utilities adopted by the Wholesale Electric Quadrant ("WEQ") of the North American Energy Standards Board ("NAESB").<sup>149</sup> The Version 003.2 Standards include NAESB's Version 003.1 revisions, which remain pending before the FERC following a July 2016 NOPR.<sup>150</sup> The FERC stated that comments already filed on the revisions made by NAESB in the WEQ Version 003.1 Standards will be given full consideration and need not be repeated in response to this NOPR. This NOPR invites comment on the latest revisions and corrections NAESB made in the WEQ Version 003.2 Standards. The FERC plans to act on all of the Version 003 revisions in this proceeding. NAESB's WEQ-023 Modeling Business Practice Standards, which concern technical issues affecting the calculation of Available Transfer Capability for wholesale electric

<sup>146</sup> *Data Collection for Analytics and Surveillance and Market-Based Rate Purposes*, 168 FERC ¶ 61,039 (July 18, 2019) ("*Order 860*").

<sup>147</sup> *Data Collection for Analytics and Surveillance and Market-Based Rate Purposes*, 156 FERC ¶ 61,045 (July 21, 2016) ("*Data Collection NOPR*").

<sup>148</sup> An LEI is a unique 20-digit alpha-numeric code assigned to a single entity. They are issued by the Local Operating Units of the Global LEI System.

<sup>149</sup> *Standards for Business Practices and Communication Protocols for Public Utilities*, 167 FERC ¶ 61,127 (May 16, 2019) ("*NAESB WEQ v. 003.2 Standards NOPR*").

<sup>150</sup> *Standards for Business Practices and Communication Protocols for Public Utilities*, 156 FERC ¶ 61,055 (July 21, 2016), ("*WEQ v. 003.1 NOPR*").

transmission services, will be addressed separately. The WEQ Version 003.2 Standards include modifications and reservations to existing standards and newly developed standards made to support the short-term preemption process (WEQ-001-25) and the merger of like transmission reservations (WEQ-001-24) prescribed in the OASIS Suite of Standards. Other changes were made to support consistency with NERC Standards, to support the use of “market operator” as a separate role within the EIR, a NAESB managed industry tool, and on electronic tags (e-Tags), to revise certain Abbreviations, Acronyms, and Definitions of Terms in WEQ-000, and to make minor corrections. Comments on the *NAESB WEQ v. 003.2 Standards NOPR* were due on or before July 23, 2019<sup>151</sup> and were filed by PJM, SPP, MISO, BPA, Southern Company, NV Energy, and Open Access Technology Inc. Also on July 23, NAESB submitted a report notifying the FERC of a minor correction to the Standards. This matter is pending before the FERC.

- **NOI: FERC’s ROE Policy (PL19-4)**

On March 21, 2019, the FERC issued a notice of inquiry seeking information and views to help the Commission explore whether, and if so how, it should modify its policies concerning the determination of the return on equity (“ROE”) to be used in designing jurisdictional rates charged by public utilities.<sup>152</sup> The Commission also seeks comment on whether any changes to its policies concerning public utility ROEs should be applied to interstate natural gas and oil pipelines. This NOI follows *Emera Maine*, which reversed *Opinion 531*, and seeks to engage interests beyond those represented in the *Emera Maine* proceeding (see EL11-66 *et al.* in Section I above). Initial comments were due June 26, 2019; reply comments, July 26, 2019.<sup>153</sup> Initial comments were been submitted by more than 60 organizations; nearly 15,000 initial comments were received from individuals. Reply comments were received from nearly 30 organizations. Further reply comments (also submitted in PL19-3, were submitted by a large group of state public utility commissions, public power utilities, electric cooperatives, consumer advocates, industrial users of electricity, and associations, TEC-RI and the RI Manufacturers Association. This matter, and its voluminous record, are pending before the FERC.

- **NOI: Electric Transmission Incentives Policy (PL19-3)**

Also on March 21, 2019, the FERC issued a notice of inquiry seeking comment on the scope and implementation of its electric transmission incentives regulations and policy pursuant to section 1241 of the Energy Policy Act of 2005 (“EPAAct 2005”), codified in FPA Section 219, which directed the FERC to use transmission incentives to help ensure reliability and reduce the cost of delivered power by reducing transmission congestion.<sup>154</sup> Given the passage of time since *Order 679* and the FERC’s 2012 Incentives Policy Statement and the “significant developments in how transmission is planned, developed, operated, and maintained,” the FERC stated that “it is appropriate to seek comment ... on the scope and implementation of the Commission’s transmission incentives policy and on how the Commission should evaluate future requests for transmission incentives in a manner consistent with Congress’s direction in section 219” and solicited comment on a variety of transmission incentives-related issues. Initial comments were due June 26, 2019<sup>155</sup> and were filed by more than 70 parties, including by Avangrid, Eversource, Exelon, Invenergy, MMWEC/NHEC, NGrid, NextEra, UCS, NESCOE, Potomac Economics, Southern New England State Agencies, AEE, AWEA, EEI, ESA, NRECA, PIOs, R Street Institute, and TAPS.

<sup>151</sup> The *ONAESB WEQ v. 003.2 NOPR* was published in the *Fed. Reg.* on May 24, 2019 (Vol. 84, No. 101) pp. 24,050-24,059.

<sup>152</sup> *Inquiry Regarding the Commission’s Policy for Determining Return on Equity*, 166 FERC ¶ 61,207 (Mar. 21, 2019) (“*ROE Policy NOI*”).

<sup>153</sup> The *ROE Policy NOI* was published in the *Fed. Reg.* on Mar. 28, 2019 (Vol. 84, No. 61) pp. 11,769-11,777.

<sup>154</sup> *Inquiry Regarding the Commission’s Elec. Trans. Incentives Policy*, 166 FERC ¶ 61,208 (Mar. 21, 2019) (“*Electric Transmission Incentives Policy NOI*”).

<sup>155</sup> The *Electric Transmission Incentives Policy NOI* was published in the *Fed. Reg.* on Mar. 28, 2019 (Vol. 84, No. 60) pp. 11,759-11,768.

On May 10, 2019, APPA, EEI and NRECA, in a motion covering both this and the FERC's ROE Policy proceeding, requested an extension of time to file reply comments. With respect to this proceeding, and unlike the ROE Policy proceeding, the FERC granted the motion to extend the reply period. Reply comments were due on or before Aug 26, 2019, and nearly 50 sets of reply comments were submitted, including from the entities identified in PL19-4 and from Avangrid, EMCOS, Eversource, Exelon, LS Power, National Grid, and NESCOE. This matter is pending before the FERC.

- **NOI: Certification of New Interstate Natural Gas Facilities (PL18-1)**

On April 19, 2018, the FERC announced its intention to revisit its approach under its 1999 Certificate Policy Statement to determine whether a proposed jurisdictional natural gas project is or will be required by the present or future public convenience and necessity, as that standard is established in NGA Section 7. Specifically, the NOI<sup>156</sup> seeks comments from interested parties on four broad issue categories: (1) project need, including whether precedent agreements are still the best demonstration of need; (2) exercise of eminent domain; (3) environmental impact evaluation (including climate change and upstream and downstream greenhouse gas emissions); and (4) the efficiency and effectiveness of the FERC certificate process. Pursuant to a May 23 order extending the comment deadline by 30 days,<sup>157</sup> comments were due on or before July 25, 2018. Literally thousands of individual and mass-mailed comments were filed. This matter remains pending before the FERC.

### XIII. Natural Gas Proceedings

For further information on any of the natural gas proceedings, please contact Joe Fagan (202-218-3901; [jfagan@daypitney.com](mailto:jfagan@daypitney.com)) or Jamie Blackburn (202-218-3905; [jblackburn@daypitney.com](mailto:jblackburn@daypitney.com)).

- **Natural Gas-Related Enforcement Actions**

The FERC continues to closely monitor and enforce compliance with regulations governing open access transportation on interstate natural gas pipelines:

**BP (IN13-15).** On July 11, 2016, the FERC issued *Opinion 549*<sup>158</sup> affirming Judge Cintron's August 13, 2015 Initial Decision finding that BP America Inc., BP Corporation North America Inc., BP America Production Company, and BP Energy Company (collectively, "BP") violated Section 1c.1 of the Commission's regulations ("Anti-Manipulation Rule") and NGA Section 4A.<sup>159</sup> Specifically, after extensive discovery and hearing procedures, Judge Cintron found that BP's Texas team engaged in market manipulation by changing their trading patterns, between September 18, 2008 through the end of November 2008, in order to suppress next-day natural gas prices at the Houston Ship Channel ("HSC") trading point in order to benefit correspondingly long position at the Henry Hub trading point. The FERC agreed, finding that the "record shows that BP's trading practices during the Investigative Period were fraudulent or deceptive, undertaken with the requisite scienter, and carried out in connection with Commission-jurisdictional transactions."<sup>160</sup> Accordingly, the FERC assessed a **\$20.16 million civil penalty** and required BP to **disgorge \$207,169** in "unjust profits it received as a result of its manipulation of the Houston Ship Channel Gas Daily index." The \$20.16 million civil penalty was at the top of the FERC's Penalty Guidelines range, reflecting increases for having had a prior adjudication within 5 years of the violation, and for BP's violation of a FERC order within 5 years of the scheme. BP's penalty was mitigated because it cooperated during the investigation, but BP received no deduction for its compliance program, or for self-reporting. The *BP Penalties*

<sup>156</sup> The NOI was published in the *Fed. Reg.* on Apr. 26, 2018 (Vol. 83, No. 80) pp. 18,020-18,032.

<sup>157</sup> *Certification of New Interstate Natural Gas Facilities*, 163 FERC ¶ 61,138 (May 23, 2018).

<sup>158</sup> *BP America Inc.*, Opinion No. 549, 156 FERC ¶ 61,031 (July 11, 2016) ("*BP Penalties Order*").

<sup>159</sup> *BP America Inc.*, 152 FERC ¶ 63,016 (Aug. 13, 2015) ("*BP Initial Decision*").

<sup>160</sup> *BP Penalties Order* at P 3.

*Order* also denied BP's request for rehearing of the order establishing a hearing in this proceeding.<sup>161</sup> BP was directed to pay the civil penalty and disgorgement amount within 60 days of the *BP Penalties Order*. On August 10, 2016 BP requested rehearing of the *BP Penalties Order*. On September 8, 2018 the FERC issued a tolling order, affording it additional time to consider BP's request for rehearing of the *BP Penalties Order*, which remains pending.

On September 7, 2016, BP submitted a motion for modification of the *BP Penalties Order's* disgorgement directive because it cannot comply with the disgorgement directive as ordered. BP explained that the entity to which disgorgement was to be directed, the Texas Low Income Home Energy Assistance Program ("LIHEAP"), is not set up to receive or disburse amounts received from any person other than the Texas Legislature. In response, on September 12, 2016, the FERC stayed the disgorgement directive (until an order on BP's pending request for rehearing is issued), but indicated that interest will continue to accrue on unpaid monies during the pendency of the stay.<sup>162</sup>

BP moved, on December 11, 2017, to lodge, to reopen the proceeding, and to dismiss, or in the alternative, for reconsideration based on changes in the law it asserted are dispositive and that have occurred since BP filed its request for rehearing of the *BP Penalties Order*. FERC Staff asked for, and was granted, additional time, to January 25, 2018, to file its Answer to BP's December 11 motion. FERC Staff filed its answer on January 25, 2018, and revised that answer on January 31. On February 9, BP replied to FERC Staff's revised answer. This matter remains pending before the FERC.

***Total Gas & Power North America, Inc. et al. (IN12-17)***. On April 28, 2016, the FERC issued a show cause order<sup>163</sup> in which it directed Total Gas & Power North America, Inc. ("TGPNA") and its West Desk traders and supervisors, Therese Tran f/k/a Nguyen ("Tran") and Aaron Hall (collectively, "Respondents") to show cause why Respondents should not be found to have violated NGA Section 4A and the FERC's Anti-Manipulation Rule through a scheme to manipulate the price of natural gas at four locations in the southwest United States between June 2009 and June 2012.<sup>164</sup>

The FERC also directed TGPNA to show cause why it should not be required to disgorge unjust profits of **\$9.18 million**, plus interest; TGPNA, Tran and Hall to show cause why they should not be assessed civil penalties (TGPNA - **\$213.6 million**; Hall - **\$1 million** (jointly and severally with TGPNA); and Tran - **\$2 million** (jointly and severally with TGPNA)). In addition, the FERC directed TGPNA's parent company, Total, S.A. ("Total"), and TGPNA's affiliate, Total Gas & Power, Ltd. ("TGPL"), to show cause why they should not be held liable for TGPNA's, Hall's, and Tran's conduct, and be held jointly and severally liable for their disgorgement and civil penalties based on Total's and TGPL's significant control and authority over TGPNA's daily operations. Respondents filed their answer on July 12, 2016. OE Staff replied to Respondents' answer on September 23, 2016. Respondents answered OE's September 23 answer on January 17, 2017, and OE Staff responded to that answer on January 27, 2017. This matter remains pending before the FERC.

<sup>161</sup> *BP America Inc.*, 147 FERC ¶ 61,130 (May 15, 2014) ("*BP Hearing Order*"), *reh'g denied*, 156 FERC ¶ 61,031 (July 11, 2016).

<sup>162</sup> *BP America Inc.*, 156 FERC ¶ 61,174 (Sep. 12, 2016) ("*Order Staying BP Disgorgement*").

<sup>163</sup> *Total Gas & Power North America, Inc.*, 155 FERC ¶ 61,105 (Apr. 28, 2016) ("*TGPNA Show Cause Order*").

<sup>164</sup> The allegations giving rise to the Total Show Cause Order were laid out in a September 21, 2015 FERC Staff Notice of Alleged Violations which summarized OE's case against the Respondents. Staff determined that the Respondents violated section 4A of the Natural Gas Act and the Commission's Anti-Manipulation Rule by devising and executing a scheme to manipulate the price of natural gas in the southwest United States between June 2009 and June 2012. Specifically, Staff alleged that the scheme involved making largely uneconomic trades for physical natural gas during bid-week designed to move indexed market prices in a way that benefited the company's related positions. Staff alleged that the West Desk implemented the bid-week scheme on at least 38 occasions during the period of interest, and that Tran and Hall each implemented the scheme and supervised and directed other traders in implementing the scheme.

- **New England Pipeline Proceedings**

The following New England pipeline projects are currently under construction or before the FERC:

- **Atlantic Bridge Project (CP16-9)**

- ▶ 132,700 Dth/d of firm transportation to new and existing delivery points on the Algonquin system and 106,276 Dth/d of firm transportation service from Beverly, MA to various existing delivery points on the Maritimes & Northeast system.
- ▶ 6.3 miles of replacement pipeline along Algonquin in NY and CT; new 7,700-horsepower compressor station in Weymouth, MA; more horsepower at existing compressor stations in CT and NY.
- ▶ Seven firm shippers: Heritage Gas Limited, Maine Natural Gas Company, NSTAR Gas Company d/b/a Eversource Energy, Exelon Generation Company, LLC (as assignee and asset manager of Summit Natural Gas of Maine), Irving Oil Terminal Operations, Inc., New England NG Supply Limited, and Norwich Public Utilities.
- ▶ Certificate of public convenience and necessity granted Jan. 25, 2017.<sup>165</sup>
- ▶ Certain facilities,<sup>166</sup> providing 40,000 out of the project's total capacity of 132,705 dekatherms per day of incremental firm transportation service, placed into service on November 1, 2017.<sup>167</sup> Remaining Project capacity will be available when the remaining Project facilities are placed into service following Director of OEP authorization.
- ▶ Algonquin files notice that construction of Salem Pike, Needham, Pine Hills and Plymouth meter and regulating stations began on April 2, 2018. Detailed information regarding construction activities can be found in the weekly construction reports filed in this docket.
- ▶ On February 16, 2018, Algonquin filed with the DC Circuit Court of Appeals, pursuant to NGA Section 19(d)(2), a petition for review of the MA DEP's failure to issue, condition, or deny a minor-source air permit for Algonquin's proposed natural gas compressor station in the Town of Weymouth, MA by the July 31, 2016 deadline established by the FERC. Algonquin seeks an order establishing a deadline for the MA DEP to issue, condition, or deny the permit.
- ▶ On May 31, 2018, the DC Circuit issued a *per curiam* order that held the case in abeyance pending further order of the court.<sup>168</sup>
- ▶ On July 12, 2019, the MA DEP issued a Final Decision adopting the Recommended Final Decision issued by the presiding officer who oversaw the adjudicatory proceeding. The Final Decision affirms MA DPE's air permit with certain modifications to the permit's term. On August 7, MA DEP issued a Final Decision on Reconsideration adopting a clarification to one of the permit's terms. That Final Decision on Reconsideration has been challenged in the U.S. Court of Appeals for the First Circuit (Case Nos. 19-1794, 19-1797 and 19-1803) and in the MA Superior Courts for Norfolk County and Suffolk County.
- ▶ Accordingly, Algonquin and MA DEP filed an Agreement to dismiss the DC Circuit case and that case was dismissed on September 3.

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<sup>165</sup> Order Issuing Certificate and Authorizing Abandonment, *Algonquin Gas Transmission LLC and Maritimes & Northeast Pipeline, LLC*, 158 FERC ¶ 61,061 (Jan. 25, 2017), *order denying stay*, 160 FERC ¶ 61,015 (2017), *reh'g denied*, 161 FERC ¶ 61,255 (Dec. 13, 2017) ("*Atlantic Bridge Project Order*").

<sup>166</sup> The following facilities placed into service: Southeast Discharge Take-up and Relay (Fairfield County, CT); Modified Oxford Compressor Station (New Haven County, CT); Modified Chaplin Compressor Station (Windham County, CT); Modified Danbury (CT) Meter Station; and Modified Stony Point Compressor Station (Rockland County, NY).

<sup>167</sup> *Algonquin Gas Trans., LLC*, 158 FERC ¶ 61,061 (Oct. 27, 2017).

<sup>168</sup> *Algonquin Gas Trans. v. Mass. Dept. of Env'tl. Protection*, Case No. 18-1045, DC Cir. (May 31, 2018).

- ▶ On December 26, 2018, the FERC granted Algonquin a two-year extension of time, to January 25, 2021, to complete the Project.<sup>169</sup> In requesting the extension, Algonquin attributed the need for additional time to permitting delays for the Weymouth Compressor Station and ongoing construction of the Horizontal Directional Drill of the Taconic Parkway in New York. Requests for rehearing of the December 26 order were filed by two parties. On February 25, 2019, the FERC issued a tolling order affording it additional time to consider the requests for rehearing, which remain pending.
- **Constitution Pipeline (CP13-499) and Wright Interconnection Project (CP13-502)**
  - ▶ Constitution Pipeline Company and Iroquois Gas Transmission (Wright Interconnection) concurrently filed for Section 7(c) certificates on June 13, 2013.
  - ▶ 650,000 Dth/d of firm capacity from Susquehanna County, PA (Marcellus Shale) through NY to Iroquois/Tennessee interconnection (Wright Interconnection).
  - ▶ New 122-mile interstate pipeline.
  - ▶ Two firm shippers: Cabot Oil & Gas and Southwestern Energy Services.
  - ▶ Final EIS completed on Oct 24, 2014.
  - ▶ Certificates of public convenience and necessity granted Dec 2, 2014.
    - By letter order issued July 26, 2016, the Director of the Division of Pipeline Certificates (Director) granted Constitution’s requested two-year extension of time to construct the project.
    - Construction was expected to begin Spring 2016 (after final Federal Authorizations), but has been plagued by delays (see below).
  - ▶ On April 22, 2016, New York State Department of Environmental Conservation (NY DEC) denied Constitution’s application for a Section 401 permit under the Clean Water Act.
    - On August 18, 2017, the 2nd Circuit denied Constitution’s petition for review of the NY DEC decision, concluding that (1) the court lacked jurisdiction over the Constitution’s claims to the extent that they challenged the timeliness of the decision; and (2) the NY DEC acted within its statutory authority in denying the certification, and its denial was not arbitrary or capricious.
    - Constitution filed a petition for a writ of certiorari of the 2nd Circuit’s decision at the United States Supreme Court in January 2018 alleging, among other things, that the State’s denial of the Clean Water Act permit exceeded the state’s authority, and interfered with FERC’s exclusive jurisdiction. On April 30, 2018, the Supreme Court denied Constitution’s petition, thereby letting stand the 2nd Circuit’s ruling.
  - ▶ On October 11, 2017, Constitution filed with the FERC a petition for declaratory order (“Petition”) requesting that the FERC find that NY DEC waived its authority under section 401 of the Clean Water Act by failing to act within a “reasonable period of time.” (CP18-5)
    - On January 11, 2018, the FERC denied Constitution’s Petition.<sup>170</sup> Although noting that states and project sponsors that engage in repeated withdrawal and refile of applications for water quality certifications are acting, in many cases, contrary to the public interest and to the spirit of the Clean Water Act by failing to provide reasonably expeditious state decisions, the FERC did not conclude that the practice violates the letter of the statute, found factually that Constitution gave

<sup>169</sup> *Algonquin Gas Trans., LLC*, Docket No. CP16-9 (Dec. 26, 2018) (unpublished letter order), *reh’g requested*. Absent the extension, and pursuant to the Jan. 25, 2017 Certificate Order, the Project would otherwise have had to have been completed by Jan. 25, 2019.

<sup>170</sup> *Constitution Pipeline Co.*, 162 FERC ¶ 61,014 (Jan. 11, 2018), *reh’g requested*.

the NY DEC new deadlines, and found that the record did not show that the NY DEC in any instance failed to act on Constitution's application for more than the outer time limit of one year.<sup>171</sup>

- On February 12, 2018, Constitution Pipeline requested rehearing of the January 11, 2018 order. FERC denied Constitution's request for rehearing of the January 2018 order.<sup>172</sup> On September 14, 2018, Constitution filed a petition for review in the U.S. Court of Appeals for the D.C. Circuit.<sup>173</sup>
  - ▶ On May 16, 2016, the New York Attorney General filed a complaint against Constitution at the FERC (CP13-499) seeking a stay of the December 2014 order granting the original certificates, as well as alleging violations of the order, the Natural Gas Act, and the Commission's own regulations due to acts and omissions associated with clear-cutting and other construction-related activities on the pipeline right of way in New York.
    - In July 2016, the FERC rejected the NY AG's filing as procedurally deficient, and declined to stay of the Certificate Order. The NY AG sought rehearing, and the Commission denied rehearing on November 22, 2016, noting again that the NY AG's complaint was still procedurally deficient.
  - ▶ Tree felling and site preparation continues, but the long-term status of the pipeline is currently unknown.
  - ▶ On June 25, 2018, Constitution requested a further 2-year extension of the deadline to complete construction of its project, given the delays caused by the on-going fight over the water quality certification from the NYSDEC. Iroquois made a similar request on August 1, 2018. Constitution's request was opposed by several parties and Constitution answered some of the opposition pleadings. The FERC granted the requested two-year extension of time on November 5, 2018.<sup>174</sup>
  - ▶ Rehearing of the November 5, 2018 order was requested by Halleran Landowners and a group of intervenors comprised of Catskill Mountainkeeper; Clean Air Council; Delaware-Otsego Audubon Society; Delaware Riverkeeper Network; Riverkeeper, Inc.; and Sierra Club ("Intervenors"). Constitution answered the requests for rehearing on December 21. The FERC issued a tolling order on December 21, affording it additional time to consider the requests for rehearing. This matter is pending before the FERC.
- **Non-New England Pipeline Proceedings**

The following pipeline projects could affect ongoing pipeline proceedings in New England and elsewhere:

- **Northern Access Project (CP15-115)**

- ▶ The New York State Department of Environmental Conservation ("NY DEC") and the Sierra Club requested rehearing of the *Northern Access Certificate Rehearing Order* on August 14 and September 5, 2018, respectively. On August 29, National Fuel Gas Supply Corporation and Empire Pipeline ("Applicants") answered the NY DEC's August 14 rehearing request and request for stay. On April 2, 2019, the FERC denied the NY DEC and Sierra Club requests for rehearing.<sup>175</sup> Those orders have been challenged on appeal to the US Court of Appeals for the Second Circuit (19-1610).

<sup>171</sup> *Id.* at P 23.

<sup>172</sup> *Constitution Pipeline Co., LLC*, 164 FERC ¶ 61,029 (2018) (September 2018 Waiver Rehearing Order).

<sup>173</sup> Constitution, Petition for Review in U.S. Court of Appeals for the D.C. Circuit, Docket No. CP18-5-000 (filed Sep. 14, 2018).

<sup>174</sup> *Constitution Pipeline Co.*, 165 FERC ¶ 61,081 (Nov. 5, 2018), *reh'g requested*.

<sup>175</sup> *Nat'l Fuel Gas Supply Corp. and Empire Pipeline, Inc.*, 167 FERC ¶ 61,007 (Apr. 2, 2019).

- ▶ As previously reported, the August 6, 2018 *Northern Access Certificate Rehearing Order* dismissed or denied the requests for rehearing of the *Northern Access Certificate Order*.<sup>176</sup> Further, in an interesting twist, the FERC found that a December 5, 2017 “Renewed Motion for Expedited Action” filed by National Fuel Gas Supply Corporation and Empire Pipeline, Inc. (the “Companies”), in which the Companies asserted a separate basis for their claim that the NY DEC waived its authority under section 401 of the Clean Water Act (“CWA”) to issue or deny a water quality certification for the Northern Access Project, served as a motion requesting a waiver determination by the FERC,<sup>177</sup> and proceeded to find that the NY DEC was obligated to act on the application within one year, failed to do so, and so waived its authority under section 401 of the CWA.
- ▶ The FERC authorized the Companies to construct and operate pipeline, compression, and ancillary facilities in McKean County, Pennsylvania, and Allegany, Cattaraugus, Erie, and Niagara Counties, New York (“Northern Access Project”) in an order issued February 3, 2017.<sup>178</sup> The Allegheny Defense Project and Sierra Club (collectively, “Allegheny”) requested rehearing of the *Northern Access Certificate Order*.
- ▶ Despite the FERC’s *Northern Access Certificate Order*, the project remained halted pending the outcome of National Fuel’s fight with the NY DEC’s April denial of a Clean Water Act permit. NY DEC found National Fuel’s application for a water quality certification under Section 401 of the Clean Water Act, as well as for stream and wetlands disturbance permits, failed to comply with water regulations aimed at protecting wetlands and wildlife and that the pipeline failed to explore construction alternatives. National Fuel appealed the NY DEC’s decision to the 2nd Circuit on the grounds that the denial was improper.<sup>179</sup> On February 2, 2019, the 2nd Circuit vacated the decision of the NY DEC and remanded the case with instructions for the NY DEC to more clearly articulate its basis for the denial and how that basis is connected to information in the existing administrative record. The matter is again before the NY DEC.
- ▶ On November 26, 2018, the Applicants filed a request at FERC for a 3-year extension of time, until February 3, 2022, to complete construction and to place the certificated facilities into service. The Applicants cited the fact that they “do not anticipate commencement of Project construction until early 2021 due to New York’s continued legal actions and to time lines required for procurement of necessary pipe and compressor facility materials.” The extension request was granted on January 31, 2019.
- ▶ On August 8, 2019, the NY DEC again denied Applicants request for a Water Quality Certification, and as directed by the Second Circuit,<sup>180</sup> provided a “more clearly articulate[d] basis for denial.”
- ▶ On August 27, Applicants requested an additional order finding on additional grounds that the NY DEC waived its authority over the Northern Access 2016 Project under Section 401

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<sup>176</sup> *Nat’l Fuel Gas Supply Corp. and Empire Pipeline, Inc.*, 164 FERC ¶ 61,084 (Aug. 6, 2018) (“*Northern Access Rehearing & Waiver Determination Order*”), *reh’g denied*, 167 FERC ¶ 61,007 (Apr. 2, 2019).

<sup>177</sup> The DC Circuit has indicated that project applicants who believe that a state certifying agency has waived its authority under CWA section 401 to act on an application for a water quality certification must present evidence of waiver to the FERC. *Millennium Pipeline Co., L.L.C. v. Seggos*, 860 F.3d 696, 701 (D.C. Cir. 2017).

<sup>178</sup> *Nat’l Fuel Gas Supply Corp.*, 158 FERC ¶ 61,145 (2017) (“*Northern Access Certificate Order*”), *reh’g denied*, 164 FERC ¶ 61,084 (Aug 6, 2018) (“*Northern Access Certificate Rehearing Order*”).

<sup>179</sup> *Nat’l Fuel Gas Supply Corp. v. NYSDEC et al.* (2d Cir., Case No. 17-1164).

<sup>180</sup> Summary Order, *Nat’l Fuel Gas Supply Corp. v. N.Y. State Dep’t of Env’tl. Conservation*, Case 17-1164 (2d Cir, issued Feb. 5, 2019).

of the CWA, even if the NY DEC and Sierra Club prevail in their currently pending court petitions challenging the basis for the Commission's Waiver Order.<sup>181</sup>

#### XIV. State Proceedings & Federal Legislative Proceedings

##### *No Activity to Report*

#### XV. Federal Courts

The following are matters of interest, including petitions for review of FERC decisions in NEPOOL-related proceedings, that are currently pending before the federal courts (unless otherwise noted, the cases are before the U.S. Court of Appeals for the District of Columbia Circuit). An "\*\*\*" following the Case No. indicates that NEPOOL has intervened or is a litigant in the appeal. The remaining matters are appeals as to which NEPOOL has no organizational interest but that may be of interest to Participants. For further information on any of these proceedings, please contact Pat Gerity (860-275-0533; [pmgerity@daypitney.com](mailto:pmgerity@daypitney.com)).

- **Order 841 (19-1142, 19-1147) (consol.)**  
Underlying FERC Proceeding: RM16-23; AD16-<sup>182</sup>  
Petitioners: NARUC, APPA et al.

NARUC and APPA et al.<sup>183</sup> petitioned the DC Circuit Court of Appeals for review of *Orders 841 and 841-A* (Electric Storage Participation in RTO/ISO Markets). The cases have been consolidated and docketing statements, statement of issues and interventions<sup>184</sup> have been filed. Further procedural deadlines have not yet been established.

- **FCM Pricing Rules Complaints (15-1071\*\*, 16-1042) (consol.)**  
Underlying FERC Proceeding: EL14-7,<sup>185</sup> EL15-23<sup>186</sup>  
Petitioners: NEPGA, Exelon

On February 2, 2018, DC Circuit granted NEPGA's and Exelon's petitions for review of orders accepting the FCM's 7-year price lock-in (EL14-7) and capacity-carry-forward rules (EL15-23).<sup>187</sup> Finding that "the FERC failed to adequately explain why its rationale [for rejecting price lock-in and capacity carry forward rules] in PJM – which seems to foreclose signing off on a Tariff scheme like ISO-NE's – does not apply even more forcefully to the scheme it accepted in the Orders [appealed from]," the DC Circuit granted the Petitions and remanded the case to the FERC for further proceedings in which the FERC, in order to accept the changes filed, must provide some analysis and explanation why it changed course. The remand is now pending before the FERC.

<sup>181</sup> See *Sierra Club v. FERC*, No. 19-01618 (2d Cir. filed May 30, 2019); *NYSDEC v. FERC*, No. 19-1610 (2d. Cir. filed May 28, 2019) (consolidated).

<sup>182</sup> 162 FERC ¶ 61,127 (Feb. 15, 2018) ("*Order 841*"); 167 FERC ¶ 61,154 (May 16, 2019) ("*Order 841-A*").

<sup>183</sup> "APPA et al." are the American Public Power Assoc. ("APPA"), National Rural Elec. Coop. Assoc. ("NRECA"), Edison Electric Institute ("EEL"), and American Municipal Power, Inc. ("AMP").

<sup>184</sup> Interventions were filed and granted for Southern California Edison, Energy Storage Association, Transmission Access Policy Study Group, Solar Energy Industries Association, Advanced Energy Economy, Natural Resources Defense Council, Environmental Defense Fund, Vote Solar, Midcontinent Independent System Operator, Inc., and NextEra Energy Resources, LLC.

<sup>185</sup> 150 FERC ¶ 61,064 (Jan. 30, 2015); 146 FERC ¶ 61,039 (Jan. 24, 2014).

<sup>186</sup> 154 FERC ¶ 61,005 (Jan. 7, 2016); 150 FERC ¶ 61,067 (Jan. 30, 2015).

<sup>187</sup> *New England Power Generators Assoc. v FERC*, 881 F.3d 202 (DC Cir. 2018).

**Other Federal Court Activity of Interest**

- **PG&E Bankruptcy (19-71615) (9<sup>th</sup> Cir.)**  
**Underlying FERC Proceeding: EL19-35, EL19-36<sup>188</sup>**  
**Petitioner: PG&E**

On June 26, PG&E appealed the FERC's orders finding that it has concurrent jurisdiction with the bankruptcy courts to review and address the disposition of wholesale power contracts sought to be rejected through its bankruptcy. On July 11, PG&E moved to suspend the briefing schedule pending the Court's decision on whether to authorize direct appeal of a decision by the Bankruptcy Court in the Northern District of California. In a declaratory judgment, the Bankruptcy Court came to a completely different conclusion than the FERC and held that it has "original and exclusive jurisdiction over . . . [PG&E's] rights to assume or reject executory contracts under 11 U.S.C. § 365" and that the FERC "does not have concurrent jurisdiction, or any jurisdiction, over the determination of whether any rejections of power purchase contracts by [PG&E] should be authorized."<sup>189</sup> Because of the opposite conclusions, PG&E suggested that, should the Ninth Circuit allow the direct appeal of the Bankruptcy Court decision, the two appeals should proceed together. The PG&E motion was granted on August 1. Briefing in this case remains suspended pending further order of the Court.

On July 12, the Court issued a mediation order directing counsel for all parties intending to file briefs in this matter to inform the circuit court's mediator by July 26, 2019 of their clients' views on whether the issues on appeal or the underlying dispute might be amenable to settlement presently or in the foreseeable future. The case was released from the mediation program on August 5. This matter is pending before the Ninth Circuit.

- **First Energy Solutions Bankruptcy (18-3787) (6<sup>th</sup> Cir.)**  
**Petitioner: FERC**

In this proceeding, the FERC is appealing an Ohio bankruptcy court's August 2018 ruling that blocks the FERC from taking any action on FirstEnergy Solutions Corp.'s agreement with Ohio Valley Electric Corp. (a power purchase agreement that it is trying to shed as part of its bankruptcy proceedings). The FERC has asked the Sixth Circuit to vacate the bankruptcy court order, claiming that the ruling usurps its FPA authority over wholesale electricity contracts. Oral argument was held on June 26, 2019. This matter is pending before the Court.

- **PennEast Project (18-1128)**  
**Underlying FERC Proceeding: CP15-558<sup>190</sup>**  
**Petitioners: NJ DEP, DE and Raritan Canal Commission, NJ Div. of Rate Counsel**

Pending before the DC Circuit is an appeal of the FERC's orders granting certificates of public convenience and necessity to PennEast Pipeline Company, LLC ("PennEast")<sup>191</sup> for the construction and operation of a new 116-mile natural gas pipeline from Luzerne County, Pennsylvania, to Mercer County, New Jersey, along with three laterals extending off the mainline, a compression station, and appurtenant above ground facilities ("PennEast Project"). All briefing is complete and oral argument was scheduled for October 4, 2019. However, on October 1, the court removed the cases from the oral argument calendar and will hold the cases in abeyance "pending final disposition of any post-dispositional proceedings in the Third Circuit or proceedings before the United States Supreme Court resulting from the Third Circuit's decision in No. 19-1191 (In re: PennEast Pipeline Company, LLC (3rd Cir. Sep. 10, 2019)), or other action that resolves the obstacle PennEast poses". That decision held that the Eleventh Amendment barred condemnation cases brought by PennEast in federal district court in New Jersey to

<sup>188</sup> *NextEra Energy, Inc. v. PG&E*, 166 FERC ¶ 61,049 (Jan. 25, 2019); *Exelon Corp. v. PG&E*, 166 FERC ¶ 61,053 (Jan. 28, 2019); *Order Denying Rehearing*, 167 FERC ¶ 61,096 (May 1, 2019).

<sup>189</sup> Declaratory Judgment at 1-2, *PG&E v. FERC*, (Bankr. N.D. Cal. June 7, 2019).

<sup>190</sup> *PennEast Pipeline Co., LLC*, 162 FERC ¶ 61,053 (Jan. 19, 2018), *reh'g denied*, 163 FERC ¶ 61,159 (May 30, 2018).

<sup>191</sup> PennEast is a joint venture owned by Red Oak Enterprise Holdings, Inc., a subsidiary of AGL Resources Inc.; NJR Pipeline Company, a subsidiary of New Jersey Resources; SJI Midstream, LLC, a subsidiary of South Jersey Industries; UGI PennEast, LLC, a subsidiary of UGI Energy Services, LLC; and Spectra Energy Partners, LP.

gain access to property owned by the State or its agencies, thus calling into question the viability of PennEast's proposed project route, and the certificates issued in the underlying case. Until the Third Circuit case is resolved, the DC Circuit will not take up this case.

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