

EXECUTIVE SUMMARY
Status Report of Current Regulatory and Legal Proceedings
as of March 31, 2020

The following activity, as more fully described in the attached litigation report, has occurred since the report dated March 3, 2020 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



1	Liberty RBA Appeal – Failure to Correct Nov 2018 Meter Data Error/Load Assignment (EL20-27)	Mar 9 Mar 18, 19	NEPOOL intervenes Eversource, ISO-NE answer Liberty Complaint
2	206 Investigation: ISO-NE Implementation of <i>Order 1000</i> Exemptions for Immediate Need Rel. Projects (EL19-90)	Mar 3	LSP Transmission replies to ISO-NE Answer and National Grid and Eversource/Avangrid replies
3	Energy Security Improvements (Chapter 3) (EL18-182)	Mar 19	ISO-NE files copy of e-mail transmitting to FERC links to its 2020 REO and presentation on "New England's Wholesale Electricity Markets: The Clean Energy Transition and Future Pathways"
3	206 Proceeding: RNS/LNS Rates and Rate Protocols (EL16-19-002)	Mar 9	TOs submit status report indicating that the Parties continue to move forward in developing and completing the necessary settlement documents as expeditiously as possible

II. Rate, ICR, FCA, Cost Recovery Filings



7	FCA14 Results Filing (ER20-1025)	Mar 4-Mar 17	NEPOOL, Eversource, NRG, Vineyard Wind intervene
* 10	MPD OATT 2018 Annual Informational Filing Settlement Agreement (ER15-1429-012)	Mar 12	Emera Maine files Settlement Agreement to resolve all issues set for hearing by the FERC in its <i>2018 Challenge Order</i> ; initial comments and reply comments due Apr 1, 2020 and Apr 13, 2020, respectively

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



11	NCPC Audit Eligibility Clean Up (ER20-1094)	Mar 17-18	Eversource, National Grid intervene
11	ISO-NE Waiver Request: FCA15 De-List Bids Submission Deadline (ER20-759)	Mar 10	FERC grants limited waiver of FCA15 De-List Bid Deadline
12	Fuel Security Retention Limit Revision (ER20-89)	Mar 6 Mar 27	FERC rejects proposed Fuel Security Retention Limit Revision Borrego Solar intervenes out-of-time
14	Economic Life Determination Revisions (ER18-1770)	Mar 10	FERC grants NEPGA's request for rehearing of the Nov 9, 2018 order accepting revised Tariff language that changed the determination of economic life under Section III.13.1.2.3.2.1.2.C of the Tariff; rejects the revisions, eff. Aug 10, 2018, without prejudice to ISO-NE filing proposed tariff revisions similar to the Economic Life Revisions, to be effective prospectively; but does not require ISO-NE to rerun FCA13 or FCA14 without applying the Economic Life Revisions

IV. OATT Amendments / TOAs / Coordination Agreements

18	CIP IROL Cost Recovery Rules (ER20-739)	Mar 27	ISO-NE responds to FERC deficiency letter; comment date Apr 17, 2020
18	Interconnection Studies Scope and Reasonable Efforts Timelines Changes (ER19-1952)	Mar 19	FERC accepts changes, without change or condition, eff. Mar 19, 2020
19	ISO-NE <i>Order 845</i> Compliance Filing (ER19-1951)	Mar 19	FERC conditionally accepts New England's <i>Order 845</i> compliance filing, eff. Mar 19, 2020; further compliance filing due Jul 17, 2020

V. Financial Assurance/Billing Policy Amendments

No Activity to Report

VI. Schedule 20/21/22/23 Changes

* 20	Sched. 21-NEP: Winchendon Hydro SGIA (ER20-1413)	Mar 27	National Grid files SGIA with Winchendon Hydro; comment date Apr 17
* 21	Sched. 21-EM: 2019 Annual Update Settlement Agreement (ER15-1434-004)	Mar 19	Emera Maine files Settlement Agreement to resolve all issues raised by the MPUC following Emera Maine's 2019 Annual Update filing; comment date Apr 9

VII. NEPOOL Agreement/Participants Agreement Amendments

No Activity to Report

VIII. Regional Reports

No Activity to Report

IX. Membership Filings

* 22	April 2020 Membership Filing (ER20-1454)	Mar 31	Memberships: Axon Energy, Energy Harbor, Nexus Energy; Terminations: ADG Group, Beacon Falls Energy Park, Clear River Energy, Entergy Nuclear Power Marketing, Rinar Power; comment date Apr 21, 2020
23	February 2020 Membership Filing (ER20-923)	Mar 19	FERC accepts (i) the memberships of Avangrid Networks; TrueLight Commodities; and Weaver Wind; (ii) the termination of the Participant status of: Great Eastern Energy; Precept Power; and the TransCanada Companies; and (iii) the name change of Mercuria Energy America

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

23	Complaint re: CIP-014-2 (Physical Security) (EL20-21)	Mar 9-10	APPA/LPPC/TAPS, EEI/NRECA, FRS, Task Force on National and Homeland Security, private citizens file comments
		Mar 10	AEP, Georgia System Operations Corp., private citizens intervene
* 24	Revised Reliability Standard: PRC-024-3 (RD20-7)	Mar 20	NERC files revised standard for approval; comment date Apr 20
24	Revised Reliability Standards: FAC-002-3 et al. (RD20-4)	Mar 23	AMP intervenes
24	Revised Reliability Standard: TPL-007-4 (RD20-3)	Mar 19	FERC approves TPL-007 Changes, eff. Sep 1, 2020

24	CIP Standards Development: Virtualization and Cloud Computing Services Projects Informational Filings (RD20-2)	Mar 19	NERC submits filing describing the activity of its virtualization and cloud computing services CIP standard drafting projects; this submission was not noticed for public comment
25	NOI: Virtualization and Cloud Computing Services in BES Operations (RM20-8)	Mar 9	J. Applebaum files comments
25	NOPR - Retirement of Reliability Standard Requirements (Standards Efficiency Review) (RM19-17; RM19-16)	Mar 9	J. Applebaum files comments

XI. Misc. - of Regional Interest



26	203 Application: CMP/NECEC (EC20-24)	Mar 13	FERC authorizes CMP to transfer to NECEC Transmission 7 TSAs with the participants that are funding the New England Clean Energy Connect ("NECEC") Transmission Line
26	203 Application: Emera Maine/ENMAX (EC19-80)	Mar 24	Transaction consummated
26	PJM MOPR-Related Proceedings (EL18-178; EL16-49)	Mar 9 Mar 19 Mar 27	Dominion supplements it Feb 21 request for rehearing East Kentucky Power Co. answers Dominion Mar 9 supplement NRECA appeals Dec 19 Order to DC Circuit out of an abundance of caution (should the time period for judicial review be determined to have commenced rather than be tolled awaiting FERC action on its request for rehearing)
*	29 Emera Maine/Houlton Water Company NITSA (ER20-1445)	Mar 31	Emera Maine files non-conforming Network Integration Transmission Service Agreement with Houlton Water Co.
*	30 IA Amendment: CMP & Sappi (ER20-1434)	Mar 30	CL&P files Amended Agreement; comment date Apr 20
*	30 IA Cancellations: NGrid/GRS, NGrid/Mini-Watt (ER20-1405/1406/1407)	Mar 27	National Grid submits notices of cancellation of superseded IAs with GRS and Mini-Watt; comment date Apr 17, 2020
*	30 D&E Agreement Cancellation: CL&P/CPV Towantic (ER20-1221)	Mar 10	CL&P submits notice of cancellation of D&E Agreement
30	IA / TSA Cancellations: Emera Maine/ReEnergy Ashland (ER20-1172/1173)	Mar 5	Emera Maine submits notices of cancellation of the IA and TSA with ReEnergy Ashland
31	Northern Pass: TSA Cancellation / Cost Reimbursement (ER20-1030/1031)	Mar 6	HQ US and HQ Production support Northern Pass request for cost reimbursement
31	Facilities Use Agreement Cancellation: NGrid/Deepwater Block Island Wind (ER20-960)	Mar 13	FERC accepts notice of cancellation, eff. Apr 7, 2020
31	Emera Maine <i>Order 845</i> Compliance Filing (ER19-1887)	Mar 19	FERC conditionally accepts Emera Maine's <i>Order 845</i> compliance filing, eff. May 20, 2019; further compliance filing due Jul 17, 2020

XII. Misc. - Administrative & Rulemaking Proceedings



33	Credit Reforms in Organized Wholesale Markets (AD20-6)	Mar 12	APPA, CAISO, CCRO, DC Energy, EEI, EPSA, Indicated PJM TOs, independent consultant submit comments on request for tech. conf. and rulemaking
* 35	NOPR – Electric Transmission Incentives Policy (RM20-10)	Mar 20	FERC issue NOPR; comment date [90 days after publication in the <i>Federal Register</i>]
37	<i>Order 864</i> : Public Util. Trans. ADIT Rate Changes (RM19-5)	Mar 4 Mar 2-18	FERC grants NHT extension of time, to Jul 31, 2020, to submit its compliance filing VELCO, IRH, GMP intervene in New England Elec. Trans. Corp. (ER20-1089), New England Hydro Trans. Elec. Co. (ER20-1088), and New England Hydro Trans. Corp. proceedings

XIII. Natural Gas Proceedings



No Activity to Report

XIV. State Proceedings & Federal Legislative Proceedings



No Activity to Report

XV. Federal Courts



	COVID-19 Response	Mar 17	<i>All in-person onsite oral arguments suspended pending further order of the court.</i> Each panel scheduled to hear argument on a particular day will determine whether: (1) argument will proceed by teleconference; (2) argument will be postponed until a later date; or (3) the case(s) will be decided without oral argument
45	ISO-NE’s Inventoried Energy Program (Chapter 2B) Proposal (19-1224) (consol.)***	Mar 5	Petitioners submit unopposed proposed briefing format and schedule
45	<i>Order 841</i> (19-1142, 19-1147) (consol.)	Mar 9 Mar 11 Mar 11-16	NARUC files Joint Appendix Oral argument set for May 5, 2020 (but see COVID-19 Response above) Parties file Final Briefs
46	PG&E Bankruptcy (19-71615) (9th Cir.)	Mar 12	9 th Circuit issues an order directing the case be calendared on a priority basis and assigned to the next available panel, but not by Jun 30, 2020
46	First Energy Solutions Bankruptcy (18-3787) (6th Cir.)	Mar 13	Court denies petitions for rehearing <i>en banc</i> , concluding this proceeding
47	PennEast Project (18-1128)	Mar 30	Parties file status reports; case continues to be held in abeyance ending resolution of Third Circuit case

M E M O R A N D U M

TO: NEPOOL Participants Committee Members and Alternates

FROM: Patrick M. Gerity, NEPOOL Counsel

DATE: March 31, 2020

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”),¹ state regulatory commissions, and the Federal Courts and legislatures through March 31, 2020. If you have questions, please contact us.

I.Complaints/Section 206 Proceedings

- **Liberty Complaint – Eversource/ISO-NE Failure to Correct Nov 2018 Meter Data Error/Load Assignment (EL20-27)**

On February 28, 2020, Liberty Power Holdings, LLC (“Liberty”) filed a complaint against Eversource Energy Company (“Eversource”) and ISO-NE related to a November 2018 Meter Data Error (“Nov 2018 Error”) for a load in Metering Domain #685 (“Nov 2018 Load”). Liberty asserted (i) that Eversource incorrectly assigned the Nov 2018 Load to Liberty (as it did with a December 2018 load, which was subsequently corrected via Meter Data Error (“MDE”) request #12/18/02MD); and (ii) ISO-NE refused to correct the error for the Nov 2018 Load at Liberty’s Request Billing Adjustment (“RBA”) because the RBA was not received within three months of the date that the Invoice containing the Disputed Amount was issued. Liberty further asserted that the Tariff, in light of the facts and circumstances Liberty describes in the Complaint, provides a basis for the correction beyond the three-month period for RBA submissions.² The amount in dispute is \$191,440 plus interest (“Disputed Amount”). Liberty seeks an order directing Eversource to refund the Disputed Amount to ISO-NE and directing ISO-NE to refund the Disputed Amount to Liberty.

ISO-NE and Eversource responded to Liberty’s Complaint on March 19 and 18, 2020, respectively. In its response, **ISO-NE** asserted that “Liberty’s Complaint has no basis under the Tariff, law, or equity, and should be rejected” because Liberty “failed to take timely or appropriate action to detect the [Nov 2018 E]rror and request that it be corrected” pursuant to ISO Tariff procedures. ISO-NE reported that, “in the three months leading up to the applicable deadline, Liberty was given information on five separate occasions that should have alerted it ... to the Nov[] 2018 [E]rror.” ISO-NE stated that the “tolling provision that Liberty claims gives safe harbor where a party only discovers an error after the deadline has passed is taken from a set of billing procedures that explicitly do not apply in this case.” ISO-NE added that the Liberty Complaint “also ignores the importance of settlement finality that underlies the correction procedures in the Tariff.” **Eversource** argued for summary dismissal in its response by highlighting the opportunities Liberty had to timely identify the Nov 2018 Error, by explaining why denying the Complaint is consistent with and supportive of the filed-rate doctrine, as well as distinguishable from other instances in which the FERC has allowed the

¹ 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”).

² See § 6.3.1 of the Tariff: A Disputing Party must submit its Requested Billing Adjustment within three months of the date that the Invoice or Remittance Advice containing the Disputed Amount was issued by the ISO unless the Disputing Party could not have reasonably known of the existence of the alleged error within such time.

correction of billing errors. Eversource also explained that any correction would have been (or would need to be) paid by different retail supplier (not Eversource). NEPOOL submitted a doc-less motion to intervene.

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

- **206 Investigation: ISO-NE Implementation of Order 1000 Exemptions for Immediate Need Reliability Projects (EL19-90)**

As previously reported, the FERC instituted a proceeding under FPA Section 206 on October 17, 2019 to consider whether ISO-NE may be implementing exemptions for immediate need reliability projects in a manner that is inconsistent with what the FERC directed pursuant to *Order 1000*, and therefore may be unjust and unreasonable, unduly preferential and discriminatory.³ The FERC noted that, “based on its review of the annual informational filings and materials provided in stakeholder processes as posted on the Responding RTOs’ websites, we are concerned that the Responding RTOs may be implementing the exemption in a manner that is inconsistent with or more expansive than what the Commission directed.”⁴ The FERC directed ISO-NE to respond to questions in the *October 17 Order* to: (1) demonstrate how it is complying with the immediate need reliability project criteria; (2) demonstrate that the provisions in the Tariff, as implemented, containing certain exemptions to the requirements of *Order 1000* for immediate need reliability projects remain just and reasonable; and (3) consider additional conditions or restrictions on the use of the exemption for immediate need reliability projects to appropriately balance the need to promote competition for transmission development and avoid delays that could endanger reliability. ISO-NE’s response was due and was filed on December 27, 2019. The FERC noted its expectation that it would issue a final order within six months of ISO-NE’s response.⁵ On October 18, the FERC issued a notice of the proceeding and of the refund effective date, which will be October 28, 2019 (the date the *October 17 Order* was published in the *Federal Register*).

Those interested in participating in this proceeding were required to intervene on or before November 27, 2019.⁶ Interventions were filed by: NEPOOL, ISO-NE, Anbaric, Avangrid, Calpine, CT AG, CT, OCC, CT PURA, ENE, Eversource, IECG, LSPower, MA AG, MA DPU, MMWEC, MS PSC, NESCOE, NHEC, NextEra, NRDC, NRG, PSEG, AK PSC, ATC, Developers Advocating Transmission Advancements, East TX Cooperative, EEI, IECA, LA PSC, MD PSC, Mid-Kansas Electric Co., NJ PBU, NY TOs, NY Transco, Northeast TX Electric Cooperative, PA PUC, Public Citizen, Sunflower Electric Cooperative, and Xcel Energy Services. As noted above, ISO-NE submitted its responses on December 27, 2019.

Comments on ISO-NE’s response are due on or before January 27, 2020 and were filed by: [NEPOOL](#), [Avangrid](#), [Eversource](#), [LSP Transmission](#), [MMEWC](#), [National Grid](#), [NESCOE](#), [CT PURA](#), [State Agencies](#),⁷ [Developers Advocating Transmission Advancements](#), and [EEI](#). Reply comments were submitted by [ISO-NE](#), [Eversource and Avangrid](#) and [National Grid](#). On February 21, [State Agencies](#) answered National Grid’s reply comments. On March 3, [LSP Transmission](#) replied to the replies submitted by ISO-NE, Eversource/Avangrid and National Grid.

As noted above, a FERC order in this proceeding is expected by the end of June 2020. If you have any questions concerning this matter, please contact Eric Runge (617-345-4735; ekrunge@daypitney.com).

³ *ISO New England Inc. et al.*, 169 FERC ¶ 61,054 (Oct. 17, 2019) (“*October 17 Order*”).

⁴ *Id.* at P 7.

⁵ *Id.* at P 23.

⁶ The *October 17 Order* was published in the *Fed. Reg.* on Oct. 29, 2019 (Vol. 84, No. 208) pp. 57,726-57,727.

⁷ “State Agencies” are: the CT and MA Attorneys General, CT DEEP, CT OCC, and MOPA.

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

As previously reported, the July 2, 2018 *Mystic Waiver Order*⁸ (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 preliminary 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 time, to and including October 15, 2019, a month earlier than requested, for the filing of that Proposal. The deadline has since been further extended – to **April 15, 2020**.⁹ Markets Committee consideration of ISO-NE’s Energy Security Improvements (“ESI”) project is on-going, with action by the Markets Committee scheduled for March 24 and by the Participants Committee on April 2, 2020.

Since the last Report, ISO-NE filed in this proceeding a copy of an e-mail sent to FERC staff transmitting links to ISO-NE’s [2020 Regional Electricity Outlook](#) and its presentation entitled “[New England’s Wholesale Electricity Markets: The Clean Energy Transition and Future Pathways](#).” The e-mail was filed to mitigate any ex parte concerns that might otherwise be created given the discussion of Energy Security Improvements (“ESI”) in both.

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

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

As described below, the procedural schedule in this proceeding is now suspended until April 22, 2020 to “allow the active participants to continue to work together to finalize the details of a formal offer of settlement and promote the efficient use of resources by avoiding litigation.”

2018 Settlement (Rejected). Concluding that the contested 2018 Joint Offer of Settlement (the “Settlement”),¹⁰ filed to resolve all issues in the Section 206 proceeding instituted by the FERC on December 28, 2015,¹¹ lacked sufficient detailed information to enable it to apply any of the approaches available to it to approve

⁸ *ISO New England Inc.*, 164 FERC ¶ 61,003 (July 2, 2018), *reh’g requested* (“*Mystic Waiver Order*”).

⁹ Notice of Extension of Time, *ISO New England Inc.*, Docket No. EL18-182 (Aug. 30, 2019).

¹⁰ 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.

¹¹ *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.

a contested settlement,¹² the FERC rejected the Settlement and remanded this proceeding (EL16-19) to Chief Judge Cintron to resume hearing procedures.¹³

As previously reported, the Settlement was supported by **NESCOE** but opposed by Municipal PTF Owners¹⁴ 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 facilities, contravened numerous settled rate principles without explanation or justification,¹⁵ 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”,¹⁶ 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.”¹⁷ **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.¹⁸

Hearings. On May 23, 2019, 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.¹⁹ A prehearing conference was held on June 6, 2019. Following that conference, orders establishing a procedural

¹² 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).

¹³ *ISO New England Inc. Participating Transmission Owners Admin. Comm., et al.*, 167 FERC ¶ 61,164 (May 22, 2019) (“*RNS Rate/Rate Protocol Settlement Order*”).

¹⁴ “Municipal PTF Owners” are: Braintree, Chicopee, Middleborough, Norwood, Reading, Taunton, and Wallingford.

¹⁵ 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).

¹⁶ 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.

¹⁷ Reply Comments of NESCOE, Docket Nos. ER18-2235 and EL16-19, at p. 2 (filed Sep. 28, 2018).

¹⁸ Reply Comments of the Mass. Att’y General in Support of Settlement, Docket Nos. EL16-19 and ER18-2235 (filed Sep. 28, 2018).

¹⁹ Track III time standards require a hearing be convened within 42 weeks and an initial decision issued within 63 weeks.

schedule and adopting rules of conduct for the hearing were issued. That schedule has since been extended three times by a total of 85 days and is currently suspended (see immediately below).

Procedural Schedule Suspended Until April 22, 2020; March 9 Status Report. On January 22, 2020, the TOs requested the suspension of the procedural schedule for an additional 90 days. Chief Judge Cintron issued an order on January 24, 2020 holding the proceedings in abeyance until April 22, 2020. On March 9, 2020, the TOs filed a status report with the Chief Judge and Presiding Judge, conveying that “the active participants ... continue to move forward in developing and completing the necessary settlement documents as expeditiously as possible” and will “submit additional filings as appropriate by April 22, 2020.” As previously noted, if the current suspension period concludes without a settlement filed, the Chief Judge and Presiding Judge will take action to re-establish a procedural schedule absent good cause provided for a further suspension.

If you have any questions concerning this matter, please contact Eric Runge (617-345-4735; ekrunge@daypitney.com).

- **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,²⁰ 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*).²¹ However, the FERC’s orders were challenged, and in *Emera Maine*,²² 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)²³ and third (EL14-86)²⁴ 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*,

²⁰ 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*”).

²¹ *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*”).

²² *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).

²³ 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%.

²⁴ 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 a pre-incentives Base ROE of 11.14%, and a reduction in the Combined ROE, relief as yet not afforded through the prior ROE proceedings.

which lowered the base ROEs for the EL13-33 and EL14-86 refund periods from 11.14% to 9.59% and 10.90%, respectively.²⁵ 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 proceeding²⁶ also went to hearing before an ALJ, Judge Glazer, who issued his initial decision on March 27, 2017.²⁷ The *Base ROE IV 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.²⁸ 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.²⁹ 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.³⁰

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

²⁵ *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*").

²⁶ 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 ¶ 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.

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

²⁸ *Id.* at P 2.; Finding of Fact (B).

²⁹ *Coakley v. Bangor Hydro-Elec. Co.*, 165 FERC ¶ 61,030 (Oct. 18, 2018) ("*Order Directing Briefs*" or "*Coakley*").

³⁰ *Id.* at 19.

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%.³¹ 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.

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 Customers³² 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.

TOs Request to Re-Open Record and file Supplemental Paper Hearing Brief. On December 26, 2019, the TOs filed a Supplemental Brief that addresses the consequences of the November 21 *MISO ROE Order*³³ and requested that the FERC re-open the record to permit that additional testimony on the impacts of the *MISO ROE Order's* changes. On January 21, EMCOS and CAPs opposed the TOs' request and brief.

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) or Joe Fagan (202-218-3901; jfagan@daypitney.com).

II. Rate, ICR, FCA, Cost Recovery Filings

- **FCA14 Results Filing (ER20-1025)**

On February 18, ISO-NE filed the results of the fourteenth FCA ("FCA14") held February 3, 2020. ISO-NE reported the following highlights:

- ◆ FCA14 Capacity Zones were the Southeastern New England ("SENE") Capacity Zone (the Northeastern Massachusetts ("NEMA")/Boston, Southeastern Massachusetts, and Rhode Island Load Zones), the Northern New England ("NNE") Capacity Zone (the Maine, New Hampshire and Vermont Load Zones), and the Rest-of-Pool Capacity Zone (the Connecticut and Western/Central

³¹ *Id.* at P 59.

³² For purposes of the motion seeking clarification, "Customers" are CT PURA, MA AG and EMCOS.

³³ *Ass'n of Buss. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, Opinion No. 569, 169 FERC ¶ 61,129 (2019) ("*MISO ROE Order*").

Massachusetts Load Zones). NNE was modeled as an export-constrained Capacity Zone. The Maine Load Zone was modeled as a separate nested export-constrained Capacity Zone within NNE.

- ◆ FCA14 commenced with a starting price of \$13.099/kW-mo. and concluded for all Capacity Zones after five rounds.
- ◆ All Resources will be paid the same Capacity Clearing Price -- \$2.001/kW-mo. – including imports at the NY AC Ties (510.7 MW), Highgate (64 MW), Phase I/II HQ Excess external interface (412 MW), and New Brunswick (72 MW).
- ◆ There were no active demand bids for the substitution auction and, accordingly, the substitution auction was not conducted.
- ◆ No resources cleared as Conditional Qualified New Generating Capacity Resources.
- ◆ No Long Lead Time Generating Facilities secured a Queue Position to participate as a New Generating Capacity Resource.
- ◆ No de-list bids were rejected for reliability reasons.

ISO-NE asked the FERC to accept the FCA14 rates and results, effective June 17, 2020. Comments on this filing are due on or before April 3, 2020. Thus far, NEPOOL, Avangrid, Calpine, Dominion, Eversource, Exelon, National Grid, NESCOE, NRG, Vineyard Wind, and Public Citizen have filed doc-less interventions. If you have any questions concerning this matter, please contact Sebastian Lombardi (860-275-0663; slombardi@daypitney.com) or Pat Gerity (860-275-0533; 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”)³⁴ among Constellation Mystic Power (“Mystic”), Exelon Generation Company (“ExGen”) and ISO-NE.³⁵ 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, 2019.³⁶ 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, 2019, 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:

³⁴ 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.

³⁵ *Constellation Mystic Power, LLC*, 165 FERC ¶ 61,267 (Dec. 20, 2018) (“*Mystic Order*”).

³⁶ *Id.* at PP 31-34.

- ◆ 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.

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, 2019, 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.³⁷ 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); or Sebastian Lombardi (860-275-0663; 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

³⁷ *Constellation Mystic Power*, 164 FERC ¶ 61,022 (July 13, 2018) ("*July Mystic COS Agreement Order*"), *reh'g requested*.

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. This matter remains pending before the FERC. If there are questions on this matter, please contact Pat Gerity (860-275-0533; pmgerity@daypitney.com).

- **MPD OATT 2018 Annual Informational Filing Settlement Agreement (ER15-1429-012)**

On March 12, 2020, Emera Maine submitted an uncontested Joint Offer of Settlement between itself, MPUC and the MCG to resolve all the issues set for hearing by the FERC in its *2018 Challenge Order*³⁸ (see ER15-1429-010 immediately below). Initial comments and reply comments are due on April 1, 2020 and April 13, 2020, respectively. On March 17, Emera Maine requested authorization to implement on an interim basis its “revised rates and charges to wholesale network and point-to-point transmission customers” that are “in accordance with” the Settlement (“Settlement Rates”), effective as of February 1, 2020. On March 18, 2020, Chief Judge Cintron authorized Emera Maine to implement the Settlement Rates as of February 1, 2020, subject to refund or surcharge, with interest, pending the outcome of the FERC’s consideration of the Settlement Agreement.³⁹

- **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 Group⁴⁰ (the “2018 Challenge”) to Emera Maine’s May 15, 2018 annual informational filing⁴¹ and set the remaining issues for hearing and settlement judge procedures.⁴² As previously reported, the 2018 Challenge sought certain cost reductions/ exclusions⁴³ 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 accumulated deferred income tax (“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.

³⁸ *Emera Maine*, 167 FERC ¶ 61,090 (Apr. 30, 2019) (“*2018 Challenge Order*”).

³⁹ *Emera Maine*, 170 FERC ¶ 63,028 (Mar. 18, 2020) (“*Settlement Rates Order*”).

⁴⁰ 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.

⁴¹ 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.

⁴² *2018 Challenge Order*.

⁴³ 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.

Settlement Judge Procedures. Chief Judge Cintron designated John P. Dring as the Settlement Judge for these proceedings. Judge Dring held two settlement conferences, one on July 18, 2019 and the second on September 11, 2019. A third settlement conference occurred on October 7, 2019, and the parties reached an agreement in principle at that time. On March 20, 2020, Judge Dring issued a report advising that Emera Maine filed an offer of settlement on March 12, 2020. See ER15-1429-012 above.

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

- **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.⁴⁴ 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*⁴⁵ 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.⁴⁶ 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.⁴⁷ 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) or Eric Runge (617-345-4735; ekrunge@daypitney.com).

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

- **NCPC Audit Eligibility Clean Up (ER20-1094)**

On February 27, ISO-NE and NEPOOL filed changes to the Net Commitment Period Compensation ("NCPC") eligibility rules, adding Real-Time Dispatch Lost Opportunity Cost NCPC Credits and Rapid Response Pricing Opportunity Cost NCPC Credits. A May 1, 2020 effective date was requested. The changes were supported by the Participants Committee at the February 5, 2020 meeting (Consent Agenda Item #6). Comments on this filing were due on or before March 19, 2020; none were filed. Eversource and National Grid intervened doc-lessly. 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) or Rosendo Garza (860-275-0660; rgarza@daypitney.com).

- **ISO-NE Waiver Request: FCA15 De-List Bids Submission Deadline (ER20-759)**

On March 10, 2020, the FERC granted the limited waiver requested by ISO-NE of § III.13.1.10(b) of the Tariff.⁴⁸ The waiver will allow Market Participants to adjust or withdraw their FCA15 Retirement De-List Bids or Permanent De-List Bids should ISO-NE make a subsequent non-clerical change to certain ISO Tariff revisions after the March 13, 2020 De-List Bid deadline or in the lead-up to (or as part of) the Participants Committee vote on the

⁴⁴ *ISO New England Inc.*, 161 FERC ¶ 61,031 (Oct. 6, 2017) ("*Order Rejecting Filing*"), *reh'g requested*.

⁴⁵ *Emera Maine v. FERC*, 854 F.3d 9 (D.C. Cir. 2017) ("*Emera Maine*").

⁴⁶ *Order Rejecting Filing* at P 1.

⁴⁷ *Id.* at P 36.

⁴⁸ *ISO New England Inc.*, 170 FERC ¶61,188 (Mar. 10, 2020) ("*FCA15 De-List Bid Deadline Waiver Order*").

ESI-related Market Rules on April 2, 2020. Under those circumstances, Participants that have submitted an FCA15 Retirement De-List Bid or Permanent De-List Bid would have the option to either (i) update its De-List Bid to reflect the impact of the changes to the ESI design or (ii) withdraw the De-List Bid altogether, and to exercise that option on or before April 9, 2020. Unless the *FCA15 De-List Bid Deadline Waiver 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) or Rosendo Garza (860-275-0660; rgarza@daypitney.com).

- **Fuel Security Retention Limit Revision (ER20-89)**

On March 6, 2020, the *FERC rejected* the revision to Market Rule 1 Section III.13.2.5.2.5A(j), jointly filed by ISO-NE and NEPOOL, that would have provided that a resource retained for fuel security reasons would not be retained for a longer period for some other reason beyond the two-year fuel-security retention period (“Fuel Security Retention Limit Revision”).⁴⁹ Effectively agreeing with Exelon,⁵⁰ the FERC did not find the Fuel Security Retention Limit Revision just and reasonable.⁵¹ The FERC explained that, “while we favor limiting the scope and length of out-of-market actions, we seek to balance that objective against the ability to address reliability concerns. The proposal here would remove ISO-NE’s ability to retain a fuel security resource to address potential future transmission reliability issues that may arise simply because the resource in question had been retained previously for fuel security.”⁵² The FERC noted that “the long-term fuel security solution and the competitive transmission solution RFP in response to the Boston Area Needs Assessment ... have not yet resolved the reliability concerns identified in the Boston Area Needs Assessment” and added that “we remain open to Filing Parties proposing to revise the relevant reliability review timeline to ensure that resources are not unnecessarily retained when transmission solutions will be in place in time to address identified reliability needs.”⁵³ Challenges, if any, to the March 6 order are due on or before April 6, 2020. If you have any questions concerning this proceeding, please contact Sebastian Lombardi (860-275-0663; slombardi@daypitney.com) or Rosendo Garza (860-275-0660; rgarza@daypitney.com).

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

Still pending is 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. 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); Vineyard Wind claimed that there would have been no impact on resources qualified to use the RTR exemption in FCA13. ISO-NE filed comments not opposing the Waiver Request, but requested 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. Despite several last minute requests to do so, including a Vineyard Wind emergency motion for immediate stay of FCA13 or, in

⁴⁹ *ISO New England Inc. and New England Power Pool Participants Comm.*, 170 FERC ¶ 61,1183 (Mar. 6, 2020).

⁵⁰ As previously reported, Exelon protested the Revision, asserting that the Revision (i) unduly discriminates against fuel security resources in general, and Mystic specifically; (ii) is premature and unreasonably ignores the likelihood that neither the transmission upgrades nor the comprehensive fuel security market mechanism will be completed or implemented prior to the proposed sunset; and (iii) has not been shown to be just and reasonable.

⁵¹ *Id.* at P 29.

⁵² *Id.*

⁵³ *Id.* at P 30.

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. 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; 860-275-0533).

- **Order 841 Compliance Filings (Electric Storage in RTO/ISO Markets) (ER19-470)**

As previously reported, the FERC conditionally accepted on November 22, 2019, subject to an additional compliance filing, New England's *Order 841*⁵⁴ compliance filing.⁵⁵ For the majority of the revisions, the effective date was December 3, 2019; the effective date for the revisions to Section II.21, Schedule 9 (Regional Network Service), and Schedule 21 (Local Service) of the OATT was December 1, 2019; the effective date for the remainder of the changes will be January 1, 2024.⁵⁶

ISO-NE Request for Rehearing (ER19-470-003). On December 23, 2019,⁵⁷ ISO-NE requested rehearing of the FERC's finding that the initial compliance filing did not comply with *Order 841*'s requirement to allow electric storage resources to account for their state of charge and duration in the Day-Ahead Energy Market. ISO-NE asserted that the finding "ignore[d] substantial record evidence and would require ISO-NE to implement a needlessly problematic solution. On January 21, 2020, the FERC issued a tolling order affording it additional time to consider ISO-NE's request for rehearing, which remains pending before the FERC.

Order 841 Compliance Filing II (ER19-470-004). On February 10, 2020, ISO-NE and NEPOOL jointly filed Tariff revisions in response to the *Order 841 Initial Compliance Filing Order*. The revisions included: (i) a provision that addresses the state of charge and duration characteristics of an energy storage facility in the Day-Ahead Energy Market;⁵⁸ (ii) metering and accounting practices for electric storage resources, including direct metering requirements and certainty that electric storage resources will not pay twice for the same charging energy; and (ii) a provision which provides that an electric storage facility will "not be precluded from providing retail services so long as it is able to fulfill its wholesale Energy Market and [FCM] obligations". The filing explained why no additional Tariff language was needed to apply transmission charges to an electric storage resource when it is charging for later resale in the wholesale markets and not providing a service. The Tariff Revisions were unanimously supported by the Participants Committee at its February 6 meeting (Agenda Item #5). Comments on this filing were due on or before March 2, 2020; none were filed. This filing is now pending before the FERC.

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

⁵⁴ 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*").

⁵⁵ *ISO New England Inc.*, 169 FERC ¶ 61,140 (Nov. 22, 2019) ("*Order 841 Initial Compliance Filing Order*").

⁵⁶ The *Order 841* revisions that became effective on Dec. 3, 2019 were filed in ER19-470-000; the revisions to § II.21, Schedule 9 and Schedule 21 became effective on Dec. 1, 2019 as requested in ER19-470-002; the remainder of the changes will become effective on Jan. 1, 2024 as requested in ER19-470-001.

⁵⁷ The Request for Rehearing was assigned a Dec. 26 filing date in FERC's eLibrary as filing was successfully completed shortly after the 5pm deadline for official receipt as of the 23rd in the FERC's eFiling system. On December 26, ISO-NE filed a motion explaining the technical difficulties experienced and asked that its request for rehearing be deemed timely filed.

⁵⁸ See proposed § III.1.10.6(d) -- "In clearing the Day-Ahead Energy Market, the ISO will account for maximum run time, maximum charge time, state of charge, maximum state of charge, and minimum state of charge through bidding parameters or other means, as required by the Commission in Order No. 841." This language reflects ISO-NE's pending challenge to the *Order 841 Initial Compliance Filing Order* on this point and will be subject to additional revision following disposition of that challenge.

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

Requests for rehearing and/or clarification of the *Fuel Security Retention Proposal Order*⁵⁹ remain pending before the FERC. As previously reported, the *Fuel Security Retention Proposal Order* accepted ISO-NE's Proposal⁶⁰ 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.⁶¹ 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).

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

On March 10, 2020, the FERC granted NEPGA's request for rehearing⁶² of the November 9, 2018 order⁶³ accepting revised Tariff language that changed the determination of economic life under Section III.13.1.2.3.2.1.2.C of the Tariff.⁶⁴ The *Economic Life Revisions Rehearing Order* rejected the revisions, effective August 10, 2018, without prejudice to ISO-NE filing proposed Tariff revisions similar to the Economic Life Revisions, to be effective prospectively. Notwithstanding the fact that the Economic Life Revisions were rejected with an effective date prior to FCA13 and FCA14, the FERC did not require ISO-NE to re-run FCA13 or FCA14 without applying the Economic Life Revisions.⁶⁵ The FERC directed ISO-NE to make a filing in eTariff, on or before April 9, 2020, to reflect the rejection of the Economic Life Revisions. Tariff changes to reflect the rejection were recommended by the Markets Committee at its March 24 meeting and will be considered by the Participants

⁵⁹ *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.

⁶⁰ 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").

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

⁶² *ISO New England Inc. and New England Power Pool Participants Comm.*, 170 FERC ¶ 61,187 (Mar. 10, 2020) ("*Economic Life Revisions Rehearing Order*").

⁶³ *ISO New England Inc. and New England Power Pool Participants Comm.*, 165 FERC ¶ 61,088 (Nov. 9, 2018) ("*Economic Life Determination Revisions Order*"), *reh'g granted*, 170 FERC ¶ 61,187 (Mar. 10, 2020).

⁶⁴ The Economic Life Revisions would have provided that the economic life of an Existing Capacity Resource be calculated as the evaluation period in which the net present value of the resource's expected future profit is maximized.

⁶⁵ *Economic Life Revisions Rehearing Order* at PP 15, 20-21.

Committee on April 2, 2020 (Agenda Item #5). If you have any questions concerning this proceeding, please contact Sebastian Lombardi (860-275-0663; slombardi@daypitney.com).

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

On July 2, 2018, the FERC issued an order⁶⁶ 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)."⁶⁷ 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."⁶⁸

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).⁶⁹ 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.⁷⁰ 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 FCM⁷¹ and an *ex ante* cost allocation proposal that appropriately identifies beneficiaries and adheres to FERC cost causation precedent.⁷²

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);

⁶⁶ *ISO New England Inc.*, 164 FERC ¶ 61,003 (July 2, 2018), *reh'g requested* ("Mystic Waiver Order").

⁶⁷ *Id.* at P 47.

⁶⁸ *Id.* at P 48.

⁶⁹ *Id.* at P 55.

⁷⁰ *Id.* at PP 56-57.

⁷¹ *Id.* at P 57.

⁷² *Id.* at P 58.

- ◆ **Connecticut Parties**⁷³ (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**⁷⁴ (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);
- ◆ **PIOs**⁷⁵ (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

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

⁷⁴ 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).

⁷⁵ “PIOs” are the Sierra Club, Natural Resources Defense Council (“NRDC”), and Sustainable FERC Project.

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; dtodoot@daypitney.com) or Sebastian Lombardi (860-275-0663; slombardi@daypitney.com).

- **CASPR (ER18-619)**

Rehearing of the FERC’s order accepting ISO-NE’s Competitive Auctions with Sponsored Policy Resources (“CASPR”) revisions,⁷⁶ 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**⁷⁷ (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**⁷⁸ (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; dtodoot@daypitney.com) or Sebastian Lombardi (860-275-0663; 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.⁷⁹ 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.⁸⁰ ISO-NE submitted its compliance filing on January 23,

⁷⁶ *ISO New England Inc.*, 162 FERC ¶ 61,205 (Mar. 9, 2018) (“*CASPR Order*”), *reh’g requested*.

⁷⁷ 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.

⁷⁸ For purposes of this proceeding, “Clean Energy Advocates” are, collectively, the NRDC, Sierra Club, Sustainable FERC Project, CLF, and RENEW Northeast, Inc.

⁷⁹ *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).

⁸⁰ *2013/14 Winter Reliability Program Remand Order* at P 17.

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).

IV.OATT Amendments / TOAs / Coordination Agreements

- **CIP IROL Cost Recovery Rules (ER20-739)**

On January 6, 2020, ISO-NE filed revisions to incorporate into the Tariff as a new Schedule 17 a mechanism to facilitate the recovery of critical infrastructure protection ("CIP") costs by facilities that ISO-NE identifies as critical to the derivation of Interconnection Reliability Operating Limits ("IROL") (the "CIP IROL Cost Recovery Rules"). ISO-NE requested a March 6, 2020 effective date for the CIP IROL Cost Recovery Rules. The CIP IROL Cost Recovery Rules were considered but not supported by the Participants Committee at its November 1, 2019 meeting (Agenda Item #8). Comments on this filing were due on or before January 27, 2020. On January 22, NEPOOL filed comments to provide the FERC with further information explaining NEPOOL's consideration of the Rules and reasons provided by members for supporting or not supporting the Rules. Calpine, Cross-Sound Cable, and the IROL-Critical Facility Owners⁸¹ filed comments supporting the Rules. NESCOE conditionally supported the Rules, subject to the FERC providing its requested guidance and clarifications.⁸² Doc-less interventions only were filed by: Brookfield, Dominion, Eversource, Exelon, MA AG, National Grid, NextEra (out-of-time), PSEG, UI, MA DPU, MPUC, Public Citizen, and RESA. On February 11, ISO-NE and NESCOE answered the IROL-Critical Facility Owners' comments and the IROL-Critical Facility Owners answered NESCOE's comments.

Deficiency Letter; ISO-NE Response. On February 26, 2020, the FERC issued a deficiency letter directing ISO-NE (a) to explain if it intends to allow the recovery of costs incurred prior to the March 6, 2020 requested effective date and if so (b) to explain how that cost recovery would be consistent with the filed rate doctrine and the rule against retroactive ratemaking. ISO-NE responded to the deficiency letter on March 27, 2020. Comments on ISO-NE's response are due on or before April 17, 2020.

If you have any questions concerning this proceeding, please contact Eric Runge (617-345-4735; ekrunge@daypitney.com).

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

On March 19, 2020, the FERC accepted changes to Schedule 22 of the OATT, filed May 22, 2019 by ISO-NE, NEPOOL and the PTO AC,⁸³ that: (i) reduce the scope of the Interconnection Feasibility Study

⁸¹ The "IROL-Critical Facility Owners" are: Cogentrix, CSC, FirstLight, NextEra, NRG, and Vistra.

⁸² NESCOE requested that the FERC (i) clarify that any order approving Schedule 17 is limited in scope and does not set broad precedent, (ii) confirm that under no circumstances may IROL-critical facilities recover costs subject to recovery under another provision of the Tariff or under any other mechanism; (iii) clarify that costs eligible for recovery under Schedule 17 must be solely and directly related to ISO-NE's designation; and (iv) clarify that only going-forward costs are eligible for recovery under Schedule 17.

⁸³ *ISO New England Inc., New England Power Pool Participants Comm. and Participating Transmission Owners Admin. Comm.*, 170 FERC ¶ 61,218 (Mar. 19, 2020).

("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 changes were accepted effective as of March 19, 2020 (the date of the order). In accepting the changes, the FERC disagreed with each of the arguments raised in the joint protest (described in previous Reports) filed by EDF Renewables, E.ON Climate & Renewables North America and Enel Green Power North America.⁸⁴ Unless the March 19 order is challenged, with any challenges due on or before April 20, 2020, this proceeding will be concluded. If you have any questions concerning this matter, please contact Eric Runge (617-345-4735; ekrunge@daypitney.com).

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

Also on March 19, 2020, the FERC conditionally accepted, subject to further compliance filings, the proposed revisions to the Large Generator Interconnection Procedures ("LGIP") and Agreement ("LGIA") in Schedule 22 of the ISO-NE OATT jointly filed on May 22, 2019 by ISO-NE and the PTO AC ("Filing Parties") in response to the requirements of Order 845 ("Order 845 Compliance Filing").⁸⁵ While the Order largely accepted the Order 845 Compliance Filing, the FERC identified a number of ways in which the Order 845 Compliance Filing only partially complied or did not comply with Order 845, directing changes to the following (Paragraph citations to the Order 845 Compliance Filing Order in brackets):

- ◆ **Stand-Alone Network Upgrades definition.** Finding that the Filing Parties did not sufficiently justify their proposal to revise the definition of "Stand Alone Network Upgrades" to specify that the 15-day period for the system operator to provide a written explanation for why an upgrade is not considered a stand-alone network upgrade is 15 business days instead of 15 calendar days, the FERC directed the Filing Parties either to provide sufficient justification or to submit proposed Tariff revisions that make no modification to the 15 calendar day period. [P 32]
- ◆ **Interconnection Customer's ability to exercise the option to build.** Finding the Filing Parties independent entity variation justification insufficient, the FERC directed the Filing Parties to "submit a further compliance filing within 60 days of the date of this order with proposed Tariff revisions that remove this variation from ISO-NE *pro forma* LGIA article 5.1.3." [P 35]
- ◆ **Option to Build Cost Recovery.** The FERC rejected the PTO-sponsored proposed variation for transmission owners to recover the actual costs for their oversight responsibilities pursuant to ISO-NE *pro forma* LGIA article 5.2 as "not consistent with or superior to the oversight cost requirements in the [FERC's] *pro forma* LGIA". [P 36]
- ◆ **Determination of Contingent Facilities.** Finding the proposed Tariff revisions "lack the requisite transparency required by Orders 845 and 845-A because the proposed Tariff revisions do not detail the specific technical screens or analyses and the specific thresholds or criteria that ISO-NE will use as part of its method to identify contingent facilities," the FERC directed the Filing Parties to add "in section 3.8 of the ISO-NE LGIP (1) the method ISO-NE will use to determine contingent facilities, including technical screens or analyses Filing Parties propose to use to identify these facilities and (2) the specific thresholds or criteria ISO-NE will use in its technical screens or analysis to achieve the level of transparency required by Order 845." [PP 45-46]
- ◆ **Requesting interconnection service below generating facility capacity.** Filing Parties were directed to incorporate required language into LGIP sections 3.1 and 8.2. [PP 78, 76]

⁸⁴ *Id.* at PP 27-29. The protest 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.

⁸⁵ *ISO New England Inc. and Participating Transmission Owners Admin. Comm.*, 170 FERC ¶ 61,209 (Mar. 19, 2020) ("Order 845 Compliance Filing Order").

- ◆ **Provisional Interconnection Service.** Rejecting the proposal to require interconnection customers to request provisional interconnection service before the system impact study, the FERC directed the Filing Parties to remove the following sentence from *pro forma* ISO-NE LGIA article 5.9.2: “Prior to the commencement of the Interconnection System Impact Study associated with a Large Generating Facility, an Interconnection Customer may request Provisional Interconnection Service.” [PP 85-86]
- ◆ **Surplus Interconnection Service – Definition.** Agreeing with NEPOOL’s and other parties’ protests, the FERC directed the Filing Parties “to provide sufficient justification for their independent entity variation that limits the availability of surplus interconnection service for customers with NRIS, or to propose Tariff revisions that adopt the *pro forma* definition of ‘Surplus Interconnection Service’ for NRIS customers.” [PP 111-112]
- ◆ **Surplus Interconnection Service – Process.** Again agreeing with NEPOOL’s and other parties’ protests, the FERC directed the Filing Parties to revise revises section 3.3.1 of the LGIP to make clear that ISO-NE will not limit studies for surplus interconnection service to 10 business days, and will continue to study a surplus interconnection service request, without requiring a new interconnection request, until it determines whether any additional interconnection facilities and/or network upgrades necessary for surplus interconnection service. [PP 128-129]

A memo describing the in more detail the *Order 845 Compliance Order* was posted with the materials for, and discussed at, the March 25, 2020 Transmission Committee meeting. The *Order 845 Compliance Filing* changes were conditionally accepted effective May 19, 2020. A compliance filing with the directed changes will be due on or before July 17, 2020. Challenges, if any, to the *Order 845 Compliance Order* are due on or before April 20, 2020. If you have any questions concerning this matter, please contact Eric Runge (617-345-4735; ekrunge@daypitney.com).

V. Financial Assurance/Billing Policy Amendments

No Activity to Report

VI. Schedule 20/21/22/23 Changes

- **Schedule 21-NEP National Grid/Winchendon Hydro SGIA (ER20-1413)**

On March 27, 2020, National Grid filed a non-conforming Small Generation Interconnection Agreement (“SGIA”) with Winchendon Hydroelectric LLC (“Winchendon Hydro”) to cover the continued interconnection between National Grid and Winchendon Hydro with respect to Winchendon Hydro’s 100 kW run-of-river hydro facility located in Winchendon, Massachusetts. The SGIA replaces an existing interconnection agreement. Since the SGIA covers an existing, interconnected facility, a new three-party interconnection agreement (that would include ISO-NE) was not required. A February 26, 2020 effective was requested. Comments on this filing are due on or before April 17, 2020. If you have any questions concerning this matter, please contact Pat Gerity (pmgerity@daypitney.com; 860-275-0533).

- **Schedule 21-NEP: Deepwater Block Island Wind Indemnification Agreement Cancellation (ER20-962)**

On February 6, 2020, Narragansett filed a notice of cancellation of its Indemnification Agreement with the Deepwater Companies. The Indemnification Agreement, which went into effect May 10, 2016, provided for the Deepwater Companies to indemnify Narragansett for costs directly incurred in connection with the delivery of switchgear at certain Rhode Island substations related to the Deepwater Companies’ construction of the Block Island Wind Farm. The Indemnification Agreement is being cancelled because the Block Island Wind Farm is completed and in commercial operation and the Agreement is no longer needed. The cancellation is to become effective April 7, 2020. Comments on the notice were due on or before February 28; none were filed. This matter is pending before the FERC. If there are questions on this matter, please contact Pat Gerity (860-275-0533; pmgerity@daypitney.com).

- **Schedule 21-EM: 2019 Annual Update Settlement Agreement (ER15-1434-004)**

On March 19, 2020, Emera Maine submitted a joint offer of settlement between itself and the MPUC to resolve all issues raised by the MPUC in response to Emera Maine's 2019 annual charges update filed, as previously reported, on June 10, 2019 (the "Emera 2019 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 2019 Annual Update, all of which are resolved by the Emera 2019 Annual Update Settlement Agreement. Comments on the Emera 2019 Annual Update Settlement Agreement are due on or before April 9, 2020. If you have any questions concerning this proceeding, please contact Pat Gerity (860-275-0533; 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*,⁸⁶ and certified by Settlement Judge Dring⁸⁷ to the Commission,⁸⁸ 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).

VII. NEPOOL Agreement/Participants Agreement Amendments

No Activity to Report

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).

⁸⁶ *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.

⁸⁷ 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.

⁸⁸ *Emera Maine and BHE Holdings*, 163 FERC ¶ 63,018 (June 11, 2018).

- **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*⁸⁹ and *531-B*⁹⁰ also remains pending. If there are questions on this matter, please contact Pat Gerity (860-275-0533; 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).

- **Capital Projects Report - 2019 Q4 (ER20-973)**

On February 11, 2020, ISO-NE filed its Capital Projects Report and Unamortized Cost Schedule covering the fourth quarter ("Q4") of calendar year 2019 (the "Report"). 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 include the following new projects: (i) nGEM software development part I (\$3.2 million); (ii) markets database refresh (\$1.7 million); (iii) enterprise application integration replacement (\$1.4 million); (iv) application server upgrade (\$894,100); (v) 2020 issue resolution project phase I (\$680,000); (vi) streamline asset registration user interface enhancements (\$631,300); and (vii) e-mail infrastructure upgrade (\$84,500). Projects with a significant changes were (i) change request system replacement (\$687,600 budget increase); (ii) energy market offer caps (*Order 831*) (2019 and overall budget decrease of \$543,100); and (iii) energy storage device phase II (\$141,300 budget increase). Comments on this filing were due on or before March 3. NEPOOL filed comments on February 25 supporting the Q4 Report. Eversource and National Grid filed doc-less interventions only. This matter is pending before the FERC. If you have any questions concerning this matter, please contact Paul Belval (860-275-0381; pnbelval@daypitney.com).

- **IMM Quarterly Markets Reports – Fall 2019 (ZZ19-4)**

On February 12, 2020, the IMM filed with the FERC its Fall 2019 report of "market data regularly collected by [the IMM] in the course of carrying out its functions under ... Appendix A and analysis of such market data," as required pursuant to Section 12.2.2 of Appendix A to Market Rule 1. These filings are not noticed for public comment by the FERC. The Fall 2019 Report will be discussed with the Markets Committee at the April 7, 2020 Markets Committee meeting.

IX.Membership Filings

- **April 2020 Membership Filing (ER20-1454)**

On March 31, 2020 NEPOOL requested that the FERC accept (i) the memberships of Axon Energy, LLC (Supplier Sector); Energy Harbor LLC (Supplier Sector); and Nexus Energy Inc. (Supplier Sector); and (ii) the termination of the Participant status of ADG Group Inc. (Supplier Sector); Beacon Falls Energy Park, LLC (Related Person of Kleen Energy Systems (Generation Sector)); Clear River Energy (Related Person of Invenergy Energy Management (Generation Sector)); Entergy Nuclear Power Marketing (Supplier Sector); and Rinar Power (Data-Only Participant). Comments on this filing are due on or before April 21, 2020.

⁸⁹ *Martha Coakley, Mass. Att'y Gen.*, 149 FERC ¶ 61,032 (Oct. 16, 2014) ("*Opinion 531-A*").

⁹⁰ *Martha Coakley, Mass. Att'y Gen.*, Opinion No. 531-B, 150 FERC ¶ 61,165 (Mar. 3, 2015) ("*Opinion 531-B*").

- **March 2020 Membership Filing (ER20-1130)**

On February 28, 2020 NEPOOL requested that the FERC accept (i) the membership of SP Transmission, LLC (Provisional Member); (ii) the termination of the Participant status of QPH Capital, LLC (Supplier Sector); and (iii) the name change of Pixelle Energy Services LLC (f/k/a Verso Energy Services LLC). Comments on this filing were due on or before March 20; none were filed. This matter is pending before the FERC.

- **February 2020 Membership Filing (ER20-923)**

On March 19, 2020 the FERC accepted (i) the memberships of Avangrid Networks, Inc. [Provisional Member, Related Person to Avangrid Companies (Transmission Sector)]; TrueLight Commodities, LLC (Supplier Sector); and Weaver Wind, LLC (AR Sector, RG Sub-Sector, Large RG Group Member); (ii) the termination of the Participant status of: BBPC LLC d/b/a Great Eastern Energy (Supplier Sector); Precept Power LLC (Supplier Sector); and the TransCanada Companies (TransCanada Power Marketing Ltd, TCPL Power Ltd.; and TransCanada Energy Ltd.) (Supplier Sector); and (iii) the name change of Mercuria Energy America, LLC (f/k/a Mercuria Energy America, Inc.). Unless the March 19 order is challenged, this proceeding will be concluded.

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).

- **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. No changes to the CIP NOP filing format will be made prior to consideration of public comment on the White Paper. Comments were filed by over 80 parties. This matter is pending before the FERC.

- **Complaint re: CIP-014-2 (Physical Security) (EL20-21)**

On January 30, 2020, Michael Mabee, a private citizen (“Complainant”), filed a formal complaint alleging that Critical Infrastructure Protection (“CIP”) Reliability Standard (CIP-014-2) (Physical Security) is inadequate and asked the FERC to issue an order directing NERC to correct the deficiencies. Specifically, Complainant alleges that (1) CIP-014-2 is inadequate in that there is no requirement that an entity’s risk assessment or physical security plan be reviewed by anyone with any physical security expertise and no regulator determination as to the effectiveness of any entity’s physical security plan and (2) enforcement of CIP-014-2 seems nonexistent (asserting that in the past seven years, there’s only been four citations (for administrative violations) for violations of CIP-014-2. Complainant supplement his complaint on February 19 with further background and detail on the allegations and further recommendations. Responses and comments to this complaint, as supplemented, were due on or before March 10, 2020, and were filed by NERC (requesting that the FERC dismiss the Complaint), APPA/LPPC/TAPS, EEI/NRECA, the Foundation for Resilient Societies, Task Force on National and Homeland Security, and by individuals supporting the Complaint, including R. James Woolsey, an honorary co-chairman of the Secure the Grid Coalition (a project of the Center for Security Policy) (encouraging the FERC to “deeply analyze

the effectiveness and the enforcement of the physical security standard you previously approved against the current threat environment and the reality that our modern civilization depends entirely upon the bulk power system”). AEP, Georgia System Operations Corp., LA PSC, Public Citizen and Dayton Power & Light intervened doc-lessly. This matter is pending before the FERC.

- **Revised Reliability Standard: PRC-024-3 (RD20-7)**

On March 20, 2020, NERC filed for approval proposed changes to Reliability Standards PRC-024-3 (Frequency and Voltage Protection Settings for Generating Resources) (“Revised PRC-024”). The changes clarify voltage and frequency protection settings requirements. Specifically, the changes clarify the types of protection subject to the requirements and incorporates language used by inverter manufacturers and solar development owners in order to ensure inverter-based resources respond to grid disturbances in a manner that contributes to the reliable operation of the Bulk-Power System. NERC asked that revised Reliability Standards become effective (and the currently effective versions be retired) on the first day of the first calendar quarter that is 24 months following FERC approval. Comments on Revised PRC-024 are due on or before April 20, 2020.

- **Revised Reliability Standards: FAC-002-3; IRO-010-3; MOD-031-3; MOD-033-2; NUC-001-4; PRC-006-4; TOP-003-4 (RD20-4)**

On February 21, 2020, NERC filed for approval proposed changes to the following Reliability Standards: FAC-002-3 (Facility Interconnection Studies); IRO-010-3 (Reliability Coordinator Data Specification and Collection); MOD-031-3 (Demand and Energy Data); MOD-033-2 (Steady-State and Dynamic System Model Validation); NUC-001-4 (Nuclear Plant Interface Coordination); PRC-006-4 (Automatic Underfrequency Load Shedding); and TOP-003-4 (Operational Reliability Data) (“Revised Standards”). The changes remove references to Load Serving Entity (which is no longer an applicable entity), add Underfrequency Load Shedding (“UFLS”)-Only Distribution Provider to PRC-006-3 as an applicable entity, and make consistent across the Standards the use of the term “Planning Coordinator”. NERC asked that revised Reliability Standards become effective (and the currently effective versions be retired) on the first day of the first calendar quarter that is three months following FERC approval. Comments on the Revised Standards were due on or before March 23, 2020; none were filed. American Municipal Power (“AMP”) submitted a doc-less intervention. This matter is pending before the FERC.

- **Revised Reliability Standard: TPL-007-4 (RD20-3)**

On March 19, the FERC approved NERC-proposed changes to Reliability Standard TPL-007 (Transmission System Planned Performance for Geomagnetic Disturbance (“GMD”) Events), the associated implementation plan, Violation Risk Factors (“VRFs”) and Violation Severity Levels (“VSLs”), and the retirement of the current version of the reliability standard (-003) (together, the “TPL-007 Changes”).⁹¹ As previously reported, the purpose of changes to TPL-007-4 is to enhance requirements related to Corrective Action Plans as directed in *Order 851*.⁹² Specifically, the TPL-007 Changes require an applicable entity to develop a Corrective Action Plan if system performance issues are identified through the supplemental GMD Vulnerability Assessment; and to seek approval for any requests to extend Corrective Action Plan implementation deadlines, requests that NERC and the Regional Entities would then consider on a case-by-case basis. The TPL-007 changes will become effective on September 1, 2020. Unless the March 19 order is challenged, this proceeding will be concluded.

- **CIP Standards Development: Informational Filings on Virtualization and Cloud Computing Services Projects (RD20-2)**

On February 20, 2020, the FERC directed NERC to submit, on or before March 23, 2020, an informational filing describing the activity of two NERC CIP standard drafting projects pertaining to virtualization and cloud

⁹¹ *N. Am. Elec. Rel. Corp.*, Docket No. RD20-3 (Mar. 19, 2020) (unpublished letter order).

⁹² *Geomagnetic Disturbance Reliability Standard; Reliability Standard for Transmission Planned Performance for Geomagnetic Disturbance Events*, Order No. 851, 165 FERC 61,124 (Nov. 15, 2018) (“*Order 851*”) at PP 29 and 39.

computing services.⁹³ Specifically, NERC was directed to submit a schedule for Project 2016-02 (Modifications to CIP Standards) and Project 2019-02 (BES Cyber System Information Access Management) (collectively, the “NERC Projects”), that would include the current status of the project, interim target dates, and the anticipated filing date for new or modified Reliability Standards. NERC submitted that filing on March 19, 2020. In addition, the FERC directed NERC to file on an information basis quarterly status updates, until such time as new or modified Reliability Standards are filed with the FERC.

- **NOI: Virtualization and Cloud Computing Services in BES Operations (RM20-8)**

On February 20, 2020, the FERC issued a notice of inquiry seeking comments on (i) the potential benefits and risks associated with the use of virtualization and cloud computing services in association with bulk electric system (“BES”) operations; and (ii) whether the CIP Reliability Standards impede the voluntary adoption of virtualization or cloud computing services (“NOI”).⁹⁴ Initial comments on the NOI are due April 27, 2020; reply comments, May 27, 2020.⁹⁵ Thus far, comments were filed by J. Applebaum.

- **NOPR - Retirement of Reliability Standard Requirements (Standards Efficiency Review) (RM19-17; RM19-16)**

On January 23, 2020, the FERC issued a NOPR⁹⁶ proposing to approve the retirement of 74 of the 77 Reliability Standard requirements requested to be retired by NERC in these two dockets⁹⁷ in connection with the first phase of work under NERC’s Standards Efficiency Review⁹⁸ (“*Retirements NOPR*”). The FERC explained in the *Retirements NOPR* that the requirements to be retired “(1) provide little or no reliability benefit; (2) are administrative in nature or relate expressly to commercial or business practices; or (3) are redundant with other Reliability Standards.”⁹⁹ The FERC also proposes to approve the associated VRFs, VSLs, implementation plan, and effective dates proposed by NERC. With respect to the remaining three requirements that NERC seeks to retire, the FERC seeks more information on two -- the retirement of FCA-008-3, Requirements R7 and R8 (with the FERC’s final determination to be based on the comments received) – and proposes to remand one – VAR-001-6 – in order to retain R2, which it found neither redundant nor unnecessary for reliability. Comments on the *Retirements NOPR* are due on or before April 6, 2020.¹⁰⁰ Thus far, comments were filed by J. Applebaum.

⁹³ *N. Am. Elec. Rel. Corp.*, 170 FERC ¶ 61,109 (Feb. 20, 2020).

⁹⁴ *Virtualization and Cloud Computing Services*, 170 FERC ¶ 61,110 (Feb. 20, 2020).

⁹⁵ The *NOI* was published in the *Fed. Reg.* on Feb. 27, 2020 (Vol. 85, No. 39) pp. 11,363-11,366.

⁹⁶ *Electric Reliability Organization Proposal to Retire Requirements in Rel. Standards Under the NERC Standards Efficiency Review*, 170 FERC ¶ 61,032 (Jan. 23, 2020).

⁹⁷ As previously reported, NERC filed in **RM19-17** for approval (i) the retirement of individual requirements 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); MOD-029-2a (Rated System Path Methodology); and MOD-030-3 (Flowgate Methodology). NERC filed in **RM19-16** for approval of the retirement of individual requirements 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).

⁹⁸ 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.

⁹⁹ *Id.* at P 1.

¹⁰⁰ The *Retirements NOPR* was published in the *Fed. Reg.* on Feb. 6, 2020 (Vol. 85, No. 25) pp. 6,831-6,838.

XI. Misc. - of Regional Interest

- **203 Application: CMP/NECEC (EC20-24)**

On March 13, 2020, the FERC authorized CMP to transfer to NECEC Transmission LLC 7 TSAs, executed on June 13, 2018, that provide the rates, terms, and conditions under which transmission service will be provided over the New England Clean Energy Connect (“NECEC”) Transmission Line to the participants that are funding construction of the Line.¹⁰¹ Pursuant to the March 13 order, notice must be filed within 10 days of consummation of the transaction, which as of the date of this Report has not yet occurred.

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

On June 25, 2019, 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.¹⁰² Pursuant to the June 25 order, Emera Maine submitted a notice on March 25, 2020 that the transaction was consummated on March 24, 2020. As a result, the Emera Energy Services Companies have become members of the Supplier Sector, while Emera Maine (soon to be known as ENMAX Maine) will remain in the Transmission Sector. Reporting on this matter is now concluded.

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

On December 19, 2019, in a long-awaited order (approved 2-1),¹⁰³ the FERC *found* that “any resource, new *or existing*, that receives, or is entitled to receive, a State Subsidy, and does not qualify for [an exemption], should be subject to the [Minimum Offer Price Rule (“MOPR”)]”¹⁰⁴ and *directed* PJM to submit a replacement rate that “extends the MOPR to include both new and existing resources, internal and external, that receive, or are entitled to receive, certain out-of-market payments, with certain exemptions.”¹⁰⁵ The FERC directed PJM to include five exemptions: (1) a Self-Supply Exemption [PP 12; 202-204]; (2) a Demand Response, Energy Efficiency, and Capacity Storage Resources Exemption [PP 13; 208-209]; (3) a RPS Exemption [PP 14; 173-174]; (4) a Competitive Exemption [PP 15; 161]; and (5) a Unit-Specific Exemption [PP 16; 214-216].¹⁰⁶ The FERC established the replacement rate under section 206 of the FPA, but declined to order refunds (which it otherwise had the discretion to do).¹⁰⁷ The FERC directed PJM to submit a compliance filing consistent with its guidance on or before March 18, 2020 (90 days from the date of the *Dec 2019 PJM MOPR Order*). In the compliance filing, PJM was directed to also provide revised dates and timelines for the 2019

¹⁰¹ *Central Maine Power Co.*, 170 FERC 62,145 (Mar. 13, 2020).

¹⁰² *Emera Maine*, 167 FERC ¶ 62,194 (June 25, 2019).

¹⁰³ *PJM Interconnection, L.L.C. and Calpine Corp. et al.*, 169 FERC ¶ 61,239 (Dec. 19, 2019) (“*Dec 2019 PJM MOPR Order*”).

¹⁰⁴ *Id.* at P 9 (emphasis added).

¹⁰⁵ *Id.* at P 2 (“[g]oing forward, the default offer price floor for applicable new resources will be the Net Cost of New Entry (“Net CONE”) for their resource class; the default offer price floor for applicable existing resources will be the Net Avoidable Cost Rate (“Net ACR”) for their resource class”).

¹⁰⁶ *Id.* (“The replacement rate will include three categorical exemptions to reflect reliance on prior Commission decisions: (1) existing self-supply resources, (2) existing demand response, energy efficiency, and storage resources, and (3) existing renewable resources participating in RPS programs. The replacement rate will also include a fourth exemption, the Competitive Exemption, for new and existing resources that are not subsidized and thus do not generally require review to protect ‘the integrity and effectiveness of the capacity market.’ To preserve flexibility, PJM will also permit new and existing suppliers that do not qualify for a categorical exemption to justify a competitive offer below the applicable default offer price floor through a Unit-Specific Exemption.”)

¹⁰⁷ *Id.* at P 3. The FERC had previously established a refund effective date of March 21, 2016, the date of the original Calpine Complaint in EL16-49.

Base Residual Auction (“BRA”) and related incremental auctions, along with revised dates and timelines for the May 2020 BRA and related incremental auctions.¹⁰⁸

The *Dec 2019 PJM MOPR Order* is the latest milestone in the FERC’s consideration of out-of-market support affecting the PJM capacity market.¹⁰⁹ As previously reported, the FERC found in a *June 2018 PJM MOPR Order*¹¹⁰ that “the integrity and effectiveness of the 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,” determined that the PJM Tariff was unjust and unreasonable, rejected the PJM MOPR Filing, granted in part Calpine’s Complaint, and *sua sponte* initiated a new FPA section 206 proceeding (EL18-178) in which it conducted a paper hearing to resolve proposed alternatives, whether put forth in the *June 2018 PJM MOPR Order* or otherwise,¹¹¹ addressing “price-suppressive” effects of out-of-market support for certain resources.

The *Dec 2019 PJM MOPR Order* affirms the FERC’s prior finding that “[a]n expanded MOPR with few or no exceptions, should protect PJM’s capacity market from the price-suppressive effects of resources receiving out-of-market support by ensuring that such resources are not able to offer below a competitive price.”¹¹² The expanded MOPR¹¹³ only applies to “State-Subsidized Resources” (Resources that receive, or are entitled to receive, State Subsidies).¹¹⁴ The FERC considers a “State Subsidy” to be:

a direct or indirect payment, concession, rebate, subsidy, non-bypassable consumer charge, or other financial benefit that is (1) a result of any action, mandated process, or sponsored process of a state government, a political subdivision or agency of a state, or an electric cooperative formed pursuant to state law, and that (2) is derived from or connected to the procurement of (a) electricity or electric generation capacity sold at wholesale in interstate commerce, or (b) an

¹⁰⁸ *Id.* at P 4. As previously reported, the FERC directed PJM not to run the BRA in August 2019 as it had proposed to do (see *Calpine et al. v. PJM*, 168 FERC ¶ 61,051 (July 25, 2019)).

¹⁰⁹ The *PJM 2019 MOPR Order* addressed a paper hearing that arose from 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 MOPR Filing”). The PJM MOPR 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 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”). A summary of the development and FERC consideration of PJM’s capacity market is set out in the Order.

¹¹⁰ *Calpine Corp. et al.*, 163 FERC ¶ 61,236 (June 29, 2018) (“*June 2018 PJM MOPR Order*”), *clarif. and/or reh’g requested*.

¹¹¹ The proposed alternative approach would have (i) modified 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, established 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.

¹¹² *Dec 2019 PJM MOPR Order* at P 5.

¹¹³ The FERC adopted an expanded MOPR rather than PJM’s Resource Carve-Out (“RCO”) and Extended RCO proposals. The FERC determined that those proposals would unacceptably distort the markets, inhibiting incentives for competitive investment in the PJM market over the long term. PJM’s longstanding FRR Alternative remains unchanged in the PJM tariff. See *Id.* at P 6.

¹¹⁴ Resources with federal subsidies will not be subject to the MOPR. See *Id.* at P 10.

attribute of the generation process for electricity or electric generation capacity sold at wholesale in interstate commerce, or (3) will support the construction, development, or operation of a new or existing capacity resource, or (4) could have the effect of allowing a resource to clear in any PJM capacity auction.¹¹⁵

The FERC declined to adopt a materiality threshold for the level of State Subsidies or the size of State-Subsidized Resources. State-Subsidized Resources “that intend to offer below the default offer price floor for a given resource type, and do not qualify for [one of the four] categorical exemption[s], must support their offers through a Unit-Specific Exemption.”¹¹⁶ While the FERC acknowledged that the extension of the MOPR may prevent certain existing resources that states have recently chosen to subsidize from clearing PJM’s capacity auctions, it noted that states may continue to support their preferred resource types in pursuit of state policy goals and make decisions about preferred generation resources, with “resources that states choose to support, and whose offers may fail to clear the capacity market under the revised MOPR directed in this order, ... still ... permitted to sell energy and ancillary services in the relevant PJM markets.”¹¹⁷ The *Order*, the FERC highlighted, “addresses the growing impact of State-Subsidized Resources because those subsidies reject the premise of the capacity market and circumvent competitive outcomes.”¹¹⁸

The *Dec 2019 PJM MOPR Order* was accompanied by a 28-page dissent of Commissioner Glick (“Glick Dissent”), who explained why he believes the Order to be “illegal, illogical, and truly bad public policy.”¹¹⁹ Commissioner Glick further suggested that it “may well be that a mandatory capacity market is no longer a sensible approach to resource adequacy at a time when states are increasingly exercising their authority under the FPA to shape the generation mix. Indeed, the conclusion that I draw from the record in front of us is not that there is an urgent need to mitigate the effects of state public policies, but rather that we should be taking a hard look at whether a mandatory capacity market remains a just and reasonable resource adequacy construct in today’s rapidly evolving electricity sector.”¹²⁰

Requests for Rehearing. Requests for rehearing and/or clarification (“Requests”) of the *Dec 2019 PJM MOPR Order* were filed by over 50 parties, including: PJM IMM, AEP/Duke, AES, Buckeye Power, Calpine, Clean Energy Advocates,¹²¹ CPower, Dominion, EDF Renewables, Exelon, FirstEnergy Utility Companies, First Energy Solutions, Hershey Co., J-POWER, Longroad Development, PSEG, Vistra, Allegheny Electric Coop., East Kentucky Power Coop. (“EKPC”), IL Municipal Electric Agency, North Carolina Electric Membership Corp., Old Dominion Elec. Coop., the S. MD Elec. Coop, the Organization of PJM States (“OPSI”), DC PSC, IL ICC, MD PSC, NJ BPU, OH PUC, PA PUC, VA State Corporation Commission, WV PSC, DE Public Advocate, DC AG, IL AG, MD AG, NJ Div. of Rate Counsel/People’s Counsel for DC/MD People’s Counsel, OH Consumers’ Counsel, PJM

¹¹⁵ *Id.* at P 9. Renewable Energy Credits (RECs) procured as part of a state-mandated or state-sponsored procurement process are State Subsidies. *Id.* at P 176. Demand response, energy efficiency, and capacity storage resources that participate in the PJM capacity market are considered to be capacity resources for purposes of this definition. *Id.* at P 9.

¹¹⁶ *Id.* (“A threshold based on resource size will not prevent a collection of smaller resources from having a significant cumulative impact on competitive outcomes. In addition, if a State Subsidy is small enough for a capacity resource to perform economically without it, then the State-Subsidized Resource should be able to secure a Unit-Specific Exemption.”)

¹¹⁷ *Id.* at P 7.

¹¹⁸ *Id.* at P 17.

¹¹⁹ Glick Dissent at P 1.

¹²⁰ *Id.* at P 62.

¹²¹ “Clean Energy Advocates” are, for the purposes of this proceeding, Environmental Defense Fund (“EDF”), Natural Resources Defense Council (“NRDC”), Sierra Club, Sustainable FERC Project, and Union of Concerned Scientists (“UCS”).

Consumer Representatives,¹²² Advanced Energy Buyers Group, Advanced Energy Economy (“AEE”), APPA/AMP/Public Power Assoc. of NJ, AWEA, ELCON, EPSA and the PJM Power Providers Group, NEI, NRECA/EKPC, and Public Citizen. An answer to PJM IMM’s request for clarification was filed by the Talen PJM Companies. Answers were also filed by the PJM IMM, Longroad Development and Old Dominion Electric Cooperative. EEI filed a motion for reconsideration. On February 18, 2020, the PJM IMM filed a second request for clarification and The National Association of State Energy Officials filed a letter to the Commissioners. On February 25, Old Dominion answered EEI’s request for reconsideration. On February 28, the MD PSC answered the IMM’s second request for clarification. The FERC issued a tolling order on February 18, 2020 affording it additional time to consider the Requests, which remain pending before the FERC.

Also, the New Jersey Division of Rate Counsel (“NJ Rate Counsel”) and NRECA, each out of an abundance of caution, have appealed the *Dec 2019 PJM MOPR Order*. They each explained that they seek judicial review now in case the DC Circuit’s action in *Allegheny Defense Project v. FERC*¹²³ should work to advance the time period for those wishing to seek judicial review of the *Dec 2019 PJM MOPR Order*. Until a decision on *Allegheny Defense Project v. FERC* is issued and its import known, each asked the DC Circuit to hold its appeal in abeyance. For further information on these proceedings, please contact Sebastian Lombardi (860-275-0663; slombardi@daypitney.com) or Rosendo Garza (860-275-0660; rgarza@daypitney.com).

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

This proceeding, which could impact 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 EL16-49 and EL18-178 (the PJM MOPR-Related Proceedings). 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, 2019. 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).

- **Emera Maine/Houlton Water Company NITSA (ER20-1445)**

On March 31, Emera Maine filed a non-conforming Network Integration Transmission Service Agreement (“NITSA”) with Houlton Water Company. The NITSA provides for continued provision of network integration transmission service by Emera Maine to Houlton until Houlton’s electric system is successfully interconnected with New Brunswick Power, which is now expected to happen sometime in mid-2020. An April 1, 2020 effective date was requested. Comments on this filing are due on or before April 21, 2020. If you have any questions concerning this matter, please contact Pat Gerity (pmgerity@daypitney.com; 860-275-0533).

¹²² PJM Consumer Representatives are: PJM Industrial Customer Coalition (“PJMICC”), Illinois Industrial Energy Consumers (“IIEC”), the Electricity Consumers Resource Council, (“ELCON”), Industrial Energy Consumers of America (“IECA”), the PA Energy Consumer Alliance (“PECA”), the Industrial Energy Consumers of PA (“IECPA”), and the American Forest and Paper Assoc. (“AF&PA”).

¹²³ *Allegheny Def. Project v. FERC*, Case No. 17-1098 (D.C. Cir. Dec. 5, 2019).

- **IA Amendment: CMP/Sappi (ER20-1434)**

On March 30, 2020, CMP filed a first amendment to its interconnection agreement (“IA”) with Sappi North America, Inc. (“Sappi”). The Amendment extends the term of the Agreement, which expired by its own terms on February 29, 2020, for an additional 20 years, to February 29, 2040. Comments on this filing are due on or before April 20, 2020. If you have any questions concerning this matter, please contact Pat Gerity (pmgerity@daypitney.com; 860-275-0533).

- **IA Cancellations: NGrid/GRS and NGrid/Mini-Watt (ER20-1405/1406/1407)**

On March 27, 2020, Massachusetts Electric Company (“NGrid”) filed notices of cancellation of three Interconnection Agreements that have been superseded by previously-accepted Small Generator Interconnection Agreements (“SGIA”) -- one with Gas Recovery Systems (“GRS”) for its Fall River facility (ER20-1405),¹²⁴ and two with Mini-Watt Hydroelectric, LCC (“Mini-Watt”) covering Mini-Watt Unit No 1. (ER20-1406) and Units 2 and 3 (ER20-1407).¹²⁵ NGrid requested that each of the cancellation notices become effective on May 27, 2020. Comments, if any, on any of these filings are due on or before April 17. If you have any questions concerning these matters, please contact Pat Gerity (pmgerity@daypitney.com; 860-275-0533).

- **D&E Agreement Cancellation: CL&P/CPV Towantic (ER20-1221)**

On March 10, 2020, CL&P filed a notice of cancellation of the Design and Engineering Agreement (“D&E Agreement”) with CPV Towantic (designated as service agreement IA-ESCLP-005). The D&E Agreement set forth the terms and conditions under which CL&P undertook preliminary engineering and design activities on the mitigation of violations (including reconductoring a 115kV 1029-2 line from Bunker Hill to Baldwin Tap) identified in ISO-NE studies, prior to execution of an LGIA. The D&E Agreement terminated by its terms when an LGIA was executed on February 26, 2020. A February 26, 2020 effective date was requested. Comments on this filing were due on or before March 31; 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; 860-275-0533).

- **IA / TSA Cancellations: Emera Maine/ReEnergy Ashland (ER20-1173/1172)**

On March 5, 2020, Emera Maine filed notices of cancellation of both the IA (ER20-1173) and Transmission Service Agreement (“TSA”) (ER20-1172) between itself and ReEnergy Ashland LLC (“Ashland”). The Agreements have been cancelled in light of the termination of operations at the 40 MW Ashland biomass facility. A February 28, 2020 effective date for each of the notices of cancellation was requested. Comments on these filings were due on or before March 26, 2020; none were filed. These matters are pending before the FERC. If you have any questions concerning these matters, please contact Pat Gerity (pmgerity@daypitney.com; 860-275-0533).

- **IA / TSA Cancellations: Emera Maine/ReEnergy Fort Fairfield (ER20-1076/1077)**

On February 26, 2020, Emera Maine filed notices of cancellation of both the IA (ER20-1076) and TSA (ER20-1077) between itself and ReEnergy Fort Fairfield LLC (“Fort Fairfield”). The Agreements have been cancelled in light of the termination of operations at the 37 MW Fort Fairfield biomass facility. A February 24, 2020 effective date for each of the notices of cancellation was requested. Comments on these filings were due on or before March 18, 2020; none were filed. These matters are pending before the FERC. If you have any questions concerning this matter, please contact Pat Gerity (pmgerity@daypitney.com; 860-275-0533).

¹²⁴ The currently effective SGIA with GRS was accepted in *Mass. Elec. Co.*, Docket No. ER19-2352 (Aug. 13, 2019) (unpublished letter order).

¹²⁵ The currently effective SGIAs with Mini-Watt were accepted in *Mass. Elec. Co.*, Docket No. ER19-2464 (Sep. 16, 2019) (unpublished letter order) (Unit No. 1) and *Mass. Elec. Co.*, Docket No. ER19-2465 (Sep. 16, 2019) (unpublished letter order) (Unit Nos. 2-3).

- **Northern Pass: TSA Cancellation / Cost Reimbursement (ER20-1030/1031)**

On February 18, Northern Pass Transmission LLC (“Northern Pass”) submitted (i) a notice of termination of its bilateral, cost-based Transmission Service Agreement (“TSA”) with Hydro Renewable Energy Inc. (“HRE”) for transmission service over the Northern Pass Transmission Project; and (ii) a December 16, 2019 agreement between Northern Pass and Hydro-Québec Production (“HQP”) under which HQP has agreed to reimburse Northern Pass for certain Project costs. Northern Pass is no longer moving forward with the Project as a result of the New Hampshire Site Evaluation Committee’s decision to deny a Certificate of Site and Facility for the Project, a decision that was affirmed by the New Hampshire Supreme Court on July 19, 2019. Northern Pass requested a September 6, 2019 effective date for the TSA termination and April 19, 2020 for the Letter Agreement. Comments on these filings were due on or before March 10, 2020. On March 6, NRE and HQP jointly submitted comments supporting the Northern Pass filings in these proceedings. These matters are now pending before the FERC. If there are questions on these proceedings, please contact Pat Gerity (pmgerity@daypitney.com; 860-275-0533).

- **Amended and Restated CONVEX Services Agreement: CL&P/MMWEC (ER20-996)**

On February 13, Eversource filed an Amended and Restated Agreement for CONVEX Services between CL&P and MMWEC. Under the Agreement, CL&P provides certain scheduling and dispatching services to MMWEC through the Connecticut Valley Exchange (“CONVEX”) dispatch center. The amendments reflect the fact that MMWEC has elected not to take certain services previously provided by CONVEX (services related to switching and tagging, and training and coordination on switching and tagging plans). Eversource asked that the amended and restated Agreement become effective February 14, 2020. Comments on this filing were due on or before March 5, 2020; none were filed. This matter is pending before the FERC. If there are questions on this proceeding, please contact Pat Gerity (pmgerity@daypitney.com; 860-275-0533).

- **Facilities Use Agreement Cancellation: NGrid/Deepwater Block Island Wind (ER20-960)**

On March 13, 2020, the FERC accepted the notice of cancellation filed by New England Power (“NEP”) of its Facilities Use Agreement with Deepwater Block Island Wind,¹²⁶ which the parties agreed to cancel because the Block Island Wind Farm has been completed and is in commercial operation.¹²⁷ The notice of cancellation was accepted effective as of April 7, 2020. Unless the March 13 order is challenged, this proceeding will be concluded. If there are questions on this proceeding, please contact Pat Gerity (pmgerity@daypitney.com; 860-275-0533).

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

On March 19, 2020, the FERC conditionally accepted, effective May 20, 2019, Emera Maine’s *Order 845* compliance filing revising the Maine Public District Open Access Transmission Tariff (“MPD OATT”), subject to a further compliance filing due on or before July 17, 2020.¹²⁸ The further compliance filing must (i) address an apparent incongruity between the deadlines for submission of a non-disputing party’s position statement and a disputing party’s response (which could become due before the position statement itself); (ii) add to section 3.8 of Emera Maine’s LGIP (a) the method Emera Maine will use to determine contingent facilities, including technical screens or analyses it proposes to use to identify these facilities; and (b) the specific thresholds or criteria it will use in its technical screens or analysis to achieve the level of transparency required by *Order 845*; (iii) incorporate all, not just some of, the *pro forma* revisions to LGIP section 3.1; (iv) provide explanations for the term “technical specifications” and the phrase “materially change” used in the definition of “permissible technological advancement”; (v) revise LGIP section 4.4.6 to clarify how it will assess changes to a generating facility’s technical specifications to determine whether the technological

¹²⁶ The Facilities Use Agreement allowed for the use of certain interconnection facilities constructed and owned by Narragansett and operated and maintained by NEP, in order to facilitate the construction and commercial operation of the Block Island Wind Farm.

¹²⁷ *New England Power Co.*, Docket No. ER20-960 (Mar. 13, 2020) (unpublished letter order).

¹²⁸ *Emera Maine*, 170 FERC ¶ 61,206 (Mar. 19, 2020) (“MPD OATT Order 845 Compliance Order”).

advancement request will result in a material modification; (vi) permit the acceptance of technological changes until execution of facilities study agreement rather than up to the conclusion of the system impact study; (vii) revise the technological change procedure to state that an interconnection customer should submit a technological advancement request if it seeks to incorporate the technological advancements into its proposed generating facility; (viii) propose a deposit amount for a technological change request; (ix) revise the LGIP to specify that Emera Maine will complete its assessment and determination of whether a proposed technological change is a material modification within 30 days of an interconnection customer submitting a technological change request; and (x) correct the reference to LGIP 4.4.6 in the definition of “permissible technological advancement”. If you have any questions concerning this matter, please contact Pat Gerity (pmgerity@daypitney.com; 860-275-0533).

- **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 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. This investigation has been closed¹²⁹ and reporting on this matter is concluded.

- **FERC Enforcement Action: Order Assessing Civil Penalties – Vitol & F. Corteggiano (IN14-4)**

On October 25, 2019, the FERC issued an order¹³⁰ finding Vitol Inc. (“Vitol”) and its co-head of FTR trading operations, Federico Corteggiano, 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”).¹³¹ The FERC assessed civil penalties of \$1,515,738 against Vitol and \$1 million against Corteggiano. In addition, the FERC directed Vitol to disgorge unjust profits, plus applicable interest of \$1,227,143.

Because Respondents’ previously 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”, the *Vitol Penalties Order* was not subject to rehearing. On January 6, 2020, the FERC instituted an action in federal district court (Eastern District of California) for an order affirming the penalties assessed against Respondents and ordering Vitol to disgorge its unjust profits,

¹²⁹ See *Public Citizen, Inc. v. Midcontinent Indep. Syst. Operator, Inc.*, 168 FERC ¶ 61,042 at P 30, *reh’g denied*, 170 FERC ¶ 61,227 (Mar. 19, 2020) at P 4.

¹³⁰ *Vitol Inc. and Federico Corteggiano*, 169 FERC ¶ 61,070 (Oct. 25, 2019) (“*Vitol Penalties Order*”).

¹³¹ 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.

plus interest.¹³² Reporting on this case will be continued in future Reports, when and as appropriate, in Section XV.

XII. Misc. - Administrative & Rulemaking Proceedings

- **Credit Reforms in Organized Wholesale Markets (AD20-6)**

On December 16, 2019, the Energy Trading Institute¹³³ requested that the FERC hold a technical conference and conduct a rulemaking to update the requirements adopted in *Order 741*¹³⁴ and Section 35.47 of the FERC's regulations addressing credit and risk management in the markets operated by RTO/ISOs. ETI, citing a recent filing by NYISO (which it protested),¹³⁵ and stating that several expedited initiatives related to RTO/ISO credit policies are underway, suggested that it would be helpful for the FERC to consolidate any "filings with this proceeding and hold the technical conference ETI is requesting by March 30, 2020 so the ISOs, RTOs and their stakeholders consider those discussions in any initiatives they have underway." ETI suggested in its request that RTO/ISO credit support requirements be standardized, and that the requested technical conference and rulemaking explore various ways to identify and mitigate counterparty risk (including know-you-customer ("KYC") tools and participant suspensions or bans) and enhance risk management infrastructure/processes within the organized markets. Doc-less interventions have been filed by, among others, PJM, the PJM IMM, SPP, CAISO, Tenaska, Avangrid, and Roscommon Analytics. On January 24, the ISO/RTO Council ("IRC"), including ISO-NE, submitted comments and proposed, as an alternative approach to the one suggested by ETI, that the FERC not commence a rulemaking or schedule a technical conference at this time and instead allow individual RTO/ISOs to address their respective credit and risk management issues, permit sufficient time for experience with the evolving rules to be gained, and then consider the best path forward to facilitate a dialogue on best practices and potential points of alignment among the RTO/ISO. ETI responded to those comments on February 10, 2020.

The FERC issued a notice of ETI's request for technical conference and petition for rulemaking on February 11, 2020, setting March 12, 2020 as the deadline for comments thereon. Comments were submitted by a number of parties, including APPA, CAISO, the Committee of Chief Risk Officers ("CCRO"), DC Energy, EEI, EPSA, Indicated PJM Transmission Owners,¹³⁶ and an independent consultant.¹³⁷ This matter is pending before the FERC.

¹³² FERC v. Vitol Inc. and Federico Corteggiano, Case No. 2:20-cv-00040-KJM-AC (E. D. CA) (filed Jan. 6, 2020).

¹³³ In its request, The Energy Trading Institute ("ETI") describes itself generally as "represent[ing] a diverse group of energy market participants, all with substantial interests in wholesale electricity transactions in Commission-jurisdictional markets. ETI members provide important services to a wide variety of wholesale energy market participants. They act as intermediaries between producers and consumers of electric energy that have mismatched quantity, timing, and contract type needs. In addition, they provide liquidity by engaging in energy related commercial transactions with a variety of market entities including, but not limited to, generation owners, project developers, load-serving entities, and investors. ETI members advocate for markets that are open, transparent, competitive and fair - all necessary attributes for markets ultimately to benefit electricity consumers."

¹³⁴ *Credit Reforms in Organized Wholesale Elec. Mkts.*, 75 Fed. Reg. 65942 (2010), FERC Stats. & Regs. ¶ 31,317 (2010) ("*Order 741*"); *order on reh'g*, 76 Fed. Reg. 10492 (2011), FERC Stats. & Regs. ¶ 31,320 (2011) ("*Order 741-A*"); *order on reh'g*, 135 FERC ¶ 61,242 (2011) ("*Order 741-B*"); 18 C.F.R. § 35.47.

¹³⁵ See Proposed Tariff Amendments to Enhance Credit Reporting Requirements and Remedies, *New York Indep. Sys. Operator, Inc.*, Docket No. ER20-483 (filed Nov. 26, 2019).

¹³⁶ "Indicated PJM Transmission Owners" are Exelon Corp. ("Exelon"), American Electric Power Service Corp. ("AEP"), Dominion Energy Services, Inc. ("Dominion"), PPL Electric Utilities Corp. ("PPL"), the FirstEnergy Utility Companies. ("FirstEnergy"), East Kentucky Power Coop. ("EKPC"), Duke Energy Corp. ("Duke"), Duquesne Light Co. ("Duquesne"), and the PSEG Companies ("PSEG").

¹³⁷ W. Scott Miller, III, Whitehall Bay Energy Services, LLC.

- **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)¹³⁸ and terminated the DOE NOPR rulemaking proceeding (RM18-1).¹³⁹ 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, Foundation for Resilient Societies (“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 security¹⁴⁰ 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

¹³⁸ *Grid Rel. and Resilience Pricing*, 162 FERC ¶ 61,012 (Jan. 8, 2018), *reh’g requested*.

¹³⁹ 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.

¹⁴⁰ 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.”

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”¹⁴¹ 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: Electric Transmission Incentives Policy (RM20-10)**

On March 20, 2020, the FERC issued a NOPR¹⁴² proposing to revise its existing transmission incentives policy and corresponding regulations.¹⁴³ The proposed revisions include the following:

- ◆ A shift from risks and challenges to a **consumers’ benefits test** that focuses on ensuring reliability and reducing the cost of delivered power by reducing transmission congestion.
- ◆ **ROEs incentive for Economic Benefits.** A 50 basis point adder for transmission projects that meet an economic benefit-to-cost ratio in the top 75th percentile of transmission projects examined over a sample period and an additional 50 basis point adder for transmission projects that demonstrate *ex post* cost savings that fall in the 90th percentile of transmission projects studied over the same sample period, as measured at the end of construction.
- ◆ **ROE for Reliability Benefits.** A 50 basis point adder for transmission projects that can demonstrate potential reliability benefits by providing quantitative analysis, where possible, as well as qualitative analysis.
- ◆ **Abandoned Plant Incentive.** 100 percent of prudently incurred costs of transmission facilities selected in a regional transmission planning process that are cancelled or abandoned due to factors that are beyond the control of the applicant. Recovery from the date that the project is selected in the regional transmission planning process.
- ◆ **Eliminate Transco Incentives.**
- ◆ **RTO-Participation Incentive.** A 100-basis-point increase for transmitting utilities that turn over their wholesale facilities to an RTO, ISO, or Transmission Organization, and available regardless of whether participation is voluntary.
- ◆ **Transmission Technologies Incentives.** Eligible for both a stand-alone, 100-basis-point ROE incentive on the costs of the specified transmission technology project and specialized regulatory asset treatment. Pilot programs presumptively eligible (though rebuttable).
- ◆ **250-Basis-Point Cap.** Total ROE incentives capped at 250 basis points in place of current “zone of reasonableness” limit.
- ◆ **Updated Date Reporting Processes.** Information to be obtained on a project-by-project basis, information collection expanded, updated reporting process.

A more detailed summary of the NOPR was distributed to the Transmission Committee and discussed at its March 25, 2020 meeting. A discussion of whether or not NEPOOL will submit comments in this proceeding will be considered at the April 28 Transmission Committee meeting. Comments on the proposed revisions are due on

¹⁴¹ For purposes of these proceedings, “Clean Energy Advocates” are NRDC, Sierra Club and UCS.

¹⁴² *Electric Transmission Incentives Policy Under Section 219 of the Federal Power Act*, 170 FERC ¶ 61,204 (Mar. 20, 2020) (“*Electric Transmission Incentives NOPR*”).

¹⁴³ 18 CFR 35.35 (2020).

or before [90 days from publication in the Federal Register].¹⁴⁴ If you have any questions concerning this matter, please contact Eric Runge (617-345-4735; ekrunge@daypitney.com).

- **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 201 and 210 of the Public Utility Regulatory Policies Act of 1978 (“PURPA”).¹⁴⁵ 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.¹⁴⁶

The *QF 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.”¹⁴⁷ The *QF 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 were due on or before December 3, 2019.¹⁴⁸ More than 130 sets of comments were submitted, including comments from Bloom Energy, Borrego Solar, ConEd, Covanta, CT PURA,

¹⁴⁴ The *Electric Transmission Incentives* NOPR has not yet been published in the *Fed. Reg.*

¹⁴⁵ 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.

¹⁴⁶ 16 U.S.C. § 824a-3; PURPA, Sec. 210(a)-(b).

¹⁴⁷ *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) (“*QF NOPR*”).

¹⁴⁸ The *QF NOPR* was published in the *Fed. Reg.* on Oct. 4, 2019 (Vol. 84, No. 193) pp. 53,246-53,275.

MA AG, MA DPU, and AEE. Since the last Report, several Congressmen have sent comments supporting comments submitted by others. Chairman Chatterjee acknowledged each of the comments received from Congressmen. Late filed comments were submitted by the American Dams, California PUC, TerraForm and the Arizona Corporation Commission. This matter remains pending before the FERC.

- **Order 864: Public Util. Trans. ADIT Rate Changes (RM19-5)**

On November 21, 2019, the FERC issued its final rule a NOPR ("*Order 864*")¹⁴⁹ requiring 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"). Specifically, for transmission formula rates, *Order 864* requires public utilities (i) to deduct excess ADIT from or add deficient ADIT to their rate bases and adjust their income tax allowances by amortized excess or deficient ADIT; and (ii) to incorporate a new permanent worksheet into their transmission formula rates that will annually track ADIT information. The FERC did not adopt its proposals in the ADIT NOPR¹⁵⁰ that were applicable to public utilities with stated rates. *Order 864* will become effective January 27, 2020. Requests for rehearing were filed by APPA and Exelon. On January 21, 2020, the FERC issued a tolling order affording it additional time to consider the APPA and Exelon requests.

New England TO Compliance Filings - Extensions of Time to File. VTransco (Feb 3), National Grid (Feb 10), Eversource (Feb 18), UI (Feb 20), VT Electric Transmission Co. ("VETCO") (Feb 25), and New Hampshire Transmission ("NHT") (Feb 26) each requested that their deadline for submitting a compliance filing be extended until July 31, 2020—the date of the TOs' next annual informational filing for regional formula rates. Each of those requests has been granted.

New England Compliance Filings - New England Electric Transmission Corporation (ER20-1089), New England Hydro Transmission Electric Company (ER20-1088), and New England Hydro Transmission Corporation (ER20-1087) each submitted their compliance filings on February 26, 2020, with comments, if any, on those filings due on or before March 18, 2020; none were filed. VELCO, the IRH Management Committee, and GMP (just in ER20-1089) each intervened. These compliance filings are pending before the FERC.

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

In *Order 841*¹⁵¹ (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*.¹⁵² 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 AD18-10,¹⁵³ 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

¹⁴⁹ *Public Util. Trans. Rate Changes to Address Accumulated Deferred Income Taxes*, Order No. 869, 169 FERC ¶ 61,139 (Nov. 21, 2019), *reh'g requested*.

¹⁵⁰ *Public Util. Trans. Rate Changes to Address Accumulated Deferred Income Taxes*, 165 FERC ¶ 61,117 (Nov. 15, 2018) ("*ADIT NOPR*").

¹⁵¹ *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*").

¹⁵² *Elec. Storage Participation in Mkts. Operated by Regional Trans. Orgs. and Indep. Sys. Operators*, 157 FERC ¶ 61,121 (Nov. 17, 2016) ("*Storage NOPR*").

¹⁵³ 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.

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.

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 were due and were filed on October 7, 2019. Comments on the responses were filed by 8 parties, including comments addressing ISO-NE's responses by MA DPU, MA DOER and MA AG (collectively, "Massachusetts"), MMWEC, AEE, EEI and NRECA. This matter is pending before the FERC.

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

On July 18, 2019, the FERC issued *Order 860*.¹⁵⁴ *Order 860*, issued three years after the FERC's *Data Collection NOPR*,¹⁵⁵ (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,¹⁵⁶ 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 ("FMP"), Joint Consumer Advocates, NRG/Vistra, Starwood Energy Group, and TAPS.

Order 860-A. On February 20, 2020, the FERC denied rehearing of *Order 860*.¹⁵⁷ The FERC denied all the requests for clarification of *Order 860*, other than TAPS' request that the FERC clarify that the public will be able to access the relational database. On that point, the FERC clarified "that we will make available services through which the public will be able to access organizational charts, asset appendices, and other reports, as well as have access to the same historical data as Sellers, including all market-based rate information submitted into the database. We also clarify that the database will retain information submitted by Sellers and that historical data can be accessed by the public."

¹⁵⁴ *Data Collection for Analytics and Surveillance and Market-Based Rate Purposes*, 168 FERC ¶ 61,039 (July 18, 2019) ("*Order 860*"), *order on reh'g and clarif.*, 170 FERC ¶ 61,129 (Feb. 20, 2020).

¹⁵⁵ *Data Collection for Analytics and Surveillance and Market-Based Rate Purposes*, 156 FERC ¶ 61,045 (July 21, 2016) ("*Data Collection NOPR*").

¹⁵⁶ 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.

¹⁵⁷ *Data Collection for Analytics and Surveillance and Market-Based Rate Purposes*, Order No. 860-A, 170 FERC ¶ 61,129 (Feb. 20, 2020) ("*Order 860-A*").

MBR Database. On January 10, 2020, the FERC issued a notice that updated versions of the XML, XSD, and MBR Data Dictionary are available on the FERC’s [website](#) and that the test environment for the MBR Database is now available and can be accessed on the [MBR Database webpage](#).

Feb 27, 2020 Technical Conference. On February 27, 2020, FERC staff held a technical workshop on the relational database being built in accordance with *Order 860* (“MBR Database”).

- **Order 676-I: NAESB WEQ Standards v. 003.2 - Incorporation by Reference into FERC Regs (RM05-5-027)**

On February 4, 2020, the FERC issued *Order 676-I*,¹⁵⁸ which incorporates by reference into its regulations, 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”).¹⁵⁹ The Version 003.2 Standards included NAESB’s Version 003.1 revisions, which were the subject of an earlier NOPR.¹⁶⁰ The FERC declined to adopt the proposal to remove the incorporation by reference of the WEQ-006 Manual Time Error Correction Business Practice Standards as adopted by NAESB. *Order 676-I* will become effective April 27, 2020.¹⁶¹

Compliance dates: Public utilities must make a compliance filing to comply with the requirements of *Order 676-I* through eTariff no later than May 26, 2020. The FERC will set an effective date for the proposed tariff changes in the order(s) on the compliance filings, but no earlier than July 27, 2020.

- **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.¹⁶² 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, 2019.¹⁶³ 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. SPP transmission owners submitted comments in light of *Opinion 569*¹⁶⁴ and statements made by the FERC concurrent with the issuance of *Opinion 569*. This matter, and its voluminous record, are pending before the FERC.

¹⁵⁸ *Standards for Business Practices and Communication Protocols for Public Utilities*, Order No. 676-I, 170 FERC ¶ 61,062 (Feb. 4, 2020) (“*Order 676-I*”).

¹⁵⁹ *Standards for Business Practices and Communication Protocols for Public Utilities*, 167 FERC ¶ 61,127 (May 16, 2019) (“*NAESB WEQ v. 003.2 Standards NOPR*”).

¹⁶⁰ *Standards for Business Practices and Communication Protocols for Public Utilities*, 156 FERC ¶ 61,055 (July 21, 2016), (“*WEQ v. 003.1 NOPR*”).

¹⁶¹ *Order 676-I* was published *Fed. Reg.* on Feb. 25, 2020 (Vol. 85, No. 37) pp. 10,571-10,586.

¹⁶² *Inquiry Regarding the Commission’s Policy for Determining Return on Equity*, 166 FERC ¶ 61,207 (Mar. 21, 2019) (“*ROE Policy NOI*”).

¹⁶³ The *ROE Policy NOI* was published in the *Fed. Reg.* on Mar. 28, 2019 (Vol. 84, No. 61) pp. 11,769-11,777.

¹⁶⁴ *Ass’n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, Opinion No. 569, 169 FERC ¶ 61,129 (2019) (“*Opinion 569*”).

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

As reported above, the FERC issued its *Electric Transmission Incentives NOPR* on March 20, 2020, based in part on the record developed earlier in this proceeding. Reporting on developments with respect to the FERC's Electric Transmission Incentives Policy will be addressed in future Reports in RM20-10.

- **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 NOI¹⁶⁵ 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,¹⁶⁶ 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).

- **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*¹⁶⁷ 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.¹⁶⁸ 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."¹⁶⁹ 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 Order* also denied BP's request for rehearing of the order establishing a hearing in this proceeding.¹⁷⁰ BP was

¹⁶⁵ The NOI was published in the *Fed. Reg.* on Apr. 26, 2018 (Vol. 83, No. 80) pp. 18,020-18,032.

¹⁶⁶ *Certification of New Interstate Natural Gas Facilities*, 163 FERC ¶ 61,138 (May 23, 2018).

¹⁶⁷ *BP America Inc.*, Opinion No. 549, 156 FERC ¶ 61,031 (July 11, 2016) ("*BP Penalties Order*").

¹⁶⁸ *BP America Inc.*, 152 FERC ¶ 63,016 (Aug. 13, 2015) ("*BP Initial Decision*").

¹⁶⁹ *BP Penalties Order* at P 3.

¹⁷⁰ *BP America Inc.*, 147 FERC ¶ 61,130 (May 15, 2014) ("*BP Hearing Order*"), *reh'g denied*, 156 FERC ¶ 61,031 (July 11, 2016).

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.¹⁷¹

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 order¹⁷² 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 2012.¹⁷³

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.

¹⁷¹ *BP America Inc.*, 156 FERC ¶ 61,174 (Sep. 12, 2016) ("*Order Staying BP Disgorgement*").

¹⁷² *Total Gas & Power North America, Inc.*, 155 FERC ¶ 61,105 (Apr. 28, 2016) ("*TGPNA Show Cause Order*").

¹⁷³ 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:

- **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.¹⁷⁴ Although noting that states and project sponsors that engage in repeated withdrawal and refiling 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 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.¹⁷⁵
 - On February 12, 2018, Constitution Pipeline requested rehearing of the January 11, 2018 order. FERC denied Constitution's request for rehearing of the January

¹⁷⁴ *Constitution Pipeline Co.*, 162 FERC ¶ 61,014 (Jan. 11, 2018), *reh'g requested*.

¹⁷⁵ *Id.* at P 23.

2018 order.¹⁷⁶ On September 14, 2018, Constitution filed a petition for review in the U.S. Court of Appeals for the D.C. Circuit.¹⁷⁷

- ▶ 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, 2018.¹⁷⁸
- ▶ 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"). On November 8, 2019, the FERC dismissed or denied the requests for rehearing.¹⁷⁹

- **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.¹⁸⁰ Those orders have been challenged on appeal to the US Court of Appeals for the Second Circuit (19-1610).
- ▶ 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*.¹⁸¹ 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

¹⁷⁶ *Constitution Pipeline Co., LLC*, 164 FERC ¶ 61,029 (2018) (September 2018 Waiver Rehearing Order).

¹⁷⁷ *Constitution*, Petition for Review in U.S. Court of Appeals for the D.C. Circuit, Docket No. CP18-5-000 (filed Sep. 14, 2018).

¹⁷⁸ *Constitution Pipeline Co.*, 165 FERC ¶ 61,081 (Nov. 5, 2018), *reh'g denied*, 169 FERC ¶ 61,102 (Nov. 8, 2019).

¹⁷⁹ *Constitution Pipeline Co.*, 169 FERC ¶ 61,102 (Nov. 8, 2019) (order on rehearing).

¹⁸⁰ *Nat'l Fuel Gas Supply Corp. and Empire Pipeline, Inc.*, 167 FERC ¶ 61,007 (Apr. 2, 2019).

¹⁸¹ *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).

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,¹⁸² 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, 2017.¹⁸³ 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.¹⁸⁴ 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,¹⁸⁵ 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 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.¹⁸⁶

¹⁸² 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).

¹⁸³ *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*”).

¹⁸⁴ *Nat’l Fuel Gas Supply Corp. v. NYSDEC et al.* (2d Cir., Case No. 17-1164).

¹⁸⁵ 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).

¹⁸⁶ 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).

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).

- **ISO-NE's Inventoried Energy Program (Chapter 2B) Proposal (19-1224***; 19-1247; 19-1252; 19-1253)(consolidated)**
Underlying FERC Proceeding: ER19-1428¹⁸⁷
Petitioners: ENECOS (Belmont et al.) (19-1224); MA AG (19-1247); NH PUC/NH OCA (19-1252); SIERRA CLUB/UCS (19-1253)

On October 24, 2019, ENECOS¹⁸⁸ petitioned the DC Circuit Court of Appeals for review of the FERC's August 6, 2019 Chapter 2B Notice that ISO-NE's Chapter 2B Proposal took effect by operation of law. MA AG (November 25), the NH PUC and NH OCA (December 3) (together, the "State Petitioners"), and RENEW Northeast, Sierra Club and UCS (December 3) ("Nonprofit Petitioners")¹⁸⁹ similarly filed separate appeals. All of the cases were ultimately consolidated on December 30, 2019 (with 19-1224 to serve as the lead docket). Petitioners' initial submissions, procedural and dispositive motions were filed on January 6, 2020. On January 6, 2020, the FERC submitted a motion asking for 60 days between the filing of Petitioners' opening brief and the FERC's brief in response, and filed the Certified Index to the Record. On January 21, the Court granted the motions to intervene of NEPOOL, ISO-NE, NEPGA, Calpine, and the MPUC. On March 5, 2020 Petitioners proposed a briefing format and schedule for this case, which included separate briefing for Petitioners (three opening and reply briefs, one each for ENECOS, State Petitioners and Nonprofit Petitioners), and the extra time requested by the FERC. The proposed briefing schedule is pending before the Court.

- **Order 841 (19-1142, 19-1147) (consol.)**
Underlying FERC Proceeding: RM16-23; AD16-¹⁹⁰
Petitioners: NARUC, APPA et al.

NARUC and APPA et al.¹⁹¹ petitioned the DC Circuit Court of Appeals for review of *Orders 841 and 841-A* (Electric Storage Participation in RTO/ISO Markets). The cases were consolidated, with 19-1142 as the lead docket. Since the last Report, briefing was completed.¹⁹² On March 11, oral argument was set for May 5, 2020. However, in light of the Court's March 17 order suspending all in-person onsite oral arguments (in response to the

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

¹⁸⁸ "ENECOS" are Belmont; Block Island Utility District; Braintree; Energy New England ("ENE"); Georgetown Municipal Light Department; Groveland; Hingham; Littleton; Merrimac; Middleborough; Middleton; North Attleborough; Norwood; Pascoag; Reading; Rowley; Stowe; Taunton; and Wellesley.

¹⁸⁹ RENEW has since moved, and the court granted that motion, to withdraw its appeal.

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

¹⁹¹ "APPA et al." are the American Public Power Assoc. ("APPA"), National Rural Elec. Coop. Assoc. ("NRECA"), Edison Electric Institute ("EEI"), and American Municipal Power, Inc. ("AMP").

¹⁹² Final Briefs were filed by: Respondent (FERC) (Mar 13); Petitioner (NARUC) (Mar 13); Petitioner (APPA/NRECA/EEI/AMP) (Mar 12); Joint Intervenor for Respondent (AEE/ESA/SEIA) (Mar 16); Joint Intervenor for Respondent (EDF/NRDC/Vote Solar) (Mar 16); Intervenor for Petitioner (TAPS); and Amicus for Respondent (Sunrun/Tesla/Vivint Solar/Engie Storage Services) (Mar 11).

COVID-19 (coronavirus) pandemic), it will be for the Court-assigned panel to decide whether to (i) proceed with argument by teleconference; (ii) postpone argument to a later date; or (iii) to decide the case without oral argument.

- **FCM Pricing Rules Complaints (15-1071**, 16-1042) (consol.)**

Underlying FERC Proceeding: EL14-7,¹⁹³ EL15-23¹⁹⁴

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).¹⁹⁵ 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.

Other Federal Court Activity of Interest

- **PG&E Bankruptcy (19-71615) (9th Cir.)**

Underlying FERC Proceeding: EL19-35, EL19-36¹⁹⁶

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."¹⁹⁷ 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. On February 24, 2020, PG&E submitted a motion to further expedite oral argument in this case so that the case can be resolved by June 30, 2020, if possible. In response to that motion, the Court issued an order directing the case be calendared on a priority basis and assigned to the next available panel, but not by June 30, 2020.

- **First Energy Solutions Bankruptcy (18-3787) (6th Cir.)**

Petitioner: FERC

In this proceeding, the FERC appealed an Ohio bankruptcy court's August 2018 ruling that blocked the FERC from taking *any* action on FirstEnergy Solutions Corp.'s agreement with Ohio Valley Electric Corp. (a power purchase agreement that FES seeks to reject as part of its bankruptcy proceedings). The FERC 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 was decided. 2-1, on December 12, 2019.¹⁹⁸

¹⁹³ 150 FERC ¶ 61,064 (Jan. 30, 2015); 146 FERC ¶ 61,039 (Jan. 24, 2014).

¹⁹⁴ 154 FERC ¶ 61,005 (Jan. 7, 2016); 150 FERC ¶ 61,067 (Jan. 30, 2015).

¹⁹⁵ *New England Power Generators Assoc. v FERC*, 881 F.3d 202 (DC Cir. 2018).

¹⁹⁶ *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).

¹⁹⁷ Declaratory Judgment at 1-2, *PG&E v. FERC*, (Bankr. N.D. Cal. June 7, 2019).

¹⁹⁸ *In re: FirstEnergy Solution Corp., et al.*, No. 18-3767, 945 F.3d 431; 2019 WL 6767004 (6th Cir. Dec. 12, 2019).

The Sixth Circuit concluded that the bankruptcy court has jurisdiction to decide whether FES may reject the contracts, but that its injunction of FERC in this case was overly broad (beyond its jurisdiction), and its standard for deciding rejection was too limited. Therefore, the Sixth Circuit affirmed in part, reversed in part, and remanded the matter to the bankruptcy court for further consideration. In reaching its decision, the Sixth Circuit held that “the public necessity of available and functional bankruptcy relief is generally superior to the necessity of FERC’s having complete or exclusive authority to regulate energy contracts and markets ... the bankruptcy court has jurisdiction to decide whether FES, as a Chapter 11 debtor-in-possession, may reject the [] contracts, meaning that FES can reject the contracts subject to proper bankruptcy court approval and FERC cannot independently prevent it.” The Sixth Circuit went on to hold, however, that “when a Chapter 11 debtor moves the bankruptcy court for permission to reject a filed energy contract that is otherwise governed by FERC, via the FPA, the bankruptcy court must consider the **public interest** and ensure that the equities balance in favor of rejecting the contract, and it must invite FERC to participate and provide an opinion in accordance with the ordinary FPA approach (e.g., under the Mobile–Sierra doctrine), within a reasonable time.” The Court noted that a “reasonable delay in this remand may be much longer that it would be in an ordinary case” given the bankruptcy court’s earlier “improper and absolute injunction preventing FERC from conducting its assessment.”

On January 27, the FERC petitioned for *en banc* rehearing of the December 12 decision. *En banc* rehearing was also requested by FirstEnergy, Duke Energy Ohio, Ohio Consumers’ Counsel, Ohio Valley Electric, and Maryland Solar Holdings. An answer opposing those petitions was filed on February 26, 2020 by counsel to FirstEnergy, the Official Committee of Unsecured Creditors, the Ad Hoc Noteholders Group, and Pass-Through Creditors. On March 13, 2020, the Court, finding that the issues raised in the petitions were fully considered and no judge requesting a vote on the suggestion for rehearing, denied the petitions for rehearing *en banc*. Reporting on this proceeding has now concluded.

- **PennEast Project (18-1128)**

Underlying FERC Proceeding: CP15-558¹⁹⁹

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”)²⁰⁰ 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 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.

Since the last Report, the parties filed status reports indicating that the Third Circuit case remains unresolved, with some requesting that the Court continue to hold this case in abeyance, and with Delaware Riverkeeper Network and the Delaware Riverkeeper (“DRN”) reiterating its request that the PennEast Certificate Order also be stayed.

¹⁹⁹ *PennEast Pipeline Co., LLC*, 162 FERC ¶ 61,053 (Jan. 19, 2018), *reh’g denied*, 163 FERC ¶ 61,159 (May 30, 2018).

²⁰⁰ 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.

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