

**EXECUTIVE SUMMARY**  
**Status Report of Current Regulatory and Legal Proceedings**  
**as of August 4, 2020**

The following activity, as more fully described in the attached litigation report, has occurred since the report dated July 10, 2020 (“last Report”) was circulated. New matters/proceedings since the last Report are preceded by an asterisk “\*”. Page numbers precede the matter description.

**COVID-19**



- |   |   |        |  |
|---|---|--------|--|
| 1 | Jul 8-9 Tech Conf: Impacts of COVID-19 on the Energy Industry (AD20-17) | Jul 16 | FERC invites post-technical conference comments on any or all of the topics discussed at the tech. conf., as well as on any of the questions outlined in the Jul 1 supplemental notice of the tech. conf.; comment date Aug 31 |
| 1 | Remote ALJ Hearings (AD20-12)   | Jul 13 | Office of ALJs posts “Remote Hearing Guidance for Participants”, including information on WebEx and SharePoint, the two platforms that will be used for all remote hearings  |

**I. Complaints/Section 206 Proceedings**



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|---|---|-------------------------------------|--|
| 2 | 206 Proceeding: FCM Pricing Rules Complaints Remand (EL20-54)   | Jul 13-29                           | ISO-NE, ISO-NE EMM, Avangrid, CPV Towantic, Dominion, FirstLight, HQUS, MMWEC, National Grid, NHEC, NTE Energy, Talen, Vistra, NEPGA, EPSA, CT AG, CT DEEP, CT PURA, MA DPU (out-of-time) intervene; initial briefs due Aug 24, 2020                     |
| 3 | Exelon PP-10 Complaint (EL20-52)  | Jul 13<br>Jul 15<br>Jul 27<br>Aug 3 | Avangrid answers Jun 23 Motion to Lodge Anbaric letter and Anbaric comments<br>Anbaric answers ISO-NE and Avangrid answers<br>NEPOOL, ISO-NE, NEPGA, Vistra answer Exelon’s Jul 10 answer<br>Exelon answers NEPOOL’s and ISO-NE’s Jul 27 answers         |
| 4 | NERA Petition: FERC Jurisdiction Over Customer-Side-of-the-Retail-Meter Energy Sales (EL20-42)  | Jul 15<br>Jul 16                    | Oxenham’s file answer to NERA’s Jun 30 Answer<br>FERC unanimously dismisses (on procedural grounds) NERA Petition  |
| 4 | Liberty Complaint – Eversource/ISO-NE Failure to Correct Nov 2018 Meter Data Error/Load Assignment (EL20-27)                          | Jul 16                              | FERC denies Complaint  |
| 5 | 206 Investigation Terminated: ISO-NE Implementation of <i>Order 1000</i> Exemptions for Immediate Need Reliability Projects (EL19-90) | Jul 17<br>Jul 20                    | CT/MA Parties request rehearing of <i>Order Terminating Proceeding</i> LS Power, MMWEC/NHEC request rehearing of <i>Order Terminating Proceeding</i> ; CT/MA Parties file errata to their Jul 17 request; FERC action required on or before Aug 17, 2020 |
| 5 | 206 Proceeding: RNS/LNS Rates and Rate Protocols (ER20-2054; EL16-19-002)   | Jul 15<br>Jul 29                    | TOs file reply comments in support of Settlement Agreement II<br>MA DPU intervenes   |

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



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|---|---------------------------------------|--------|--------------------------|
| 8 | FCA15 De-List Bids Filing (ER20-2317) | Jul 20 | National grid intervenes |
|---|---------------------------------------|--------|--------------------------|

9	Mystic 8/9 Cost of Service Agreement (ER18-1639)	Jul 17	<b>Jul 2018 Order:</b> FERC modifies the discussion in the July 2018 Order, reaches the same result, grants clarification in part, and denies clarification in part
		Jul 17	<b>Dec 2018 Order:</b> FERC modifies the discussion in the Dec 2018 Order, sets aside the Order in part, grants clarification in part, denies clarification in part, and directs additional compliance
		Jul 17	<b>Mar 2019 Compliance Filing:</b> FERC accepts in part, and rejects in part, the Mar 1, 2019 compliance filing and directs a further compliance filing due on or before Sep 15, 2020
		Jul 28	<b>ROE Paper Hearing:</b> FERC reopens record to allow parties an opportunity to present written evidence applying the FERC's <i>Opinion 569-A</i> ROE methodology to the facts of this proceeding; initial briefs due Sep 28, 2020; responses to those initial briefs, Oct 28, 2020
* 12	2020/2021 Power Year Transmission Rate Filing (ER09-1532; RT04-2)	Jul 31	PTO AC submits informational filing identifying adjustments to regional transmission service charges for the Jun 1, 2020 to May 31, 2021 period (RNS Rate of \$129.26/kW-year and a Schedule 1 formula rate of \$1.745 kW-year, increases of \$17.32 /kW-year and \$0.152/kW-year, respectively); this filing will not be noticed for public comment
* 12	ISO Securities: Authorization for Future Drawdowns (ES20-46)	Jul 13	FERC authorizes continued ISO-NE drawdowns under its \$20 million Revolving Credit Line and \$4 million line of credit supporting the Payment Default Shortfall Fund through Jul 12, 2022

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



* 12	Information Policy §2.3 Revisions (ER20-2518)	Jul 28	ISO-NE and NEPOOL file enhancements/ clarifications to Info Policy; comment date Aug 18
		Jul 29-30	Calpine, Exelon intervene
* 12	DAM Offer Window Modification (ER20-2511)	Jul 27	ISO-NE and NEPOOL files changes to extend by 30 minutes the Day-Ahead Energy Market ("DAM") offer window; comment date Aug 17
		Jul 28-30	Calpine, Exelon, FirstLight, PSEG intervene
13	EE CSOs During Scarcity Conditions (ER20-1967)	Jul 21 Aug 1	FERC accepts EE Changes, eff. Aug 1, 2020 EE Changes become effective
14	Inventoried Energy Program (Chapter 2B) Remand (ER19-1428)	Jul 17 Jul 20	MPUC, Sierra Club/UCS request rehearing of <i>IEP Remand Order</i> MA AG, NECOS/ENE, NH PUC/NH OCA request rehearing of <i>IEP Remand Order</i>
15	<i>Order 841</i> Compliance Filings (Electric Storage in RTO/ISO Markets) (ER19-470)	Aug 4	FERC conditionally accepts <i>Order 841</i> Compliance Filing II, eff. Dec 19, 2019, with a limited number of revisions to become eff. Jan 1, 2026

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



20	CIP IROL Cost Recovery Rules (ER20-739)	Jul 27	FERC issues Notice of Denial by Operation of Law of the IROL-Critical Facility Owners' Jun 25 request for reh'g of <i>CIP IROL Cost Recovery Order</i> , though it indicated that the request would be addressed in a future order (which can be issued up until the record of the proceeding is filed with the Court of Appeals)
21	<i>Order 845</i> Compliance Filing II (ER19-1951-002)	Jul 17	ISO-NE, NEPOOL, PTO AC submit <i>Order 845</i> Compliance Filing II; comment date Aug 7

**V. Financial Assurance/Billing Policy Amendments**

22	Billing Policy Enhancements and Clean-Up Changes (ER20-1862)	Jul 24	FERC accepts changes, eff. Jul 27, 2020
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**VI. Schedule 20/21/22/23 Changes**

* 22	Schedule 22: NSTAR/Vineyard Wind LGIA (ER20-2489)	Jul 23	NSTAR files LGIA; comment date Aug 13
* 22	Schedule 21-NEP: DWW E&P Agreement (ER20-2454)	Jul 17	NEP files E&P Agreement; comment date Aug 7
* 22	Schedule 21-UI: LCSA: UI/ NextEra (ER20-2449)	Jul 17	UI files LCSA with NextEra to recover NextEra’s Category B Load Ratio Share of the revenue requirement for UI’s Localized Facilities under Schedule 21-UI; comment date Aug 7
		Jul 20	Eversource intervenes
* 23	Schedule 21-FG&E Annual Informational Filing (ER09-1498)	Jul 31	FG&E submits annual update to its Revenue Requirement recovered through the ISO-NE Tariff and Schedule 21-FG&E for the Jun 1, 2020 – May 31, 2021 period

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

No Activity to Report

**VIII. Regional Reports**

* 24	LFTR Implementation: 47 <sup>th</sup> Quarterly Status Report (ER07-476)	Jul 15	ISO-NE files its 47th quarterly report
* 24	IMM Quarterly Markets Reports - 2020 Spring (ZZ20-4)	Jul 31	IMM files Spring 2020 Report

**IX. Membership Filings**

* 24	August 2020 Membership Filing (ER20-2581)	Jul 31	<b>New Members:</b> Blueprint Power Technologies (Provisional Member) and Advanced Energy Economy (Fuels Industry Participant); and <b>Terminations:</b> New Hampshire Industries Inc. and The Energy Council of Rhode Island; comment date Aug 21
25	June 2020 Membership Filing (ER20-1943)	Jul 30	FERC accepts (i) the memberships of: Actual Energy, Borrego Solar Systems, Paper Birch Energy, Priogen Power, and Standard Normal Energy; (ii) the termination of the Participant status of: Royal Bank of Canada, Wallingford Energy II and Agera Energy; and (iii) the name changes of: Versant Power and IPKeys Power Partners, Inc.

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

26	NOI: Virtualization and Cloud Computing Services in BES Operations (RM20-8)	Jul 31	AEE, Amazon, Microsoft file reply comments
28	Report of Comparisons of Budgeted to Actual Costs for 2019 for NERC and the Regional Entities (RR20-3)	Jul 21	NERC supplements report with final, audited 2019 financial report for Texas RE; comment date Aug 11

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

28	<i>Opinion 569-A: FERC's Base ROE Methodology</i> (EL14-12; EL15-45)	Jul 22	FERC issues Notice of Denial by Operation of Law of requests for reh'g of <i>Opinion 569-A</i> , though it indicated that the request would be addressed in a future order (which can be issued up until the record of the proceeding is filed with the Court of Appeals)
* 29	VTransco Rate Schedule Cancellations (ER20-2507)	Jul 27	VTransco files notice of cancellation of 2 rate schedules no longer in use; comment date Aug 17
29	Termination of IA and NITSA between Versant Power & Houlton Water Company (ER20-1919/1914)	Jul 24 Jul 27	FERC accepts NITSA termination notice, eff. May 15, 2020 FERC accepts IA termination notice, eff. May 15, 2020
30	NSTAR TSA Cancellations (ER20-1896)	Jul 23	FERC accepts Transmission Service Agreement cancellations, eff. Jul 27, 2020
* 30	D&E Agreement: NSTAR-Mayflower Wind (ER20-1855)	Jul 14	FERC accepts Agreement, eff. May 19, 2020

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

31	Hybrid Resources Tech Conf (Jul 23, 2020) (AD20-9)	Jul 13 Jul 23 Jul 29	FERC issues supplemental notice of tech conf. FERC holds tech. conf. Speaker materials posted to eLibrary
33	Increasing Market & Planning Efficiency Through Improved Software Tech Conf (AD10-12)	Jul 10	Speaker materials from Jun 23-25 tech. conf. posted to eLibrary
33	NOPR – Electric Transmission Incentives Policy (RM20-10)	Jul 16	AEP, ITC Holding, the N. California Transmission Agency, and WIRES file reply comments
34	<i>Order 872: Pricing and Eligibility Changes to PURPA Regulations</i> (RM19-15)	Jul 16	FERC issues final order approving revisions to its PURPA regulations

**XIII. Natural Gas Proceedings**

43	Iroquois ExC Project (CP20-48)	Jul 10 Jul 28 Jul 30 Jul 31	NYS DEC files comments on Sensitive Species Habitat Assessment Rpt Iroquois responds to NYS DEC Jul 10 comments Iroquois files supplemental information FERC issues data request; response date Aug 7
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**XIV. State Proceedings & Federal Legislative Proceedings**

No Activity to Report

**XV. Federal Courts**

* 45	2013/14 Winter Reliability Program Remand Proceeding (20-1289)	Jul 30	TransCanada appeals <i>2013/14 Winter Reliability Program Order on Remand and Compliance</i> ; appearances due Aug 31, 2020
46	<i>Allegheny Defense Project v. FERC</i> (19-1098)	Jul 23	DC Circuit issues <i>per curiam</i> order staying issuance of the mandate through Oct 5, 2020, as requested by the FERC
48	<i>Opinion 569/569-A: FERC's Base ROE Methodology</i> (16-1325, 20-1227)	Jul 10	Court consolidates FirstEnergy and Transource cases; Transource directed to file a Docketing Statement and Statement of Issues by Aug 10, 2020



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

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

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

**DATE:** August 4, 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”),<sup>1</sup> state regulatory commissions, and the Federal Courts and legislatures through August 4, 2020. If you have questions, please contact us.

**COVID-19**

- **Jul 8-9 Tech Conf: Impacts of COVID-19 on the Energy Industry (AD20-17)**

On July 8-9, 2020, the FERC convened a Commissioner-led technical conference to explore the potential longer-term impacts of the emergency conditions caused by COVID-19 on FERC-jurisdictional entities “in order to ensure the continued efficient functioning of energy markets, transmission of electricity, transportation of natural gas and oil, and reliable operation of energy infrastructure today and in the future, while also protecting consumers”. The conference included consideration of: (i) the energy industry’s ongoing and potential future operational and planning challenges due to COVID-19 and as the situation evolves moving forward; (ii) the potential impacts of changes in electric demand on operations, planning, and infrastructure development; (iii) the potential impacts of changes in natural gas and oil demand on operations, planning, and infrastructure development; and (iv) issues related to access to capital, including credit, liquidity, and return on equity. Comments and speaker opening statements are posted in eLibrary.

Since the last Report, on July 16, 2020, the FERC invited all interested parties to file post-technical conference comments on any or all of the topics discussed at the July 8-9 technical conference, as well as to respond to the questions outlined in the July 1, 2020 supplemental notice of technical conference. Comments must be submitted on or before August 31, 2020.

- **Remote ALJ Hearings (AD20-12)**

All hearings before Administrative Law Judges (“ALJs”) will be held remotely through video conference software until further notice.<sup>2</sup> The Presiding Judge in each remote hearing will ensure that the participants have access to an IT Day prior to the hearing to allow all participants, witnesses, and the public who will attend the hearing to learn more about the remote hearing software and to get their technical questions answered by the appropriate FERC staff. Since the last Report, on July 13, 2020, the Office of ALJs posted “Remote Hearing Guidance for Participants”, including information on WebEx and SharePoint, the two platforms that will be used for all remote hearings.

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

<sup>2</sup> Chief Administrative Law Judge’s Notices to the Public, Docket No. AD20-12 (June 17, 2020).

- **Extension of Filing Deadlines (AD20-11)**

Entities may seek waiver of FERC orders, regulations, tariffs and rate schedules, including motions for waiver of regulations that govern the form of filings, as appropriate, to address needs resulting from steps they have taken in response to the coronavirus. The FERC committed to take action on any such motions as expeditiously as possible.<sup>3</sup> In addition, FERC's regulations that require that filings with the FERC be notarized or supported by sworn declarations are waived through September 1, 2020.<sup>4</sup>

- **Blanket Waiver of ISO/RTO Tariff In-Person Meeting and Notarization Requirements (EL20-37)**

On April 2, 2020, the FERC, pursuant to Section 206 of the Federal Power Act ("FPA"), provided a blanket waiver, effective April 2, 2020 and through September 1, 2020, of all jurisdictional agreement<sup>5</sup> requirements for (i) document notarization and (ii) *in-person* meetings (such meetings must still be held, but should be conducted by other means). The FERC, noting alternatives like electronic signatures and telephonic and web-based meeting capabilities, indicated that it took the action given the President's proclamation of a National Emergency, the unprecedented risk to health and safety currently presented by personal contact, and to be consistent with guidance from public health officials on social distancing. The blanket waiver made moot requests separately filed earlier by ISO-NE (ER20-1484) and NYISO (ER20-1419), among others.

## I. Complaints/Section 206 Proceedings

- **206 Proceeding: FCM Pricing Rules Complaints Remand (EL20-54)**

In response to the February 2, 2018 remand by the United States Court of Appeals for the District of Columbia Circuit ("DC Circuit")<sup>6</sup> (where the DC Circuit found that the FERC did not adequately explain why it allowed ISO-NE to forego an offer floor for its seven-year price lock period despite previously rejecting PJM's request to remove the offer floor for its three-year price lock period), the FERC instituted this proceeding, pursuant to section 206 of the FPA, finding preliminarily that ISO-NE's new entrant rules may be unjust and unreasonable.<sup>7</sup> The FERC established paper hearing procedures and posed the following questions, which need to be addressed in initial briefs due on or before **August 24, 2020**:<sup>8</sup>

- (a) **to evaluate the need for the price lock in its entirety:** (i) how many resources have taken advantage of the price lock to date? (ii) is a price lock still needed to incent new entry in ISO-NE? (iii) does the price lock lead to unreasonable price suppression in the entry year? (iv) does the price lock with the zero-price offer rule result in unreasonable price suppression in years 2-7? (v) is the price lock unduly discriminatory? and (vi) if the price lock is retained, should the term be shortened and, if so, what would be a just and reasonable term?
- (b) **to evaluate retaining the price-lock and adding an offer floor:** (i) how would an offer floor be implemented? (2) would an offer floor require significant market redesign? and (iii) what would be the timeline for implementing an offer floor in ISO-NE?

<sup>3</sup> *Extension of Non-Statutory Deadlines*, Docket No. AD20-11-000 (Apr. 2, 2020).

<sup>4</sup> *Extension of Non-Statutory Deadlines*, Docket No. AD20-11-000 (May 8, 2020).

<sup>5</sup> This waiver applies to any tariff, rate schedule, service agreement, or contract subject to the FERC's jurisdiction under the FPA, the Natural Gas Act, or the Interstate Commerce Act.

<sup>6</sup> *New England Power Generators Assoc. v FERC*, 881 F.3d 202 (DC Cir. 2018) (granting NEPGA's and Exelon's petitions for review of orders accepting the Forward Capacity Market's ("FCM") 7-year price lock-in (EL14-7) and capacity-carry-forward rules (EL15-23)).

<sup>7</sup> *ISO New England Inc.*, 172 FERC ¶ 61,005 (Jul 1, 2020) ("*FCM Pricing Rules Complaints Remand Order*").

<sup>8</sup> Notice of the initiation of this proceeding was published in the *Fed. Reg.* on July 9, 2020 (Vol. 85, No. 132) p. 41,237. Aug. 24, 2020 is the first business day that is 45 days after publication.

- (c) **to evaluate whether to impose an alternative replacement rate:** (i) are there alternative approaches to the current price-lock that would be sufficient to incent new entry? (ii) how would these alternative approaches address any concerns related to unreasonable price suppression? and (iii) how would these alternative approaches address any concerns related to undue discriminatory or preferential treatment?

Interventions were due on or before **July 22, 2020**. Responses to initial briefs will be due **September 23, 2020** (30 days after the date that the initial briefs are due). No additional answers or briefs will be permitted. In order to accept the changes originally filed, the FERC must provide some analysis and explanation why it changed course. The FERC established July 9, 2020 (the date of publication in the *Federal Register*) as the refund effective date. The FERC noted its expectation that it would issue a final order in this proceeding within the 180-day period contemplated under FPA section 206(b). Interventions were filed by NEPOOL, ISO-NE, ISO-NE EMM, Avangrid, Brookfield, Calpine, CPV Towantic, Dominion, Energy New England (“ENE”), Eversource, Exelon, FirstLight, HQUS, LS Power, Massachusetts Attorney General (“MA AG”), MMWEC, National Grid, NESCOE, NHEC, NextEra, NRG, NTE Energy, Talen, Vistra, NEPGA, EPSA, CT AG, CT DEEP, CT PURA, MA DPU (out-of-time), PJM EMM, and Public Citizen.

If you have any questions concerning this proceeding, please contact Sebastian Lombardi (860-275-0663; [slombardi@daypitney.com](mailto:slombardi@daypitney.com)) or Rosendo Garza (860-275-0660; [rgarza@daypitney.com](mailto:rgarza@daypitney.com)).

- **Exelon PP-10 Complaint (EL20-52)**

On June 10, 2020, Constellation Mystic Power, LLC (“Exelon”) filed a complaint against ISO-NE requesting that the FERC prohibit ISO-NE from (i) implementing changes to Planning Procedure No. 10 (Planning Procedure to Support the Forward Capacity Market),<sup>9</sup> which it asserted would significantly affect the rates, terms and conditions of jurisdictional services by dramatically changing the way in which ISO-NE conducts its annual transmission security review of capacity auction retirement bids and the Network Model upon which the capacity auction is based, and (ii) violating the requirements of its Tariff for *Order 1000* competitive transmission procurements. Exelon requested fast track processing, a shortened 14-day answer period (which was not granted), and an order by August 4, 2020, which Exelon asserted would provide ISO-NE time to revise its transmission security review currently underway should the Complaint be granted.

ISO-NE’s response, as well as comments, protests and answers, to the Complaint were due on or before June 30, 2020, and were filed by ISO-NE, ISO-NE IMM, NEPOOL, Anbaric, EMCOS, FirstLight, MA AG, NEPGA, NESCOE, TOs (Avangrid, Eversource, Nat’l Grid and VELCO), Versant Power (out-of-time), Vistra, and EPSA. Doc-less interventions only were filed by Brookfield, Calpine, Dominion, ENE, Footprint, LS Power, MMWEC, NextEra, NRG, Southern Power, CT AG, CT DEEP, CT PURA, MA DPU, and the NY TOs. Also, on June 23, Exelon moved to lodge a June 16 letter from Anbaric to ISO-NE. ISO-NE opposed that motion on July 8. On July 10, Exelon answered ISO-NE and protesters.

Since the last Report, Avangrid answered Exelon’s June 23 motion to lodge the Anbaric letter and Anbaric’s comments. On July 15, Anbaric answers ISO-NE and Avangrid’s answers. On July 27, NEPOOL, ISO-NE, NEPGA, and Vistra answered Exelon’s July 10 answer. This matter is pending before the FERC. If you have any questions concerning this matter, please contact Eric Runge (617-345-4735; [ekrunge@daypitney.com](mailto:ekrunge@daypitney.com)) or Sophia Browning (202-218-3904; [sbrowning@daypitney.com](mailto:sbrowning@daypitney.com)).

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<sup>9</sup> The PP-10 Revisions were supported by the Participants Committee at its June 4 meeting by a vote of 99.12% in support (only Exelon opposing).



- **NERA Petition: FERC Jurisdiction Over Customer-Side-of-the-Retail-Meter Energy Sales (EL20-42)**

On July 16, 2020, the FERC unanimously dismissed<sup>10</sup> (on procedural grounds) the April 14, 2020 petition of the New England Ratepayers Association (“NERA”).<sup>11</sup> Rather than address the issues raised by NERA in the petition, the FERC exercised its broad discretion not to address the issues on the merits, finding “the issues presented in the Petition do not warrant a generic statement from the Commission at this time” and finding no specific controversy or harm to be addressed.<sup>12</sup> In so doing, the *NERA Order* leaves in place for now state net metering programs that NERA had sought to invalidate, and leaves for another day a decision on the jurisdictional issues underlying the petition. In separate concurring opinions, both Commissioners McNamee and Danly addressed the need to resolve the jurisdictional issues, with Commissioner Danly stating a concern that the *NERA Order* could well result in a “patchwork quilt of conflicting decisions” if the jurisdictional issues are addressed by federal district courts across the country. “Confusion, delay and inconsistent rules—some of which will apply to individual states or parts of states—will be the inevitable result.”<sup>13</sup> Challenges, if any, to the *NERA Order* will be due on or before August 17, 2020. If you have any questions concerning this matter, please contact Pat Gerity (860-275-0533; [pmgerity@daypitney.com](mailto:pmgerity@daypitney.com)).

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

Also on July 16, 2020, the FERC denied Liberty’s February 28, 2020 Meter Data Error Complaint.<sup>14</sup> As previously reported, Liberty Power Holdings, LLC (“Liberty”) filed the 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 described in the Complaint, provided a basis for the correction beyond the three-month period for RBA submissions.<sup>15</sup> The amount in dispute was \$191,440 plus interest (“Disputed Amount”).

In denying the Complaint, the FERC found that ISO-NE’s refusal to correct the November 2018 billing error did not violate the ISO-NE Tariff or the filed rate doctrine.<sup>16</sup> Rather, the FERC found, ISO-NE followed the applicable Tariff provisions with respect to Liberty’s untimely request for a billing adjustment and, therefore, Liberty was not entitled to the requested November 2018 billing adjustment.<sup>17</sup> Liberty’s failure to review the

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<sup>10</sup> *New England Ratepayers Assoc.*, 172 FERC ¶ 61,042 (July 16, 2020) (“*NERA Order*”).

<sup>11</sup> The NERA petition asked the FERC to assert jurisdiction over energy sales from facilities located on the customer side of the retail meter (rooftop solar and other DG) (i) whenever the DG output exceeds customer demand or (ii) where the energy from the DG is designed to bypass the customer’s load and therefore is not used to serve demand behind the customer’s meter, and ensure the output is priced accordingly.

<sup>12</sup> *Id.* at PP 35-36.

<sup>13</sup> Danly, Commissioner, concurring at P 4.

<sup>14</sup> *Liberty Power Holdings LLC v. Eversource Energy Co. and ISO New England Inc.*, 172 FERC ¶ 61,031 (July 16, 2020) (“*Liberty Complaint Order*”).

<sup>15</sup> 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.

<sup>16</sup> *Liberty Complaint Order* at P 27.

<sup>17</sup> *Id.* at P 23.

data in a timely fashion was the reason that the error was not discovered by the deadline.<sup>18</sup> The FERC disagreed with Liberty that section 6.3.1 of the ISO-NE Billing Policy applied.<sup>19</sup> Unless Liberty challenges the *Liberty Complaint Order* on or before August 17, this proceeding will be concluded. If you have any questions concerning this matter, please contact Pat Gerity (860-275-0533; [pmgerity@daypitney.com](mailto:pmgerity@daypitney.com)).

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

Challenges to the FERC's June 18, 2020 order terminating this FPA Section 206 proceeding<sup>20</sup> were filed by CT PURA/CT OCC/MA AG ("CT/MA Parties"), LS Power and MMWEC/NHEC. As previously reported, in the *Order Terminating Proceeding*, the FERC found (i) "insufficient evidence in the record to find under FPA section 206 that [ISO-NE's] implementation of the exemption for immediate need reliability projects is unjust, unreasonable, or unduly discriminatory or preferential;<sup>21</sup> (ii) "insufficient evidence in the record to find that ISO-NE implemented the immediate need reliability project exemption in a manner that is inconsistent with or more expansive than [the FERC] directed";<sup>22</sup> and (iii) that ISO-NE complies with the five criteria established for the immediate need reliability project exemption.<sup>23</sup> The requests for rehearing challenged the FERC's decision not to act under Section 206 and are pending, with FERC action required on or before August 17, 2020 (the first business day that is 30 days from the day that CT/MA Parties request for rehearing was filed), or the requests will be deemed denied by operation of law. If you have any questions concerning this matter, please contact Eric Runge (617-345-4735; [ekrunge@daypitney.com](mailto:ekrunge@daypitney.com)).

- **RNS/LNS Rates and Rate Protocols Settlement Agreement II (ER20-2054; EL16-19-002)**

On June 15, 2020, the Transmission Owners submitted, on behalf of the Settling Parties, an uncontested Joint Offer of Settlement ("Settlement Agreement II") to resolve all issues in Docket No. EL16-19, a Section 206 proceeding first instituted by the FERC on December 28, 2015.<sup>24</sup> Recall that, as previously reported, the first joint offer of settlement filed ("Settlement Agreement I") was contested<sup>25</sup> and subsequently rejected by the FERC.<sup>26</sup> The Tariff changes included with Settlement Agreement II were considered through the Participants Processes

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<sup>18</sup> *Id.* at

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

<sup>20</sup> *ISO New England Inc.*, 171 FERC ¶ 61,211 (June 18, 2020) ("*Order Terminating Proceeding*").

<sup>21</sup> *Order Terminating Proceeding* at PP 1, 11.

<sup>22</sup> *Id.* a P 11.

<sup>23</sup> *Id.*

<sup>24</sup> *ISO New England Inc. Participating Transmission Owners Admin. Comm.*, 153 FERC ¶ 61,343 (Dec. 28, 2015), *reh'g denied*, 154 FERC ¶ 61,230 (Mar. 22, 2016) ("*RNS/LNS Rates and Rate Protocols Order*"). The *RNS/LNS Rates and Rate Protocols Order* found the ISO-NE Tariff unjust, unreasonable, and unduly discriminatory or preferential because the Tariff "lacks adequate transparency and challenge procedures with regard to the formula rates" for Regional Network Service ("RNS") and Local Network Service ("LNS"). The FERC also found that the RNS and LNS rates themselves "appear to be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful" because (i) "the formula rates appear to lack sufficient detail in order to determine how certain costs are derived and recovered in the formula rates" and "could result in an over-recovery of costs" due to the "the timing and synchronization of the RNS and LNS rates". The FERC encouraged the parties to make every effort to settle this matter before hearing procedures are commenced. The FERC-established refund date is January 4, 2016.

<sup>25</sup> Settlement Agreement I was opposed by FERC Trial Staff and "Municipal PTF Owners" (Braintree, Chicopee, Middleborough, Norwood, Reading, Taunton, and Wallingford).

<sup>26</sup> As previously reported, the Settling Parties filed the Settlement on Aug. 17, 2018, in ER18-2235. The Settlement proposed changes to Section II.25, Schedules 8 and 9, Attachment F (including the addition of Interim Formula Rate Protocols ("Interim Protocols")), and the Schedule 21s to the ISO-NE OATT. 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. However, the FERC found insufficient detailed information to enable it to apply any of the approaches available to it to approve a contested settlement and remanded the proceeding (EL16-19) to Chief Judge Cintron to resume hearing procedures. *ISO New England Inc. Participating Transmission Owners Admin. Comm., et al.*, 167 FERC ¶ 61,164 (May 22, 2019) ("*RNS Rate/Rate Protocol Settlement I Order*").

(Transmission and Participants Committee review), and supported by the Participants Committee at its June 4, 2020 meeting (Agenda Item # 13).

Comments on Settlement Agreement II were due on or before July 6, 2020. NEPOOL filed comments supporting the Tariff changes included with Settlement Agreement II. FERC Trial Staff filed comments not opposing Settlement Agreement II. On July 15, 2020, the TOs filed reply comments supporting Settlement Agreement II. On July 29, 2020, the MA DPU intervened. Settlement Agreement II is now before Presiding Judge Coffman for certification to the Commission.

If you have any questions concerning this matter, please contact Eric Runge (617-345-4735; [ekrunge@daypitney.com](mailto: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,<sup>27</sup> set the TOs' Base ROE at 10.57% (reduced from 11.14%), capped the TOs' total ROE (Base ROE *plus* transmission incentive adders) at 11.74%, and required implementation effective as of October 16, 2014 (the date of *Opinion 531-A*).<sup>28</sup> However, the FERC's orders were challenged, and in *Emera Maine*,<sup>29</sup> the DC Circuit vacated the FERC's prior orders, and remanded the case for further proceedings consistent with its order. The FERC's determinations in *Opinion 531* are thus no longer precedential, though the FERC remains free to re-adopt those determinations on remand as long as it provides a reasoned basis for doing so.
- **Base ROE Complaints II & III (EL13-33 and EL14-86) (consolidated).** The second (EL13-33)<sup>30</sup> and third (EL14-86)<sup>31</sup> ROE complaint proceedings were consolidated for purposes of hearing and decision, though the parties were permitted to litigate a separate ROE for each refund period. After hearings were completed, ALJ Sterner issued a 939-paragraph, 371-page *Initial Decision*, which lowered the base ROEs for the EL13-33 and EL14-86 refund periods from 11.14% to 9.59%

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<sup>27</sup> The TOs' 11.14% pre-existing Base ROE was established in *Opinion 489. Bangor Hydro-Elec. Co.*, Opinion No. 489, 117 FERC ¶ 61,129 (2006), *order on reh'g*, 122 FERC ¶ 61,265 (2008), *order granting clarif.*, 124 FERC ¶ 61,136 (2008), *aff'd sub nom.*, Conn. Dep't of Pub. Util. Control v. FERC, 593 F.3d 30 (D.C. Cir. 2010) ("*Opinion 489*").

<sup>28</sup> *Coakley Mass. Att'y Gen. v. Bangor Hydro-Elec. Co.*, 147 FERC ¶ 61,234 (2014) ("*Opinion 531*"), *order on paper hearing*, 149 FERC ¶ 61,032 (2014) ("*Opinion 531-A*"), *order on reh'g*, 150 FERC ¶ 61,165 (2015) ("*Opinion 531-B*").

<sup>29</sup> *Emera Maine v. FERC*, 854 F.3d 9 (D.C. Cir. 2017) ("*Emera Maine*"). *Emera Maine* vacated the FERC's prior orders in the Base ROE Complaint I proceeding, and remanded the case for further proceedings consistent with its order. The Court agreed with both the TOs (that the FERC did not meet the Section 206 obligation to first find the existing rate unlawful before setting the new rate) and "Customers" (that the 10.57% ROE was not based on reasoned decision-making, and was a departure from past precedent of setting the ROE at the midpoint of the zone of reasonableness).

<sup>30</sup> The 2012 Base ROE Complaint, filed by Environment Northeast (now known as Acadia Center), Greater Boston Real Estate Board, National Consumer Law Center, and the NEPOOL Industrial Customer Coalition ("NICC", and together, the "2012 Complainants"), challenged the TOs' 11.14% ROE, and seeks a reduction of the Base ROE to 8.7%.

<sup>31</sup> The 2014 Base ROE Complaint, filed July 31, 2014 by the Massachusetts Attorney General ("MA AG"), together with a group of State Advocates, Publicly Owned Entities, End Users, and End User Organizations (together, the "2014 ROE Complainants"), seeks to reduce the current 11.14% Base ROE to 8.84% (but in any case no more than 9.44%) and to cap the Combined ROE for all rate base components at 12.54%. 2014 ROE Complainants state that they submitted this Complaint seeking refund protection against payments based on 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.

and 10.90%, respectively.<sup>32</sup> The *Initial Decision* also lowered the ROE ceilings. Parties to these proceedings filed briefs on exception to the FERC, which has not yet issued an opinion on the ALJ's *Initial Decision*.

- **Base ROE Complaint IV (EL16-64).** The fourth and final ROE proceeding<sup>33</sup> also went to hearing before an ALJ, Judge Glazer, who issued his initial decision on March 27, 2017.<sup>34</sup> 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.<sup>35</sup> Parties in this proceeding filed briefs on exception to the FERC, which has not yet issued an opinion on the *Base ROE IV Initial Decision*.

**October 16, 2018 Order Proposing Methodology for Addressing ROE Issues Remanded in Emera Maine and Directing Briefs.** On October 16, 2018, the FERC, addressing the issues that were remanded in *Emera Maine*, proposed a new methodology for determining whether an existing ROE remains just and reasonable.<sup>36</sup> The FERC indicated its intention that the methodology be its policy going forward, including in the four currently pending New England proceedings (*see, however, Opinion 569-A* (EL14-12; EL15-45) in Section XI below). The FERC established a paper hearing on how its proposed methodology should apply to the four pending ROE proceedings.<sup>37</sup>

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

If the FERC finds an existing ROE unjust and unreasonable, it will then determine the new just and reasonable ROE using an averaging process. For a diverse group of average risk utilities, FERC will average four values: the midpoints of the DCF, CAPM and Expected Earnings models, and the results of the Risk Premium model. For a single utility of average risk, the FERC will average the medians rather than the midpoints. The

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<sup>32</sup> *Environment Northeast v. Bangor Hydro-Elec. Co. and Mass. Att'y Gen. v. Bangor Hydro-Elec. Co.*, 154 FERC ¶ 63,024 (Mar. 22, 2016) ("*2012/14 ROE Initial Decision*").

<sup>33</sup> The 4th ROE Complaint asked the FERC to reduce the TOs' current 10.57% return on equity ("Base ROE") to 8.93% and to determine that the upper end of the zone of reasonableness (which sets the incentives cap) is no higher than 11.24%. The FERC established hearing and settlement judge procedures (and set a refund effective date of April 29, 2016) for the 4th ROE Complaint on September 20, 2016. Settlement procedures did not lead to a settlement, were terminated, and hearings were held subsequently held December 11-15, 2017. The September 26, 2016 order was challenged on rehearing, but rehearing of that order was denied on January 16, 2018. *Belmont Mun. Light Dept. v. Central Me. Power Co.*, 156 FERC ¶ 61,198 (Sep. 20, 2016) ("*Base ROE Complaint IV Order*"), *reh'g denied*, 162 FERC ¶ 61,035 (Jan. 18, 2018) (together, the "*Base ROE Complaint IV Orders*"). The *Base ROE Complaint IV Orders*, as described in Section XV below, have been appealed to, and are pending before, the DC Circuit.

<sup>34</sup> *Belmont Mun. Light Dept. v. Central Me. Power Co.*, 162 FERC ¶ 63,026 (Mar. 27, 2018) ("*Base ROE Complaint IV Initial Decision*").

<sup>35</sup> *Id.* at P 2.; Finding of Fact (B).

<sup>36</sup> *Coakley v. Bangor Hydro-Elec. Co.*, 165 FERC ¶ 61,030 (Oct. 18, 2018) ("*Order Directing Briefs*" or "*Coakley*").

<sup>37</sup> *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%.<sup>38</sup> The new ROE would be effective as of the date of *Opinion 531-A*, or October 16, 2014. Accordingly, the issue to be addressed in the Base ROE Complaint II proceeding is whether the ROE established on remand in the first complaint proceeding remained just and reasonable based on financial data for the six-month period September 2013 through February 2014 addressed by the evidence presented by the participants in the second proceeding. Similarly, briefing in the third and fourth complaints will have to address whether whatever ROE is in effect as a result of the immediately preceding complaint proceeding continues to be just and reasonable.

The FERC directed participants in the four proceedings to submit briefs regarding the proposed approaches to the FPA section 206 inquiry and how to apply them to the complaints (separate briefs for each proceeding). Additional financial data or evidence concerning economic conditions in any proceeding must relate to periods before the conclusion of the hearings in the relevant complaint proceeding. Following a FERC notice granting a request by the TOs and Customers<sup>39</sup> for an extension of time to submit briefs, the latest date for filing initial and reply briefs was extended to January 11 and March 8, 2019, respectively. On January 11, initial briefs were filed by EMCOS, Complainant-Aligned Parties, TOs, EEI, Louisiana PSC, Southern California Edison, and AEP. As part of their initial briefs, each of the Louisiana PSC, SEC and AEP also moved to intervene out-of-time. Those interventions were opposed by the TOs on January 24. The Louisiana PSC answered the TOs' January 24 motion on February 12. Reply briefs were due March 8, 2019 and were submitted by the TOs, Complainant-Aligned Parties, EMCOS, FERC Trial Staff.

***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*<sup>40</sup> 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 remain pending before the FERC. If you have any questions concerning these matters, please contact Eric Runge (617-345-4735; [ekrunge@daypitney.com](mailto:ekrunge@daypitney.com)) or Joe Fagan (202-218-3901; [jfagan@daypitney.com](mailto:jfagan@daypitney.com)).

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

- **FCA15 De-List Bids Filing (ER20-2317)**

Pursuant to Market Rule 1 § 13.8.1(a), ISO-NE submitted on July 2, 2020 a filing describing the Permanent De-List Bids and Retirement De-List Bids that were submitted on or prior to the FCA15 Existing Capacity Retirement Deadline. ISO-NE reported that the Existing Capacity Retirement Deadline for FCA15 was March 13, 2020 and it received 1 Permanent De-List Bid, 13 Retirement De-List Bids, and 0 substitution auction test prices from 10 Lead Market Participants. The bids were for resources located in the CT, VT, ME, South Eastern Massachusetts, and Western Central MA Load Zones, with 241.256 MWs of aggregate capacity. All but four of the Bids were for resources under 20 MW or that did not meet the affiliation requirements that would have required

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<sup>38</sup> *Id.* at P 59.

<sup>39</sup> For purposes of the motion seeking clarification, "Customers" are CT PURA, MA AG and EMCOS.

<sup>40</sup> *Ass'n of Buss. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, Opinion No. 569, 169 FERC ¶ 61,129 (2019) ("*MISO ROE Order*"), *order on reh'g*, Opinion No. 569-A, 171 FERC ¶ 61,154 (May 21, 2020).

IMM review, with two (representing 20.712 MWs) requiring substitution auction test price reviews because the Bids were for greater than 3 MWs. The IMM did review the remaining four Bids (from four separate suppliers) for 213.376 MWs of capacity. The IMM's determination regarding those bids is described in the version of the filing that was filed confidentially as required under §13.8.1(a) of Market Rule 1.

ISO-NE reported that, because the Energy Security Improvements ("ESI") filing described in Section III below (ER20-1567) is still pending and FCA15 participants will receive final mitigated prices from the Internal Market Monitor ("IMM") before there is a FERC determination on the ESI filing, the IMM provided Participants with conditional retirement notifications that included a price under the current Market Rules, and a price to be used under each of the ISO-NE and NEPOOL ESI alternatives, should one of those be accepted.

Comments on this filing were due on or before July 23; none were filed. Doc-less interventions were filed by NEPOOL, Eversource, National Grid, and NRG. This matter is pending before the FERC. If you have any questions concerning this matter, please contact Pat Gerity (860-275-0533; [pmgerity@daypitney.com](mailto:pmgerity@daypitney.com)).

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

Since the last Report, the FERC issued four orders in this proceeding (three on July 17; one on July 28, 2020). Each of the orders addressed in part or in whole the Cost-of-Service Agreement ("COS Agreement")<sup>41</sup> among Constellation Mystic Power ("Mystic"), Exelon Generation Company ("ExGen") and ISO-NE, which is to provide compensation for the continued operation of the Mystic 8 & 9 units from June 1, 2022 through May 31, 2024.

**July 2018 Order.** As long reported, the FERC's initial order in this proceeding, issued July 13, 2018,<sup>42</sup> accepted the COS Agreement but suspended its effectiveness and set the matter for accelerated hearings and settlement discussions. The *July 2018 Order* was approved by a 3-2 vote, with dissents by Commissioners Powelson and Glick. Challenges to the *July 2018 Order* were filed by NESCOE, ENECOS, MA AG, and the NH PUC. The FERC issued a tolling order on September 10, 2018 to afford itself additional time to consider the requests for rehearing, which remained pending until last month.

In a July 17, 2020 order on the requests for rehearing, the FERC modified the discussion in the *July 2018 Order*, but nevertheless reached the same result, denying each of the requests for rehearing.<sup>43</sup> The FERC's July 2020 order did grant a clarification requested by the MA AG, that, "before Mystic may include any capital expenditure in its cost-of-service rate, it must demonstrate, and the [FERC] must determine, that such an expenditure is just and reasonable."<sup>44</sup> The order denied a request for clarification by ENECOS.<sup>45</sup>

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

<sup>42</sup> *Constellation Mystic Power*, 164 FERC ¶ 61,022 (July 13, 2018) ("*July 2018 Order*"), *clarif. granted in part and denied in part, reh'g denied*, 172 FERC ¶ 61,043 (July 17, 2020).

<sup>43</sup> *Constellation Mystic Power, LLC*, 172 FERC ¶ 61,043 (July 17, 2020) (order granting clarification in part, denyin clarification in part, and addressing arguments raised on rehearing of *July 2018 Order*).

<sup>44</sup> *Id.* at P 25.

<sup>45</sup> ENECOs requested that the FERC "clarify that [Mystic] can assign no more than a third of Everett's fixed costs to ISO-NE under the proposed [COS Agreement]" was among the issues set for, and addressed based on the record developed at, the hearings in this proceeding. Accordingly, the FERC did not address the request in its July 17, 2020 order on these issues.

**Dec 2018 Order.** Following hearings, the FERC’s December 20, 2018 order conditionally accepted the COS Agreement.<sup>46</sup> The *Dec 2018 Order* directed Mystic to submit a compliance filing (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. Requests for clarification and/or rehearing of the *Dec 2018 Order* were filed by Constellation Mystic Power, CT Parties, EDF, ENECOS, MA AG, NESCOE, NextEra, and Repsol. On February 15, 2019, the FERC issued a tolling order to afford it additional time to consider the requests for clarification and/or rehearing.

In its July 17 order addressing the requests for rehearing of the *Dec 2018 Order*, the FERC modified the discussion in the *Dec 2018 Order*, set aside that Order in part, granted clarification in part, denied clarification in part, and directed additional compliance.<sup>47</sup> Specifically, the FERC set aside the parts of the *Dec 2018 Order* that required the COS Agreement to include a sliding scale or other revenue crediting mechanism and the part that required Mystic to true-up revenues. The FERC granted clarification requested by Mystic that the FERC did not intend to re-state its prudence standard in the *Dec 2018 Order* (stating that its prudence standard differs from the prudence analysis that will be used in applying the standard). The FERC denied clarifications requested by Mystic,<sup>48</sup> NESCOE,<sup>49</sup> and ENECOS.<sup>50</sup>

**Mar 2019 Compliance Filing.** Mystic submitted its compliance filing required pursuant to the *Dec 2018 Order* on March 1, 2019 (“Mar 19 Compliance Filing”). As previously reported, the compliance filing included the following modifications:

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

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<sup>46</sup> *Constellation Mystic Power, LLC*, 165 FERC ¶ 61,267 (Dec. 20, 2018) (“*Dec 2018 Order*”), set aside in part, clarification granted in part and clarification denied in part, 172 FERC ¶ 61,044 (July 17, 2020).

<sup>47</sup> *Constellation Mystic Power, LLC*, 172 FERC ¶ 61,044 (July 17, 2020) (order on clarification, directing compliance, and addressing arguments raised on rehearing of *Dec 2018 Order*).

<sup>48</sup> Mystic challenged the Fuel Supply Charge as a component of its cost-of-service rate and, as a result, subject to FERC review and approval. The FERC found the request for clarification moot given its finding that that a revenue crediting mechanism for third party sales was no longer necessary to ensure that the Fuel Supply Charge is just and reasonable.

<sup>49</sup> NESCOE requested clarification on whether the COS Agreement’s clawback provision would apply to consumer-funded investments and repairs in connection with both Mystic 8 and 9 and Everett. The FERC stated that the clawback mechanism for Everett’s capital costs suggested by NESCOE would not apply to payments that Mystic received under a jurisdictional rate, but rather would apply to payments that Everett received under the non-jurisdictional Everett Agreement. Order at P 43.

<sup>50</sup> ENECOS requested clarification of the FERC’s finding that Exelon’s August 2003 booking of accumulated depreciation against the plant value of Mystic 8 & 9 effected a permanent reduction in that plant value that cannot be restored through subsequent accounting treatment.

In addition, Mystic's compliance filing included for informational purposes changes to the Fuel Supply and Terminal Services Agreements.

In its July 17, 2020 order on the Mar 19 Compliance Filing, the FERC accepted, with one exception, the Mar 19 Compliance Filing and directed a further compliance filing due on or before September 15, 2020.<sup>51</sup> In that further compliance filing, Mystic must reflect the 2004 transfer in lieu of foreclosure<sup>52</sup> in its original cost study. When it makes that further compliance filing, the FERC encouraged Mystic to correct any ministerial or typographical errors, such as those identified by NESCOE.<sup>53</sup>

**ROE Paper Hearing.** The *Dec 2018 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, 2019, 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.

In a July 28, 2020 order,<sup>54</sup> the FERC reopened the record to allow parties an opportunity to present written evidence applying the FERC's *Opinion 569-A* ROE methodology to the facts of this proceeding. Initial briefs are due on or before September 28, 2020; responses to those initial briefs, October 28, 2020.

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

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

Rehearing remains pending of the FERC's October 6, 2017 order rejecting the TOs' June 5, 2017 filing in this proceeding.<sup>55</sup> As previously reported, the June 5 filing was designed to reinstate TOs' transmission rates to those in place prior to the FERC's orders later vacated by the DC Circuit's *Emera Maine*<sup>56</sup> decision. In its *Order Rejecting Filing*, the FERC required the TOs to continue collecting their ROEs currently on file, subject to a future FERC order.<sup>57</sup> The FERC explained that it will "order such refunds or surcharges as necessary to replace the rates set in the now-vacated order with the rates that the Commission ultimately determines to be just and reasonable in its order on remand" so as to "put the parties in the position that they would have been in but for [its] error." For the time being, so as not to "significantly complicate the process of putting into effect whatever ROEs the Commission establishes on remand" or create "unnecessary and detrimental variability in rates," the FERC has temporarily left in place the ROEs set in *Opinion 531-A*, pending an order on remand.<sup>58</sup> On November 6, the TOs requested rehearing of the *Order Rejecting Filing*. On December 4, 2017, the FERC issued a tolling order providing it additional time to consider the TOs' request for rehearing of the *Order Rejecting Filing*, which remains pending. If you have any questions concerning this matter, please contact Joe Fagan (202-218-3901; [jfagan@daypitney.com](mailto:jfagan@daypitney.com)) or Eric Runge (617-345-4735; [ekrunge@daypitney.com](mailto:ekrunge@daypitney.com)).

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<sup>51</sup> *Constellation Mystic Power, LLC*, 172 FERC ¶ 61,045 (July 17, 2020) (order on compliance and directing further compliance).

<sup>52</sup> In 2004, a group of creditors acquired the units from the then-owner in exchange for extinguishing the debt owed by those owners. Because the units changed ownership as a consequence of the transfer in lieu of foreclosure, Mystic should have included the transaction in the original cost study. The FERC rejected Mystic's assertion that the transfer in lieu of foreclosure did not represent a sale or purchase.

<sup>53</sup> *Id.* at P 54.

<sup>54</sup> *Constellation Mystic Power, LLC*, 172 FERC ¶ 61,093 (July 28, 2020).

<sup>55</sup> *ISO New England Inc.*, 161 FERC ¶ 61,031 (Oct. 6, 2017) ("*Order Rejecting Filing*"), *reh'g requested*.

<sup>56</sup> *Emera Maine v. FERC*, 854 F.3d 9 (D.C. Cir. 2017) ("*Emera Maine*").

<sup>57</sup> *Order Rejecting Filing* at P 1.

<sup>58</sup> *Id.* at P 36.



- **2020/21 Power Year Transmission Rate Filing (ER09-1532; RT04-2)**

On July 31, 2020, the Participating Transmission Owners (“PTOs”) Administrative Committee (“PTO AC”) submitted a filing identifying adjustments to regional transmission service charges under Section II of the ISO Tariff for the period June 1, 2020 through May 31, 2021. The filing reflected the charges to be assessed under annual transmission formula rates, reflecting actual 2019 cost data, Forecasted Annual Transmission Revenue Requirements associated with projected PTF additions for the 2019 Forecast Period, and the Annual True-up including associated interest. The PTO AC states that the annual updates results in a Pool “postage stamp” RNS Rate of \$129.26 /kW-year effective June 1, 2020, an increase of \$17.32 /kW-year from the charges that went into effect on June 1, 2019. In addition, the annual update to the Schedule 1 formula rate results in a charge of \$1.745 kW-year, a \$0.152/kW-year increase from the Schedule 1 charge that last went into effect on June 1, 2019. This filing will be reviewed at the August 18-19 Reliability/Transmission Committee summer meeting. The filing will not be noticed for public comment. If there are questions on this proceeding, please contact Eric Runge (617-345-4735; [ekrunge@daypitney.com](mailto:ekrunge@daypitney.com)).

- **ISO Securities: Authorization for Future Drawdowns (ES20-46)**

On July 13, 2020, the FERC authorized continued ISO-NE drawdowns under a \$20 million Revolving Credit Line and a \$4 million line of credit supporting the Payment Default Shortfall Fund,<sup>59</sup> each of which are with TDBank, and have a term of ending June 30, 2021.<sup>60</sup> Unless the July 13 order is challenged, this proceeding will be concluded, If you have any questions concerning this matter, please contact Paul Belval (860-275-0381; [pnbelval@daypitney.com](mailto:pnbelval@daypitney.com)).

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

- **Information Policy §2.3 Revisions (ER20-2518)**

On July 28, 2020, ISO-NE and NEPOOL jointly filed revisions to Section 2.3 the Information Policy. Specifically, the revisions are designed (i) to improve and clarify communications with Participants regarding the status of Participants emerging from bankruptcy and (ii) to provide ISO-NE with greater flexibility when disclosing confidential information of defaulting Participants to the FERC, courts of competent jurisdiction (esp. bankruptcy courts), and/or other agencies. The revisions do not modify the type of information that will be disclosed on weekly notices and do not affect the confidentiality and non-disclosure obligations of Participants under the Information Policy. The revisions were supported by the Participants Committee at its June 4 meeting (Consent Agenda Item #1). An October 1, 2020 effective date was requested. Comments on this filing are due on or before August 18, 2020. Thus far, doc-less interventions have been filed by Calpine and Exelon. If you have any questions concerning this proceeding, please contact Sebastian Lombardi (860-275-0663; [slombardi@daypitney.com](mailto:slombardi@daypitney.com)) or Rosendo Garza (860-275-0660; [rgarza@daypitney.com](mailto:rgarza@daypitney.com)).

- **DAM Offer Window Modification (ER20-2511)**

On July 27, 2020, ISO-NE and NEPOOL jointly filed revisions to Market Rule 1 Section 1.10.1A to extend by 30 minutes the Day-Ahead Energy Market (“DAM”) offer window. Also included with the DAM Offer Window modification were two Offer Cap clean-up changes, one to add Demand Reduction Offers to the consolidated offer floor provisions of Section III.1.9.1.2, the other to remove “Energy Offer Cap” from Section III.1.10.1A(e)(ii). The revisions were supported by the Participants Committee at its June 4 meeting (Consent Agenda Item #2). A September 30, 2020 effective date was requested. Comments on this filing are due on or before August 17, 2020. Thus far, doc-less interventions have been filed by Calpine, Exelon, FirstLight, and PSEG. If you have any questions

<sup>59</sup> *ISO New England Inc.*, 172 FERC ¶ 62,017 (July 13, 2020) (continuing authorization through July 12, 2022).

<sup>60</sup> See *ISO New England Inc.*, 139 FERC ¶ 62,248 (June 22, 2012) (initially authorizing borrowings through June 30, 2014); *ISO New England Inc.*, 147 FERC ¶ 62,091 (May 6, 2014) (continuing authorization through June 30, 2015); *ISO New England Inc.*, 151 FERC ¶ 62,185 (June 15, 2015) (continuing authorization through June 30, 2017); *ISO New England Inc.*, 159 FERC ¶ 62,143 (May 9, 2017) (continuing authorization through June 30, 2019); 163 FERC ¶ 62,144 (June 1, 2018) (continuing authorization through May 31, 2020).

concerning this proceeding, please contact Sebastian Lombardi (860-275-0663; [slombardi@daypitney.com](mailto:slombardi@daypitney.com)) or Rosendo Garza (860-275-0660; [rgarza@daypitney.com](mailto:rgarza@daypitney.com)).

- **EE CSOs During Scarcity Conditions (ER20-1967)**

On July 21, 2020, the FERC accepted changes jointly filed by ISO-NE and NEPOOL to address an implementation issue regarding the treatment of energy efficiency resources (“EE”) during Capacity Scarcity Conditions (“EE Changes”).<sup>61</sup> The EE Changes remove EE Capacity Supply Obligations (“CSOs”) from the denominator of the balancing ratio outside of measure hours, so that EE will be absent from both the numerator and the denominator of the ratio in those hours. The EE Changes are designed to eliminate the undercollection problem and associated mutual insurance pool charges, and to more appropriately allocate Pay For Performance (“PFP”) proceeds, all while more fully honoring the FERC’s directive in the 2014 PFP Order to calculate performance payments for EE only when scarcity conditions occur during measure hours. Unless the July 21 order is challenged, this proceeding will be concluded. If you have any questions concerning this matter, please contact Pat Gerity (860-275-0533; [pmgerity@daypitney.com](mailto:pmgerity@daypitney.com)).

- **Waiver Request: Settlement Only Resources Definition -- GMP’s Searsburg facility (ER20-1755)**

Green Mountain Power (“GMP”)’s May 4, 2020 request for a limited waiver from the revised definition of Settlement Only Resources<sup>62</sup> as applied to GMP’s Searsburg wind power facility<sup>63</sup> (because the vintage and unique physical characteristics of the Searsburg facility’s wind turbines will make compliance with the revised definition of a Settlement Only Resource infeasible) remains pending before the FERC.<sup>64</sup> No comments on GMP’s waiver request were filed before the May 22, 2020 comment date. NEPOOL filed a doc-less intervention. If you have any questions concerning this matter, please contact Pat Gerity (860-275-0533; [pmgerity@daypitney.com](mailto:pmgerity@daypitney.com)).

- **ESI Alternatives (ER20-1567)**

This proceeding was initiated by ISO-NE’s April 15, 2020 filing of Tariff revisions to incorporate comprehensive, long-term market enhancements to address the fuel security challenges facing the New England region (“Energy Security Improvements” or “ESI”).<sup>65</sup> The revisions included NEPOOL-supported alternatives to certain aspects of the enhancements proposed by ISO-NE, which ISO-NE and NEPOOL agreed would be considered on equal legal footing with ISO-NE’s favored alternative. ISO-NE asked that the FERC issue an order and accept the changes effective no later than November 1, 2020, conditioned on ISO-NE’s filing of an appropriate market power mitigation proposal supported by a Market Power Assessment by the fourth quarter of 2021. The ESI Proposals were considered at the April 2 Participants Committee meeting. ISO-NE’s ESI proposal with three amendments proposed by NESCOE was approved by NEPOOL and is the NEPOOL Alternative. ISO-NE’s ESI proposal without the

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<sup>61</sup> *ISO New England Inc.*, Docket No. ER20-1967 (July 21, 2020) (unpublished letter order).

<sup>62</sup> See ER20-1582 below.

<sup>63</sup> The Searsburg facility is comprised of eleven Zond Z-40 turbines, each of which is rated at 550 kW; the overall project has a nameplate rating of 6MW. However, due to the age and physical characteristics of the turbines (the facility went online in July 1997, and reached its projected design lifetime of 20 years in July 2017), the Searsburg facility has a 20-25 percent capacity factor and produces on average 1.2 to 1.5 MW annually.

<sup>64</sup> Searsburg’s SCADA system does not have the ability to set an active power limit for the wind facility, and the GMP control room does not have any turbine-level control capability. In addition, because the facility’s Zond Z-40 turbines are among the last turbines of this model still in operation in the country, updated or modified control systems or spare parts for Searsburg’s legacy Zond turbines are not available, and GMP states that it is unable to acquire turbine software capable of allowing Searsburg to set up an active power limit. The power output of the facility can only be limited by manually taking individual turbines offline, if a technician is available, or alternatively, shutting down the entire plant remotely by tripping the substation breaker, potentially damaging the wind turbines. Over the coming years, as each of Searsburg’s turbines becomes inoperable, GMP will decommission the turbine.

<sup>65</sup> This filing was submitted in response to the requirements of the *Mystic Waiver Order*, which directed ISO-NE, in part, to submit permanent Tariff revisions reflecting improvements to its market design to better address regional fuel security concerns. See *ISO New England Inc.*, 164 FERC ¶ 61,003 (July 2, 2018), *reh’g requested (“Mystic Waiver Order”)*.

amendments (the “ISO-NE Proposal”) was not supported. Comments on this filing are due on or before May 15, 2020. On April 24, NEPOOL submitted comments to provide NEPOOL's support for the NEPOOL Alternative.

Comments and protests were filed by Avangrid, API, Calpine/Vistra, Cogentrix, Dominion, Excelerate, Exelon, FirstLight, IECG, MA AG/NH OCA, MMWEC, NECOES/ENE, NESCOE, Repsol, NEPGA, NRG, PIOs, ISO-NE IMM, Potomac Economics, CT DEEP, MPUC, VT PUC, AEE, EPSA, National Hydropower Assoc., and the National Gas Supply Association (“NGSA”). On June 1 NEPOOL and NESCOE filed answers to some of the pleadings submitted. Doc-less interventions were filed by Acadia Center, Brookfield RTM, CT OCC, CT AG, CLF, ENE, Environmental Defense Fund, Eversource, National Grid, NextEra, NRDC/Sustainable FERC Project, PSEG, Repsol, Shell, UCS, Vistra, AWEA, APPA, EPSA, Helix Maine, Public Citizen, Sierra Club, and Vote Solar. On June 5, [Calpine/Vistra](#) and [NEPGA](#) answered [NESCOE's May 15 protest](#). On June 10, FirstLight answered [NEPOOL's](#) and [NESCOE's](#) answers. ISO-NE submitted its answer to various pleadings on June 16. On June 22, NESCOE filed a second answer, to the June 5 answers by [NEPGA](#) and [Calpine/Vistra](#). [NESCOE](#), and the [MA AG](#) answered [ISO-NE's Jun 16 answer](#) on June 30, And, finally, NEPOOL answered [ISO-NE's out-of-time answer](#) on July 1.

There has been no activity in this proceeding since the last Report and this matter remains pending before the FERC. If you have any questions concerning this proceeding, please contact Sebastian Lombardi (860-275-0663; [slombardi@daypitney.com](mailto:slombardi@daypitney.com)) or Rosendo Garza (860-275-0660; [rgarza@daypitney.com](mailto:rgarza@daypitney.com)).

- **Inventoried Energy Program (Chapter 2B) Remand (ER19-1428)**

Rehearing has been requested of the FERC’s June 18, 2020 order accepting the ISO-NE’s Inventoried Energy Program (“IEP”), eff. May 28, 2019.<sup>66</sup> The *IEP Remand Order* was issued following voluntary remand from the DC Circuit of challenges to the FERC’s August 6, 2019 notice<sup>67</sup> that the IEP became effective by operation of law (because the FERC indicated was unable to act on ISO-NE’s IEP filing on or before its statutory deadline “because of a lack of quorum”). In accepting the IEP in the *IEP Remand Order*, the FERC agreed with ISO-NE that “the current market design contains a “misaligned incentives” problem, such that fuel secure resources may not be sufficiently incented to make additional investments in energy supply arrangements, which may have adverse efficiency and reliability consequences under the existing market rules” and found that the IEP “is a reasonable short-term solution to compensating, in a technology-neutral manner, resources that provide fuel security.”<sup>68</sup> The FERC stated that the IEP “will help ISO-NE address winter energy security in light of the misaligned incentives in the market, while ISO-NE finishes developing a long-term market solution.”<sup>69</sup>

Challenges to the *IEP Remand Order* were filed by MA AG, MPUC, and jointly by NECOS<sup>70</sup> and ENE, NH PUC and NH OCA, and by Sierra Club and UCS. The requests for rehearing are pending, with FERC action required on or before August 17, 2020 (the first business day that is 30 days from the day that the first requests for rehearing were filed), or the requests will be deemed denied by operation of law. If you have

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<sup>66</sup> *ISO New England Inc.*, 171 FERC ¶ 61,235 (June 18, 2020) (“*IEP Remand Order*”).

<sup>67</sup> Requests for rehearing of the August 6, 2019 notice (“IEP Notice”) were filed by the MA AG, Clean Energy Advocates, NECOS/ENE, NESCOE, MPUC, NH PUC/NH OCA. Those requests, which challenged the IEP Notice on substantive and procedural grounds, were similarly denied by operation of law. On October 7, 2019, the FERC provided notice that the “Commission took no action on the requests for rehearing within 30 days of their filing ... and that the requests for rehearing were denied by operation of law.” As summarized in previous Reports, petitions for review of those notices were filed with the DC Circuit (Case No. 19-1224). On April 14, 2020, the FERC filed a motion for voluntary remand with the DC Circuit to allow the FERC to issue an order addressing the filing since it then had a quorum in this proceeding. The DC Circuit granted the motion on April 21, 2020.

<sup>68</sup> *Id.* at PP 32-33.

<sup>69</sup> *Id.* at P 34.

<sup>70</sup> “NECOS” are Belmont, Block Island Utility District, Braintree, Georgetown, Groveland, Hingham, Littleton (MA) Electric Light Dept., Merrimack, Middleborough, Middleton, North Attleborough, Norwood, Pascoag, Reading, Rowley, Stowe, Taunton, and Wellesley.

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

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

Still pending FERC action 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 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. Given the passage of time, monthly reporting on this matter will cease with this Report. Should the FERC in the future issue an order in this proceeding, that order will be summarized in the next Report to be issued. Until then, should you have any questions concerning this matter, please contact Pat Gerity ([pmgerity@daypitney.com](mailto: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*<sup>71</sup> compliance filing.<sup>72</sup> 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.<sup>73</sup>

**Order 841 Compliance Filing II (ER19-470-004).** On August 4, 2020, the FERC conditionally accepted<sup>74</sup> the February 10, 2020 compliance filing jointly filed by ISO-NE and NEPOOL<sup>75</sup> in response to the *Order 841*

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<sup>71</sup> See *Elec. Storage Participation in Mkts. Operated by Regional Transmission Orgs. and Indep. Sys. Operators*, Order No. 841, 162 FERC ¶ 61,127 (Feb. 15, 2018) ("*Order 841*").

<sup>72</sup> *ISO New England Inc.*, 169 FERC ¶ 61,140 (Nov. 22, 2019) ("*Order 841 Initial Compliance Filing Order*").

<sup>73</sup> 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.

<sup>74</sup> *ISO New England Inc.*, 172 FERC ¶ 61,125 (Aug. 4, 2020) ("*Order 841 Compliance Filing II Order*").

<sup>75</sup> 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; (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 (iii) 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.

*Initial Compliance Filing Order*, subject to a two further compliance filings, one due on or before November 2, 2020, and the other on or before August 4, 2021.

The **November 2020 compliance filing** must address concerns that the FERC raised with respect to the application of transmission charges to electric storage resources. Finding that ISO-NE “has failed to demonstrate that an electric storage resource that is self-scheduled to charge at a fixed MW quantity is providing a service that warrants exempting its *full* self-scheduled charging MW from transmission charges,” the FERC directed ISO-NE to file, on or before November 2, 2020, proposed Tariff revisions: (i) specifying that it will not apply transmission charges to electric storage resources when they are dispatched to withdraw energy to provide voltage support and reactive control, provide operating reserves, provide regulation, balance energy supply and demand on an economic basis, or address a reliability concern; and (ii) applying transmission charges to electric storage resources when they are not being dispatched to provide one of those tariff-defined services.<sup>76</sup> The November 2020 compliance filing must also modify section III.1.10.6(d)(ii) to either (i) eliminate any suggestion that a host utility could be allowed, through an unwillingness to support the necessary registration, metering, and accounting of the electric storage resource, to decide whether an electric storage resource may participate in the ISO-NE markets; or (ii) to clarify how the section does not serve as a barrier to the participation of electric storage resources.

The **August 4, 2021 compliance filing**<sup>77</sup> must include proposed revisions to Tariff section III.1.10.6(d) to specify how ISO-NE will account for State of Charge and Duration Characteristics of electric storage resources in the Day-Ahead Energy Market. If ISO-NE intends to rely on new bidding parameters, it must define those bidding parameters in its Tariff and explain in its transmittal how those bidding parameters will be incorporated into its Day-Ahead Energy Market engine. If ISO-NE intends to rely on “other means,” it must specify those other means with sufficient detail in its Tariff and explain in its transmittal how those other means will account for State of Charge and Duration Characteristics of electric storage resources in the Day-Ahead Energy Market.

Challenges, if any, to the *Order 841 Compliance Filing II Order* must be filed on or before September 3, 2020. If you have any questions concerning this proceeding, please contact Sebastian Lombardi (860-275-0663; [slombardi@daypitney.com](mailto:slombardi@daypitney.com)).

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

Requests for rehearing and/or clarification of the *Fuel Security Retention Proposal Order*<sup>78</sup> remain pending before the FERC. As previously reported, the *Fuel Security Retention Proposal Order* accepted ISO-NE’s Proposal<sup>79</sup>

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<sup>76</sup> *Order 841 Compliance Filing II Order* at P 52.

<sup>77</sup> The FERC explained that it directed a one-year compliance window to allow ISO-NE sufficient time to develop a solution to account for State of Charge that recognizes the technical complexities of the issue as well as ISO-NE’s existing software constraints, given ISO-NE is in the process of conducting various Day-Ahead Energy Market initiatives, including replacement of its Day-Ahead software.

<sup>78</sup> *ISO New England Inc.*, 165 FERC ¶ 61,202 (Dec. 3, 2018), *reh’g requested* (“*Fuel Security Retention Proposal Order*”). In accepting the ISO-NE Proposal, the FERC, among other things: (i) found ISO-NE’s trigger and assumptions for the fuel security reliability review for retention of resources be reasonable, but required ISO-NE at the end of each winter to “to submit an informational filing comparing the study assumptions and triggers from the modeling analysis to actual conditions experienced in the winter of 2018/19; (ii) found cost allocation on a regional basis to Real-Time Load Obligation just and reasonable and consistent with precedent regarding the past Winter Reliability Programs; (iii) found that entering retained resources into the FCAs as price takers would be just and reasonable to ensure that they clear and are counted towards resource adequacy so that customers do not pay twice for the resource; and (iv) found that it was appropriate to include FCAs 13, 14 and 15 in the term. The FERC agreed that it is necessary to implement a longer-term market solution as soon as possible, and required ISO-NE to file its longer-term market solution no later than June 1, 2019. The FERC declined to provide guidance on what the long-term solution(s) should be.

<sup>79</sup> As previously reported, ISO-NE filed, in response to the *Mystic Waiver Order*, “interim Tariff revisions that provide for the filing of a short-term, cost-of-service agreement to address demonstrated fuel security concerns”. ISO-NE proposed three sets of provisions to expand its authority on a short-term basis to enter into out-of-market arrangements in order to provide greater assurance of fuel security during winter months in New England (collectively, the “Fuel Security Retention Proposal”). ISO-NE stated that the interim provisions would

in all respects, despite the various protests and alternative proposals filed. There was a concurring decision from Commissioner Glick, and a partial dissent from Chairman Chatterjee on the FCA price treatment issue. Challenges to the *Fuel Security Retention Proposal Order* were filed by NEPGA, NRG, Verso, Vistra/Dynegy Marketing & Trade, MPUC, and PIOs.<sup>80</sup> On February 1, 2019, the FERC issued a tolling order to afford it additional time to consider the requests for rehearing, which remain pending. If you have further questions concerning this proceeding, please contact Sebastian Lombardi (860-275-0663; [slombardi@daypitney.com](mailto:slombardi@daypitney.com)).

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

On July 2, 2018, the FERC issued an order<sup>81</sup> that (i) denied ISO-NE's request for waiver of certain Tariff provisions that would have permitted ISO-NE to retain Mystic 8 & 9 for fuel security purposes (ER18-1509); and (ii) instituted an FPA Section 206 proceeding (EL18-182) (having preliminarily found that the ISO-NE Tariff may be unjust and unreasonable in that it fails to address specific regional fuel security concerns identified in the record that could result in reliability violations as soon as year 2022). The *Mystic Waiver Order* required ISO-NE, on or before August 31, 2018 to either: (a) submit interim Tariff revisions that provide for the filing of a short-term, cost-of-service agreement ("COS Agreement") to address demonstrated fuel security concerns (and to submit by July 1, 2019 permanent Tariff revisions reflecting improvements to its market design to better address regional fuel security concerns "Chapter 3 Proposal"); or (b) show cause as to why the Tariff remains just and reasonable in the short- and long-term such that one or both of Tariff revisions filings is not necessary.

Addressing the waiver element, the FERC found the waiver request "an inappropriate vehicle for allowing Mystic 8 and 9 to submit a [COS Agreement] in response to the identified fuel security need" and further that the request "would not only suspend tariff provisions but also alter the existing conditions upon which a market participant could enter into a [COS Agreement] (for a transmission constraint that impacts reliability) and allow for an entirely new basis (for fuel security concerns that impact reliability) to enter into such an agreement." The FERC concluded that "[s]uch new processes may not be effectuated by a waiver of the ISO-NE Tariff; they must be filed as proposed tariff provisions under FPA section 205(d)."<sup>82</sup> Even if it were inclined to apply its waiver criteria, the FERC stated that it would still have denied the waiver request as "not sufficiently limited in scope."<sup>83</sup>

Although it denied the waiver request, the FERC was persuaded that the record supported "the conclusion that, due largely to fuel security concerns, the retirement of Mystic 8 and 9 may cause ISO-NE to violate NERC reliability criteria." Finding ISO-NE's methodology and assumptions in the Operational Fuel-Security Analysis ("OFSA") and Mystic Retirement Studies reasonable, the FERC directed the filing of both interim and permanent Tariff revisions to address fuel security concerns (or a filing showing why such revisions are not necessary).<sup>84</sup> The FERC directed ISO-NE to consider the possibility that a resource owner may need to decide, prior to receiving approval of a COS Agreement, whether to unconditionally retire, and provided examples of how to address that

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sunset after FCA15, with a longer-term market solution to be filed by July 1, 2019, as directed in the *Mystic Waiver Order*. In addition, the ISO-NE transmittal letter described (i) the generally-applicable fuel security reliability review standard that will be used to determine whether a retiring generating resource is needed for fuel security reliability reasons; (ii) the proposed cost allocation methodology (Real-Time Load Obligation, though ISO-NE indicated an ability to implement NEPOOL's alternative allocation methodology if determined appropriate by the FERC); and (iii) the proposed treatment in the FCA of a retiring generator needed for fuel security reasons that elects to remain in service. The ISO-NE Fuel Security Changes were considered but not supported by the Participants Committee at its August 24, 2018 meeting. There was, however, super-majority support for (1) the Appendix L Proposal with some important adjustments to make that proposal more responsive to the FERC's guidance in the Mystic Waiver Order and other FERC precedent, and (2) the PP-10 Revisions, also with important adjustments (together, the "NEPOOL Alternative").

<sup>80</sup> "PIOs" for purposes of this proceeding are Sierra Club, NRDC, Sustainable FERC Project, and Acadia Center.

<sup>81</sup> *ISO New England Inc.*, 164 FERC ¶ 61,003 (July 2, 2018), *reh'g requested* ("Mystic Waiver Order").

<sup>82</sup> *Id.* at P 47.

<sup>83</sup> *Id.* at P 48.

<sup>84</sup> *Id.* at P 55.

possibility.<sup>85</sup> The FERC also directed ISO-NE include with any proposed Tariff revisions a mechanism that addresses how cost-of-service-retained resources would be treated in the FCM<sup>86</sup> and an *ex ante* cost allocation proposal that appropriately identifies beneficiaries and adheres to FERC cost causation precedent.<sup>87</sup>

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

- ◆ **NEPGA** (requesting that the FERC grant clarification that it directed, or on rehearing direct, ISO-NE to adopt a mechanism that prohibits the re-pricing of Fuel Security Resources in the FCA at \$0/kW-mo. or at any other uncompetitive offer price);
- ◆ **Connecticut Parties**<sup>88</sup> (requesting that the FERC clarify that (i) the discussion in the *Mystic Waiver Order* of pricing treatment in the FCM for fuel security reliability resources is not a final determination nor is it intended to establish FERC policy; (ii) the FERC did not intend to prejudge whether entering those resources in the FCM as price takers would be just and reasonable; and (iii) that ISO-NE may confirm its submitted position that price taking treatment for these resources would, in fact, be a just and reasonable outcome. Failing such clarification, Connecticut Parties request rehearing, asserting that the record fails to support a determination that resources retained for reliability to address fuel security concerns must be entered into the FCM at a price greater than zero);
- ◆ **ENECOS** (asserting that the *Mystic Waiver Order* (i) misplaces reliance on ISO-NE “assertions concerning ‘fuel security,’ which do not in fact establish a basis in evidence or logic for initiating” a Section 206(a) proceeding; (ii) impermissibly relies on extra-record material that the FERC did not actually review and that intervenors were afforded no meaningful opportunity to challenge; and (iii) speculation concerning potential future modifications to the FCM bidding rules as to retiring generation retained for fuel security misunderstands the problem it seeks to address, and prejudices the already truncated opportunities for stakeholder input in this proceeding), ENECOS suggest that the FERC should grant rehearing, vacate its show cause directive, strike its dictum concerning potential treatment of FCM bidding for retiring generation retained for “fuel security,” and direct ISO-NE to proceed either in accordance with its Tariff or under FPA Section 205 to address, with appropriate evidentiary support, whatever concerns it believes to exist concerning “fuel security”);
- ◆ **MA AG** (asserting that the decision to institute a Section 206 proceeding was insufficiently supported by sole reliance on highly contested OFSA and Mystic Retirement Studies; and the FERC should reconsider the timeline for the permanent tariff solution and set the deadline for implementation no later than February 2020);
- ◆ **MPUC** (challenging the Order’s (i) adoption of ISO-NE’s methodology and assumptions in the OFSA and Mystic Retirement Studies without undertaking any independent analysis; (ii) failure to address arguments and analysis challenging assumptions in the OFSA and Mystic Retirement Studies; (iii) failure to address the MPUC argument that the Mystic Retirement Studies adopted a completely new standard for determining a reliability problem three years in advance; (iv) unreasonably discounting of the ability of Pay-for-Performance to provide sufficient incentives to Market Participants to ensure their performance under stressed system conditions; and (v) failure to direct ISO-NE to undertake a Transmission Security Analysis consistent with the provisions in the Tariff);
- ◆ **New England EDCs**<sup>89</sup> (requesting clarification that (i) the central purpose of ISO-NE’s July 1, 2019 filing is to assure that New England adds needed new infrastructure to address the fuel supply shortfalls

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<sup>85</sup> *Id.* at PP 56-57.

<sup>86</sup> *Id.* at P 57.

<sup>87</sup> *Id.* at P 58.

<sup>88</sup> “Connecticut Parties” are CT PURA and CT DEEP.

<sup>89</sup> The “EDCs” are the National Grid companies (Mass. Elec. Co., Nantucket Elec. Co., and Narragansett Elec. Co.) and Eversource Energy Service Co. (on behalf of its electric distribution companies – CL&P, NSTAR and PSNH).

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**<sup>90</sup> (asserting that (i) the FERC failed to respond to or provide a reasoned explanation for rejecting the arguments submitted by numerous parties that key assumptions underlying and the results of the ISO-NE analyses were flawed; and (ii) the FERC's determination that ISO-NE's analyses were reasonable is not supported by substantial evidence in the record); and
- ◆ **AWEA/NGSA** (asserting that the FERC erred (i) in finding that ISO-NE's OFSA and subsequent impact analysis of fuel security was reasonable without further examination and (ii) in its preliminary finding that a short-term out-of-market solution to keep Mystic 8 & 9 in operation is needed to address fuel security issues).

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

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

- **CASPR (ER18-619)**

Rehearing of the FERC's order accepting ISO-NE's Competitive Auctions with Sponsored Policy Resources ("CASPR") revisions,<sup>91</sup> summarized in more detail in prior Reports, remains pending. Those requests were filed by (i) **NextEra/NRG** (which challenged the RTR Exemption Phase Out); (ii) **ENECOS**<sup>92</sup> (challenging the FERC's findings with respect to the definition of Sponsored Policy Resource and the allocation of CASPR side payment costs to municipal utilities); (iii) **Clean Energy Advocates**<sup>93</sup> (which challenged the CASPR construct in its entirety, asserting that state-sponsored resources should not be subject to the MOPR); and (iv) **Public Citizen** (which also challenged the CASPR construct in its entirety and the *CASPR Order's* failure to define "investor confidence"). On April 24, 2018, ISO-NE answered Clean Energy Advocates' answer. On May 7, 2018, the FERC issued a tolling order to afford it additional time to consider the requests for rehearing, which remain pending. If you have any questions concerning this proceeding, please contact Dave Doot (860-275-0102; [dtdoot@daypitney.com](mailto:dtdoot@daypitney.com)) or Sebastian Lombardi (860-275-0663; [slombardi@daypitney.com](mailto:slombardi@daypitney.com)).

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

On July 30, 2020, TransCanada petitioned the DC Circuit for review of the FERC's April 1, 2020 order on compliance and remand that found (for a second time) that the bid results from the 2013/14 Winter Reliability

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<sup>90</sup> "PIOs" are the Sierra Club, Natural Resources Defense Council ("NRDC"), and Sustainable FERC Project.

<sup>91</sup> *ISO New England Inc.*, 162 FERC ¶ 61,205 (Mar. 9, 2018) ("*CASPR Order*"), *reh'g requested*.

<sup>92</sup> The Eastern New England Consumer-Owned Systems ("ENECOS") are: Braintree Electric Light Department, Georgetown Municipal Light Department, Groveland Electric Light Department, Littleton Electric Light & Water Department, Middleton Electric Light Department, Middleborough Gas & Electric Department, Norwood Light & Broadband Department, Pascoag (Rhode Island) Utility District, Rowley Municipal Lighting Plant, Taunton Municipal Lighting Plant, and Wallingford (Connecticut) Department of Public Utilities. Wellesley Municipal Light Plant, which intervened in this proceeding as one of the ENECOS, did not join in the ENECOS' request for rehearing.

<sup>93</sup> For purposes of this proceeding, "Clean Energy Advocates" are, collectively, the NRDC, Sierra Club, Sustainable FERC Project, CLF, and RENEW Northeast, Inc.



Program were just and reasonable (“2013/14 Winter Reliability Program Order on Compliance and Remand”).<sup>94</sup> That order followed a second series of filings<sup>95</sup> in response to an earlier DC Circuit Order remanding this matter back to the FERC.<sup>96</sup> In its 2013/14 Winter Reliability Program Order on Compliance and Remand, the FERC did not find convincing challenges by TransCanada and the MA AG to ISO-NE’s recommendation that was an “insufficient demonstration of market power to warrant modification of program.”<sup>97</sup>

Although TransCanada requested rehearing of the 2013/14 Winter Reliability Program Order on Compliance and Remand on May 1, 2020, and the FERC issued a June 1, 2020 tolling order to afford it additional time to consider TransCanada’s request for rehearing, the DC Circuit’s *Allegheny* decision, which recently held that tolling orders “are not the kind of action on a rehearing application that can fend off a deemed denial and the opportunity for judicial review”, makes clear that TransCanada’s request was deemed denied as of June 1, 2020 (triggering the 60-day period during which a petition for review of the FERC’s order(s) can be filed with an appropriate federal court. With TransCanada’s filing of the July 30 appeal, and absent any further FERC activity prior to the filing of the record in the DC Circuit proceeding,<sup>98</sup> reporting on this matter will move to Section XV in future Reports. If you have any questions concerning this proceeding, please contact Sebastian Lombardi (860-275-0663; [slombardi@daypitney.com](mailto:slombardi@daypitney.com)).

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

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

On July 27, 2020, the FERC issued a notice (i) that the rehearing of the *CIP IROL Cost Recovery Order*<sup>99</sup> requested June 25, 2020 by the IROL-Critical Facility Owners<sup>100</sup> may be deemed denied by operation of law and (ii) providing for further consideration (“Notice”). In accordance with *Allegheny*, while the *CIP IROL Cost Recovery Order*<sup>101</sup> may now be appealed to a federal court of appeals within 60 days of the Notice, the FERC retains the right to address the rehearing request in a future order, modifying or setting aside its order, in whole or in part, up until the record of the proceeding is filed with a court of appeals.<sup>102</sup> As previously

<sup>94</sup> *ISO New England Inc.*, 171 FERC ¶ 61,003 (Apr. 1, 2020) (“2013/14 Winter Reliability Program Order on Compliance and Remand”), *reh’g requested*. In this Order, the FERC also provided the further reasoning requested by the DC Circuit for this finding.

<sup>95</sup> The second series of filings followed the FERC’s “2013/14 Winter Reliability Program Remand Order”, *ISO New England Inc.*, 156 FERC ¶ 61,097 (Aug. 8, 2016).

<sup>96</sup> *TransCanada Power Mktg. Ltd. v. FERC*, 2015 U.S. App. LEXIS 22304 (D.C. Cir. 2015) (remanding the FERC’s decision in ER13-2266 back the FERC to either offer a reasoned justification for the order in ER13-2266 or to revise its disposition to ensure that the Program rates are just and reasonable; the DC Circuit agree with TransCanada that the record upon which the FERC had to that point relied was devoid of any evidence regarding how much of the 2013/14 Winter Reliability Program cost was attributable to profit and risk mark-up (and without which the FERC could not properly assess whether the Program’s rates were just and reasonable).

<sup>97</sup> ISO-NE submitted a compliance filing on Jan. 23, 2017 reporting the IMM’s conclusion that “the auction was not structurally competitive and a ‘small proportion’ of the total cost of the program may be the result of the exercise of market power” but that the “vast majority of supply was offered at prices that appear reasonable and that, for a number of reasons, it is difficult to assess the impact of market power on cost.” Based on the IMM and additional analysis, ISO-NE recommended in its compliance filing, accepted in the 2013/14 Winter Reliability Program Order on Compliance and Remand, that there was “insufficient demonstration of market power to warrant modification of program.”

<sup>98</sup> Under 16 USC § 8251(a), the FERC retains the right to address the rehearing request in a future order, modifying or setting aside its order, in whole or in part, up until the record of the proceeding is filed with a court of appeals. See n. 102 *supra*.

<sup>99</sup> *ISO New England Inc.*, 171 FERC ¶ 61,160 (May 26, 2020) (“*CIP IROL Cost Recovery Order*”).

<sup>100</sup> “IROL-Critical Facility Owners” are Calpine, Cogentrix, Cross-Sound Cable, FirstLight, NextEra, NRG, and Vistra.

<sup>101</sup> *ISO New England Inc.*, 171 FERC ¶ 61,160 (May 26, 2020) (“*CIP IROL Cost Recovery Order*”).

<sup>102</sup> See 16 USC § 8251(a) (“Until the record in a proceeding shall have been filed in a court of appeals, ... the [FERC] may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.”).

reported, the *CIP IROL Cost Recovery Order* accepted Schedule 17, which sets forth 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”). Importantly, in accepting Schedule 17, the FERC found that “Schedule 17 permits recovery only of CIP costs incurred on or after the effective date of a section 205 filing made by an IROL-Critical Facility Owner to recover such costs”.<sup>103</sup> It is this determination that was at the heart of IROL-Critical Facility Owners’ request for rehearing, which argued that, as a result, the *CIP IROL Cost Recovery Order* ultimately establishes a rate that is unjust, unreasonable, and inconsistent with the clear cost recovery right Congress established in FPA section 219. IROL-Critical Facility Owners have until September 25, 2020 to appeal the *CIP IROL Cost Recovery Order* to a federal court. If you have any questions concerning this proceeding, please contact Eric Runge (617-345-4735; [ekrunge@daypitney.com](mailto:ekrunge@daypitney.com)).

- **Order 845 Compliance Filing II (ER19-1951-002)**

On July 17, 2020, ISO-NE, NEPOOL and the PTO AC submitted an additional compliance filing (“*Order 845 Compliance Filing II*”) in response to the March 19, 2020 order<sup>104</sup> conditionally accepting the first set of changes filed in response to the requirements of *Order 845* (“*Order 845 Compliance Filing I*”).<sup>105</sup> The changes in *Order 845 Compliance Filing II* were considered and supported by the Participants Committee at its June 4 meeting (Agenda Item #7). Comments on *Order 845 Compliance Filing II* are due on or before August 7, 2020. If you have any questions concerning this matter, please contact Eric Runge (617-345-4735; [ekrunge@daypitney.com](mailto:ekrunge@daypitney.com)).

## V. Financial Assurance/Billing Policy Amendments

- **FAP Enhancements and Clean-Up Changes (ER20-2145)**

On June 24, 2020, ISO-NE and the NEPOOL jointly filed enhancements and clean-up changes to the Financial Assurance Policy (“FAP”). Among other things, the filing included: (i) updates and enhancements to the credit insurance provisions; (ii) updates to the form letter of credit and related provisions; and (iii) miscellaneous revisions, including a change to the retention period for financial assurance after membership termination and a conforming change in the FCM Charge Rate calculation (collectively, the “FAP Changes”). A September 10, 2020 effective date was requested. The FAP Changes were unanimously supported by the Participants Committee at its June 23 meeting (Agenda Item #2). Comments on this filing were due on or before July 15; none were filed. Doc-less interventions were submitted by Calpine, Eversource, National Grid, NRG, and Financial Marketers Coalition. This matter is pending before the FERC. If you have any questions concerning this matter, please contact Paul Belval ([pnbelval@daypitney.com](mailto:pnbelval@daypitney.com); 860-275-0381).

<sup>103</sup> *Id.* at PP 1, 27. “Section 2.2(A) of proposed Schedule 17 would permit IROL-Critical Facility Owners to make FPA section 205 filings to recover costs incurred by the IROL Critical Facility Owner *during the period in which the subject facility is designated as an IROL-Critical Facility*. While the parties dispute the meaning of the italicized language, that language is appropriately read in conjunction with the requirement that IROL-Critical Facility Owners submit individual FPA section 205 filings to recover such costs ... Thus, we find that, read in context with the remainder of section 2.2(A), the italicized language would allow IROL-Critical Facility Owners to recover only those costs incurred on or after the effective date of the relevant individual FPA section 205 filing.”

<sup>104</sup> *ISO New England Inc. and Participating Transmission Owners Admin. Comm.*, 170 FERC ¶ 61,209 (Mar. 19, 2020) (“*Order 845 Compliance Filing Order*”).

<sup>105</sup> The *Order 845 Compliance Filing Order* identified a number of ways in which *Order 845 Compliance Filing I* only partially or did not comply at all with *Order 845*. The *Order* directed changes that needed to include additional justification for proposed changes or revisions that make no modification to the *pro forma* LGIA/LGIP in the following areas: Stand-Alone Network Upgrades definition, Interconnection Customer’s ability to exercise the option to build; Option to Build Cost Recovery; Determination of Contingent Facilities; requesting interconnection service below generating facility capacity; Provisional Interconnection Service; definition of Surplus Interconnection Service; Surplus Interconnection Service process;

- **Billing Policy Enhancements and Clean-Up Changes (ER20-1862)**

On July 24, the FERC accepted the enhancements and clean-up changes to the Billing Policy jointly filed by ISO-NE and NEPOOL.<sup>106</sup> Among other things, the changes: (i) update the definition of Non-Hourly Charges (to include any pass-through charges where ISO-NE acts as agent (including communications related charges, OASIS-related charges, and fees related to the Shortfall Funding Arrangement); (ii) modify the timing of Statements for Non-Hourly Charges (from the first Monday after the tenth of each calendar month to the first Monday after the ninth of each calendar month); (iii) reflect the issuance (rather than the sending) of Invoices and Remittance Advices; (iv) change the timing for payment instructions; (v) limit distributions from late payment accounts (to only those Market Participants not in a Payment Default at the time of a distribution); and (vi) limit the frequency for the use of pre-payments (to five in any rolling 365-day period), limiting the risk that prepayment provisions are being used to deflate financial assurance obligations. In accepting the changes, the FERC noted that it was not persuaded by the Plant-E comments protesting the change that would limit for all the frequency for the use of pre-payments.<sup>107</sup> The changes were accepted effective July 27, 2020, as requested. Unless the July 24 order is challenged, with any challenges due on or before August 24, 2020, this matter will be concluded. If you have any questions concerning this matter, please contact Paul Belval ([pnbelval@daypitney.com](mailto:pnbelval@daypitney.com); 860-275-0381).

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

- **Schedule 22: NSTAR/Vineyard Wind LGIA (ER20-2489)**

On July 23, Eversource filed an executed, non-conforming LGIA by and among ISO-NE, NSTAR and Vineyard Wind, LLC (“Vineyard Wind”), designated as Original Service Agreement No. LGIA-ISONE/NSTAR-20-01 under Schedule 22 of the ISO-NE OATT. The LGIA is non-conforming in that it contains certain deviations in Appendix C.3 necessary to reflect unique characteristics of the proposed interconnection -- the location of the met gathering station(s) and the layout of the facility due to its location in offshore federal waters rather than onshore. A July 10, 2020 effective date was requested. Comments on this filing are due August 7. If you have any questions concerning this matter, please contact Pat Gerity ([pmgerity@daypitney.com](mailto:pmgerity@daypitney.com); 860-275-0533).

- **Schedule 21-NEP: DWW E&P Agreement (ER20-2454)**

On July 17, New England Power Company (“NEP”) filed under Schedule 21-NEP an Engineering & Procurement Agreement (“E&P Agreement”) between NEP and DWW REV I, LLC (“DWW”). The E&P Agreement (designated as Service Agreement No. E&P-NEP-01) is to facilitate NEP’s performance of preliminary engineering and certain procurement-related activities in connection with the interconnection of DWW’s Revolution Wind project, a proposed 704 MW offshore wind generating facility project, to NEP’s transmission system at the 115kV Davisville substation in Washington County, Rhode Island, prior to the parties entering into an LGIA. A June 17, 2020 effective date was requested. Comments on this filing are due on or before August 7. If you have any questions concerning this matter, please contact Pat Gerity ([pmgerity@daypitney.com](mailto:pmgerity@daypitney.com); 860-275-0533).

- **Schedule 21-UI: LCSA: UI/NextEra (ER20-2449)**

On July 17, UI filed under Schedule 21-UI a Localized Costs Sharing Agreement (“LCSA”) by and between UI and NextEra Energy Marketing (“NextEra”). UI filed the LCSA so that it can recover NextEra’s Category B Load Ratio Share of the revenue requirement for UI’s Localized Facilities under Schedule 21-UI.<sup>108</sup> A July 1, 2020 effective date was requested. Comments on this filing are due August 7. Thus far, Eversource

<sup>106</sup> *ISO New England Inc. and New England Power Pool Participants Comm.*, 172 FERC ¶ 61,089 (July 24, 2020).

<sup>107</sup> *Id.* at PP 15-16.

<sup>108</sup> NextEra entered into the Agreement on behalf for its affiliate Nutmeg Solar, LLC, whose electric generating facility consists of a 19.9 MW solar array located in Enfield, Connecticut within the NU Local Network / Connecticut Reliability Region outside of UI’s native load service area.

filed a doc-less intervention. If you have any questions concerning this matter, please contact Pat Gerity ([pmgerity@daypitney.com](mailto:pmgerity@daypitney.com); 860-275-0533).

- **Schedule 21-VP: 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, "Interested Parties shall have the opportunity to conduct discovery seeking any information relevant to implementation of the [Attachment P] 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 were due on or before April 9, 2020; none were filed. This matter is pending before the FERC. If you have any questions concerning this proceeding, please contact Pat Gerity (860-275-0533; [pmgerity@daypitney.com](mailto:pmgerity@daypitney.com)).

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

The MPS Merger Cost Recovery Settlement, filed by Emera Maine on May 8, 2018 to resolve all issues pending before the FERC in the consolidated proceedings set for hearing in the *MPS Merger-Related Costs Order*,<sup>109</sup> and certified by Settlement Judge Dring<sup>110</sup> to the Commission,<sup>111</sup> remains pending before the FERC. As previously reported, under the Settlement, permitted cost recovery over a period from June 1, 2018 to May 31, 2021 will be \$390,000 under Attachment P of the BHD OATT and \$260,000 under the MPD OATT. If you have any questions concerning these matters, please contact Pat Gerity (860-275-0533; [pmgerity@daypitney.com](mailto:pmgerity@daypitney.com)).

- **Schedule 21-FG&E Annual Informational Filing (ER09-1498)**

On July 31, 2020, Fitchburg Gas & Electric ("FG&E") submitted its data and schedules used to calculate its annual transmission revenue requirement for Non-PTF Local Network Transmission Service, Firm Point-to-Point Transmission Service and Non-Firm Point-to-Point Transmission Service as set forth in Schedule 21-FG&E covering the June 1, 2020– May 31, 2021 period. FG&E reported that its annual revenue requirement reflected in FG&E's rates effective June 1, 2020, is \$1,378,521. The FERC will not notice this filing for public comment, and absent further activity, no further FERC action is expected. If there are questions on this matter, please contact Pat Gerity (860-275-0533; [pmgerity@daypitney.com](mailto:pmgerity@daypitney.com)).

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<sup>109</sup> *Emera Maine and BHE Holdings*, 155 FERC ¶ 61,230 (June 2, 2016) ("*MPS Merger-Related Costs Order*"). In the *MPS Merger-Related Costs Order*, the FERC accepted, but established hearing and settlement judge procedures for, filings by Emera Maine seeking authorization to recover certain merger-related costs viewed by the FERC's Office of Enforcement's Division of Audits and Accounting ("DAA") to be subject to the conditions of the orders authorizing Emera Maine's acquisition of, and ultimate merger with, Maine Public Service ("Merger Conditions"). The Merger Conditions imposed a hold harmless requirement, and required a compliance filing demonstrating fulfillment of that requirement, should Emera Maine seek to recover transaction-related costs through any transmission rate. Following an audit of Emera Maine, DAA found that Emera Maine "inappropriately included the costs of four merger-related capital initiatives in its formula rate recovery mechanisms" and "did not properly record certain merger-related expenses incurred to consummate the merger transaction to appropriate non-operating expense accounts as required by [FERC] regulations [and] inappropriately included costs of merger-related activities through its formula rate recovery mechanisms" without first making a compliance filing as required by the merger orders. The *MPS Merger-Related Costs Order* set resolution of the issues of material fact for hearing and settlement judge procedures, consolidating the separate compliance filing dockets.

<sup>110</sup> ALJ John Dring was the settlement judge for these proceedings. There were five settlement conferences -- three in 2016 and two in 2017. With the Settlement pending before the FERC, settlement judge procedures, for now, have not been terminated.

<sup>111</sup> *Emera Maine and BHE Holdings*, 163 FERC ¶ 63,018 (June 11, 2018).

## 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](mailto:pmgerity@daypitney.com)).

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

The TOs' November 2, 2015 refund report documenting resettlements of regional transmission charges by ISO-NE in compliance with *Opinions No. 531-A<sup>112</sup> and 531-B<sup>113</sup>* also remains pending. If there are questions on this matter, please contact Pat Gerity (860-275-0533; [pmgerity@daypitney.com](mailto:pmgerity@daypitney.com)).

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

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

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

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

- **LFTR Implementation: 47<sup>th</sup> Quarterly Status Report (ER07-476; RM06-08)**

ISO-NE filed the 47th of its quarterly status reports regarding LFTR implementation on July 15, 2020. ISO-NE reported that it implemented monthly reconfiguration auctions (accepted in ER12-2122) beginning with the month of October 2019. ISO-NE further reported that, while it will continue to evaluate its as-filed LFTR design and financial assurance issues, including an ongoing evaluation of the FTR market and risk associated with FTRs and LFTRs, it is currently focused on higher priority market-design initiatives. These status reports are not noticed for public comment.

- **IMM Quarterly Markets Reports – Spring 2020 (ZZ20-4)**

On July 31, 2020, the IMM filed with the FERC its Spring 2020 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 Spring 2020 Report will be discussed with the Markets Committee at its August 11-13 meeting.

## IX. Membership Filings

- **August 2020 Membership Filing (ER20-2581)**

On July 31, 2020, NEPOOL requested that the FERC accept (i) the memberships of: Blueprint Power Technologies Inc. (Provisional Member); and Advanced Energy Economy Inc. (Fuels Industry Participant); and (ii)

<sup>112</sup> *Martha Coakley, Mass. Att’y Gen.*, 149 FERC ¶ 61,032 (Oct. 16, 2014) (“*Opinion 531-A*”).

<sup>113</sup> *Martha Coakley, Mass. Att’y Gen.*, Opinion No. 531-B, 150 FERC ¶ 61,165 (Mar. 3, 2015) (“*Opinion 531-B*”).

the termination of the Participant status of two End Users, New Hampshire Industries Inc. and The Energy Council of Rhode Island ("TEC-RI"). Comments on this filing are due on or before August 21, 2020.

- **July 2020 Membership Filing (ER20-2277)**

On June 30, 2020, NEPOOL requested that the FERC accept the memberships of: Hampshire Power (Supplier Sector); Invenia Technical Computing Corp. ("Invenia") (Supplier Sector); and Power Ledger Pty. Ltd. (GIS-Only Participant). Comments on this filing were due on or before July 21, 2020; none were filed. This matter is pending before the FERC.

- **Invenia Additional Conditions Informational Filing (ER20-2001)**

On June 5, 2020, pursuant to Section II.A.1(b) of the FAP, ISO-NE submitted an informational filing identifying the additional condition (supplemental financial assurance) required of Invenia for participation in the New England Markets. The additional condition was supported, and made a condition of Invenia's membership, by the Participants Committee at its June 4 meeting. A doc-less intervention was submitted by Public Citizen. This informational filing is pending before the FERC.

- **June 2020 Membership Filing (ER20-1943)**

On July 30, the FERC accepted (i) the memberships of: Actual Energy (Supplier Sector); Borrego Solar Systems, Inc. (AR Sector, DG Sub-Sector); Paper Birch Energy, LLC [Related Person to CS Berlin Ops/Berlin Station (Generation Sector Group Seat)]; Priogen Power LLC (Supplier Sector); and Standard Normal Energy LLC (Supplier Sector); (ii) the termination of the Participant status of: Royal Bank of Canada (Supplier Sector) (May 1, 2020); Wallingford Energy II, LLC [Related Person to Jericho Power (AR Sector; RG Sub-Sector)] (May 1, 2020); Agera Energy LLC (Supplier Sector) (June 1, 2020); and (iii) the name changes of: Versant Power (f/k/a Emera Maine) and IPKeys Power Partners, Inc. (f/k/a IPKeys Power Partners LLC).<sup>114</sup> The membership of Borrego Solar System fully activates the AR Sector's DG Sub-Sector. Accordingly, the AR Sector Voting Share, as well as each of the other five Sector's Voting Share (before any re-allocation of unused Provisional Member Voting Share), will be 16.5%. Comments on this filing were due on or before June 22, 2020; none were filed. This matter is pending before the FERC.

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

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

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

Still pending is the FERC's White Paper, prepared jointly with NERC staff and issued on August 27, 2019, that sets 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

<sup>114</sup> *New England Power Pool Participants Comm.*, Docket No. ER20-1943 (July 30, 2020) (unpublished letter order).

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.

- **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)**

Still pending before the FERC are the proposed changes, filed on February 21, 2020, 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.

Since the last Report, the FERC issued a notice of revised information collections that would impact these Reliability Standards and requested that comments on the collections of information be filed in this proceeding on or before September 22, 2020.<sup>115</sup>

- **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 computing services.<sup>116</sup> 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. Comments were submitted by a private citizen (Barry Jones) and VMware, Inc. on April 21 and 27, respectively. 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. NERC filed its second informational filing on June 19, 2020. With respect to Project 2016-02, NERC reported that it “continues to target a December 2021 filing to the Commission.” With respect to Project 2019-02, NERC reported that it “now anticipates filing the proposed Reliability Standards with the Commission in December 2020 (deferred from the original target date of September 2020).”

- **Revised Reliability Standard: CIP-002-6 (RM20-17)**

On June 12, 2020, NERC filed for approval a revised Reliability Standard -- CIP-002-6 (Cyber Security – BES Cyber System Categorization), and associated implementation plan, VRFs and VSLs (together, the “CIP-002 Changes”). NERC stated that the CIP-002 Changes improve upon the currently effective standard by clarifying the criterion for Transmission Owner Control Centers and tailoring the language to better reflect the risk posed by these Control Centers if unavailable or compromised. As of the date of this Report, the FERC has not noticed a proposed rulemaking proceeding or otherwise invited public comment.

- **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

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<sup>115</sup> See *Fed. Reg.* July 24, 2020 (Vol. 85, No. 143) pp. 44,875-44,880.

<sup>116</sup> *N. Am. Elec. Rel. Corp.*, 170 FERC ¶ 61,109 (Feb. 20, 2020).

system (“BES”) operations; and (ii) whether the CIP Reliability Standards impede the voluntary adoption of virtualization or cloud computing services (“NOI”).<sup>117</sup> On March 25, 2020, Joint Associations<sup>118</sup> requested an extension of time to submit comments and reply comments. On April 2, the FERC granted Joint Associations’ request and extended the deadline for initial comments on the NOI to July 1, 2020; the deadline for reply comments, July 31, 2020. Comments were filed by NERC, the ISO/RTO Council (“IRC”), Accenture, Amazon Web Services (“Amazon”), Bonneville, the Bureau of Reclamation, Barry Jones, Georgia System Operations, GridBright, Idaho Power, Microsoft, MISO, MISO Transmission Owners, Siemens Energy Management, Tri-State Generation and Transmission Association, VMware, Inc., AEE, American Association for Laboratory Accreditation (“A2LA”), APPA, Canadian Electricity Assoc., EEI, NRECA, and Waterfall Security Solutions. Reply comments were due on or before July 31, 2020, and were filed by AEE, Amazon and Microsoft. This matter is pending before the FERC.

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

On January 23, 2020, the FERC issued a NOPR<sup>119</sup> proposing to approve the retirement of 74 of the 77 Reliability Standard requirements requested to be retired by NERC in these two dockets<sup>120</sup> in connection with the first phase of work under NERC’s Standards Efficiency Review<sup>121</sup> (“*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.”<sup>122</sup> 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* were due on or before April 6, 2020.<sup>123</sup> Comments were filed by J. Applebaum, Bonneville Power Administration (“BPA”), NERC, and the Western Area Power Administration (“WAPA”).

**NERC Notice of Withdrawal of VAR-001-6.** On May 14, 2020, NERC withdrew its proposed changes to VAR-001-6.

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<sup>117</sup> *Virtualization and Cloud Computing Services*, 170 FERC ¶ 61,110 (Feb. 20, 2020).

<sup>118</sup> “Joint Associations” are for purposes of this proceeding: EEI, APPA, NRECA, and LPPC.

<sup>119</sup> *Electric Reliability Organization Proposal to Retire Requirements in Rel. Standards Under the NERC Standards Efficiency Review*, 170 FERC ¶ 61,032 (Jan. 23, 2020).

<sup>120</sup> 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).

<sup>121</sup> The Standards Efficiency Review initiative, which began in 2017, reviewed the body of NERC Reliability Standards to identify those Reliability Standards and requirements that were administrative in nature, duplicative to other standards, or provided no benefit to reliability.

<sup>122</sup> *Id.* at P 1.

<sup>123</sup> The *Retirements NOPR* was published in the *Fed. Reg.* on Feb. 6, 2020 (Vol. 85, No. 25) pp. 6,831-6,838.



- **Report of Comparisons of Budgeted to Actual Costs for 2019 for NERC and the Regional Entities (RR20-3)**

On May 29, 2020, NERC filed comparisons of actual to budgeted costs for 2019 for NERC and the seven Regional Entities operating in 2019, including NPCC. The Report includes comparisons of actual funding received and costs incurred, with explanations of significant actual cost-to-budget variances, audited financial statements, and tables showing metrics concerning NERC and Regional Entity administrative costs in their 2019 budgets and actual results. Comments on this filing were due on or before June 19, 2020; none were filed.

On July 21, 2020, NERC supplemented its May 29, 2020 filing to include the final, audited 2019 financial report for Texas Reliability Entity, Inc. ("Texas RE") (not available to be included at the time of the May 29 filing). Any comments on this report as supplemented are now due on or before August 11, 2020.

## 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.<sup>124</sup> 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.

- **Opinion 569-A: FERC's Base ROE Methodology (EL14-12; EL15-45)**

In an Opinion which could impact the resolution of New England ROE cases (TO Base ROE and Mystic 8/9 COS Agreement ROE), the FERC refined, in ruling on a MISO ROE proceeding, its methodology for setting the ROE that electric utilities earn on electric transmission investments.<sup>125</sup> The refinements to the FERC's methodology include:

- The use of the Risk Premium model instead of only relying on the DCF model and CAPM under both prongs of FPA Section 206. The FERC stated that "the defects of the Risk Premium model do not outweigh the benefits of model diversity and reduced volatility resulting from the averaging of more models."
- Adjusting the relative weighting of long- and short-term growth rates, increasing the weight for the short-term growth rate to 80% and reducing to 20% the weight given to the long-term growth rate in the two-step DCF model.
- Modifying the high-end outlier test to treat any proxy company as high-end outlier if its cost of equity estimated under the model in question is more than 200% of the median result of all the potential proxy group members in that model before any high- or low-end outlier test is applied, subject to a natural break analysis. This is a shift from the 150% threshold applied in *Opinion 569*. By raising the threshold to 200%, the FERC believes it will reduce the risk that rational results are inappropriately excluded. Continued application of the natural break analysis will allow the exclusion of ROEs that are truly irrational or anomalously high.
- Calculating the zone of reasonableness in equal thirds, instead of using the quartile approach that was applied in *Opinion 569*. The FERC found that the quartile approach, which excluded the bottom eighth and top eighth of the overall zone of reasonableness, was inappropriate because it

<sup>124</sup> *Central Maine Power Co.*, 170 FERC 62,145 (Mar. 13, 2020).

<sup>125</sup> *Ass'n of Buss. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, Opinion No. 569-A, 171 FERC ¶ 61,154 (2020) ("*Opinion 569-A*").

ignores some “potentially lawful ROEs” when determining which ranges of ROEs should be considered presumptively just and reasonable.

A more detail summary and background of Opinion 569-A prepared by NEPOOL counsel was posted with the materials for and discussed at the May 19, 2020 Transmission Committee meeting. EEI, FirstEnergy, Louisiana PSC, and MISO Complaint-Aligned Parties requested rehearing and/or clarification of *Opinion 569-A*.

Since the last Report, on July 22, 2020, the FERC issued a notice (i) that those requests for rehearing of the *Opinion 569-A* may be deemed denied by operation of law and (ii) providing for further consideration. Petitions to the Federal Courts for review of *Opinion 569-A* have been filed with the DC Circuit by Alliant, DTE, FirstEnergy the MISO TOs, Ameren/ITC Companies, Petitioners,<sup>126</sup> Transource, and Resale Power Group of Iowa. (see Section XV below).

- **VTransco Rate Schedule Cancellations (ER20-2507)**

On July 27, 2020, VTransco filed a notice of cancellation of two agreements,<sup>127</sup> both entered into in 2006, among Vermont Electric Power Company, Inc. (“VELCO”), Central Vermont Public Service Corporation (“CVPS”), Green Mountain Power Corporation (“GMP”), and VTransco, which are no longer in use. VTransco requested that the notice of cancellation be accepted for filing as of July 30, 2020. Comments on this filing are due on or before August 17, 2020. If you have any questions concerning this matter, please contact Pat Gerity ([pmgerity@daypitney.com](mailto:pmgerity@daypitney.com); 860-275-0533).

- **D&E Agreement Cancellation: CL&P-NTE CT (ER20-2327)**

On July 6, 2020, CL&P filed a notice of cancellation of its Design, Engineering and Procurement Agreement (the “D&E Agreement”) with NTE Connecticut, LLC (“NTE CT”). The D&E Agreement, which set forth the terms and conditions under which CL&P would undertake certain preliminary design and engineering activities on the Interconnection Facilities that were identified in ISO-NE’s studies, prior to execution of a Standard Large Generator Interconnection Agreement (“LGIA”), expired when an LGIA was signed on June 16, 2020. CL&P requested that the notice of cancellation be accepted for filing as of June 1, 2020. Comments on this filing were due on or before July 27, 2020; none were filed. This matter is pending before the FERC. If you have any questions concerning this matter, please contact Pat Gerity ([pmgerity@daypitney.com](mailto:pmgerity@daypitney.com); 860-275-0533).

- **Termination of IA and NITSA between Versant Power & Houlton Water Company (ER20-1919/1914)**

On July 24 and 27, respectively, the FERC accepted Versant Power’s notice of termination of the Network Integration Transmission Service Agreement (“NITSA”)(ER20-1914) and the Interconnection Agreement (ER20-1919) between itself and Houlton Water Company (“Houlton”), each of which expired by its terms on May 15, 2020, the date Houlton directly interconnected its electric system with that of New Brunswick Power.<sup>128</sup> Unless the July 24 or 27 orders are challenged, these proceedings will be concluded. If you have any questions concerning these matters, please contact Pat Gerity ([pmgerity@daypitney.com](mailto:pmgerity@daypitney.com); 860-275-0533).

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<sup>126</sup> “Petitioners” are the Assoc. of Bus. Advocating Tariff Equity, Coalition of MISO Transmission Customers, IL Industrial Energy Consumers, IN Industrial Energy Consumers, MN Large Industrial Group, WI Industrial Energy Group, American Municipal Power (AMP), Cooperative Energy, Hoosier Energy Rural Elec. Coop., MS Pub. Svc. Comm., MO Pub. Svc. Comm., MO Joint Mun. Elec. Util. Comm., Org. of MISO States, Southwestern Elec. Coop., and Wabash Valley Power Assoc.

<sup>127</sup> The Agreements are an Amended and Restated Three Party Transmission Agreement and an Amended and Restated Three Party Agreement.

<sup>128</sup> *Versant Power*, Docket No. ER20-1914 (July 24, 2020) (unpublished letter order).

- **NSTAR Transmission Service Agreement Cancellations (ER20-1896)**

On July 23, the FERC accepted NSTAR's notice of cancellation of various transmission service agreements no longer active but not yet previously cancelled.<sup>129</sup> The cancellation notices were accepted effective as of July 25, 2020, as requested. Unless the July 23 order is challenged, this proceeding will be concluded. If you have any questions concerning this matter, please contact Pat Gerity ([pmgerity@daypitney.com](mailto:pmgerity@daypitney.com); 860-275-0533).

- **D&E Agreement: NSTAR-Mayflower Wind (ER20-1855)**

On July 14, 2020, the FERC accepted for filing an executed Preliminary Engineering and Design Agreement ("Agreement") between NSTAR and Mayflower Wind Energy LLC ("Mayflower Wind").<sup>130</sup> The Agreement, designated as Service Agreement No. IA-NSTAR39, sets forth the terms and conditions under which NSTAR will undertake certain preliminary design and engineering activities to determine whether NSTAR can develop a co-optimized solution for serving reliability needs and the interconnection needs of Mayflower Wind's large generating facility using NSTAR's existing rights of way. The Agreement was accepted effective as of May 19, 2020, as requested. Unless the July 14 order is challenged, this proceeding will be concluded. If you have any questions concerning this matter, please contact Pat Gerity ([pmgerity@daypitney.com](mailto:pmgerity@daypitney.com); 860-275-0533).

- **Phase II VT DMNRC Support Agreement Order 864-Related Filing (ER20-1480)**

On April 1, Vermont Electric Power Company ("VELCO"), as an agent of the Joint Owners, submitted a filing (following consultation with FERC staff) that described why no changes were required to the Phase II Vermont Dedicated Metallic Neutral Return Conductor ("DMNRC") Support Agreement<sup>131</sup> as a result of *Order 864*. Comments on this filing were due April 22 and were filed by GMP, which supported the filing and agreed with VELCO that no *Order 864* compliance filing is necessary. The IRH Management Committee, Eversource and National Grid intervened doc-lessly. This matter is pending before the FERC. If you have any questions concerning this matter, please contact Eric Runge (617-345-4735; [ekrunge@daypitney.com](mailto:ekrunge@daypitney.com)).

## XII. Misc. - Administrative & Rulemaking Proceedings

- **Carbon Pricing in RTO/ISO Markets Tech Conf (Sep 30, 2020) (AD20-14)**

On June 17, 2020, the FERC issued a notice that it would convene a Commissioner-led technical conference on September 30, 2020. The purpose of the conference will be to discuss considerations related to state adoption of mechanisms to price carbon dioxide emissions, commonly referred to as carbon pricing, in regions with FERC-jurisdictional organized wholesale electricity markets. Supplemental notices will be issued prior to the conference with further details regarding the agenda, how to register to participate, and the format (including whether the technical conference will be held in-person or electronically).

The September 30 conference is a response to (i) the April 14, 2020 request by Interest Parties,<sup>132</sup> who asserted that a technical conference "would be helpful to the Commission and stakeholders in the electric energy industry in deciding how best to move forward at the state and regional levels on these issues and in the relevant

<sup>129</sup> *Eversource Energy Service Co.*, Docket No. ER20-1896 (July 23, 2020) (unpublished letter order).

<sup>130</sup> *NSTAR Elec. Co.*, Docket No. ER20-1855 (July 14, 2020) (unpublished letter order).

<sup>131</sup> The DMNRC was installed on VETCO's Phase I facilities to provide a neutral return for Phase I and Phase II at a total construction cost of approximately \$2.6 million. Pursuant to the Agreement, the Joint Owners recover their total cost of service by making the DMNRC available to NHH who in turn makes the DMNRC available to the Participants pursuant to, and for the term of, the Phase II New Hampshire Transmission Facilities Support Agreement.

<sup>132</sup> "Interested Parties" are AEE, the American Council on Renewable Energy, the American Wind Energy Association, Brookfield Renewable, Calpine, CPV, EPSA, the Independent Power Producers of New York ("IPPNY"), LS Power Associates ("LS Power"), the Natural Gas Supply Association ("NGSA"), NextEra, PJM Power Providers Group, R Street Institute, and Vistra Energy Corp.

organized markets” complementing “state, regional, and national discussions currently taking place” as well as to (ii) the more than 30 sets of comments on the request that were filed.

- **Hybrid Resources Technical Conference Tech Conf (Jul 23, 2020) (AD20-9)**

On July 23, 2020, the FERC convened a technical conference to discuss technical and market issues prompted by growing interest in projects that are comprised of more than one resource type at the same plant location (“hybrid resources”). The focus was on generation resources and electric storage resources paired together as hybrid resources. Speaker materials have been posted to the FERC’s eLibrary.

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

Energy Trading Institute’s<sup>133</sup> December 16, 2019 request that the FERC hold a technical conference and conduct a rulemaking to update the requirements adopted in *Order 741*<sup>134</sup> and Section 35.47 of the FERC’s regulations addressing credit and risk management in the markets operated by RTO/ISOs remains pending. As previously reported, ETI, citing a recent filing by NYISO (which it protested),<sup>135</sup> 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 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,<sup>136</sup> and an independent consultant.<sup>137</sup> This matter remains pending before the FERC.

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<sup>133</sup> 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.”

<sup>134</sup> *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.

<sup>135</sup> 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).

<sup>136</sup> “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”).

<sup>137</sup> 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)<sup>138</sup> and terminated the DOE NOPR rulemaking proceeding (RM18-1).<sup>139</sup> In terminating the DOE NOPR proceeding, the FERC concluded that the Proposed Rule and comments received did not support FERC action under Section 206 of the FPA, but did suggest the need for further examination by the FERC and market participants of the risks that the bulk power system faces and possible ways to address those risks in the changing electric markets. On February 7, 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 to afford it additional time to consider the FRS request for rehearing, which remains pending.

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

**ISO-NE Response.** In its response, ISO-NE identified fuel security<sup>140</sup> as the most significant resilience challenge facing the New England region. ISO-NE reported that it has established a process to discuss market-based solutions to address this risk, and indicated that it believed it will need through the second quarter of 2019 to develop a solution and test its robustness through the stakeholder process. In the meantime, ISO-NE indicated that it would continue to independently assess the level of fuel-security risk to reliable system operation and, if circumstances dictate, would take, with FERC approval when required, actions it determines to be necessary to address near-term reliability risks. ISO-NE’s response was broken into three parts: (i) an introduction to fuel-security risk; (ii) background on how ISO-NE’s work in transmission planning, markets, and operations support the New England bulk power system’s resilience; and (iii) answers to the specific questions posed in the January 8 order.

**Industry Comments.** Following a 30-day extension issued on March 20, 2018, reply comments were due on or before May 9, 2018. NEPOOL’s comments, which were approved at the May 4 meeting, were filed May 7, and were among over 100 sets of initial comments filed. A summary of the comments that seemed most relevant to New England and NEPOOL was circulated to the Participants Committee on May 15 and is posted on the [NEPOOL website](#). On May 23, NEPOOL submitted a limited response to four sets of comments, opposing the suggestions made in those pleadings to the extent that the suggestions would not permit full use of the Participant Processes. Supplemental comments and answers were also filed by FirstEnergy, MISO South Regulators, NEI, and EDF. Exelon and American Petroleum Institute filed reply comments. FirstEnergy included in this proceeding its motion for emergency action also filed in ER18-1509 (ISO-NE Waiver Filing: Mystic 8 & 9), which Eversource answered (in both proceedings). Reply comments were filed by APPA and AMP and the Nuclear Energy Institute (“NEI”) moved to lodge presentations by the National Infrastructure Advisory Council. On December 6, the

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

<sup>139</sup> As previously reported, the FERC opened the DOE NOPR proceeding in response to a September 28, 2017 proposal by Energy Secretary Rick Perry, issued under a rarely-used authority under §403(a) of the Department of Energy (“DOE”) Organization Act, that would have required RTO/ISOs to develop and implement market rules for the full recovery of costs and a fair rate of return for “eligible units” that (i) are able to provide essential energy and ancillary reliability services, (ii) have a 90-day fuel supply on site in the event of supply disruptions caused by emergencies, extreme weather, or natural or man-made disasters, (iii) are compliant with all applicable environmental regulations, and (iv) are not subject to cost-of-service rate regulation by any State or local authority. More than 450 comments were submitted in response to the DOE NOPR, raising and discussing an exceptionally broad spectrum of process, legal, and substantive arguments. A summary of those initial comments was circulated under separate cover and can be found with the posted materials for the November 3, 2017 Participants Committee meeting. Reply comments and answers to those comments were filed by over 100 parties.

<sup>140</sup> ISO-NE defined fuel security as “the assurance that power plants will have or be able to obtain the fuel they need to run, particularly in winter – especially against the backdrop of coal, oil, and nuclear unit retirements, constrained fuel infrastructure, and the difficulty in permitting and operating dual-fuel generating capability.”

Harvard Electricity Law Initiative filed a comment suggesting that, as a matter of law, “Commissioner McNamee cannot be an impartial adjudicator in these proceedings” and “any proceeding about rates for ‘fuel-secure’ generators” and should recuse himself. Similarly, on December 18, “Clean Energy Advocates”<sup>141</sup> requested Commissioner McNamee recuse himself from these proceedings. These matters remain pending before the FERC.

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

- **Increasing Market and Planning Efficiency Through Improved Software Tech Conf (Jun 23-25, 2020) (AD10-12)**

On June 23-25, the FERC held its 11<sup>th</sup> annual technical conference addressing increasing Real-Time and Day-Ahead market efficiency through improved software. FERC Staff facilitated a discussion to explore research and operational advances with respect to market modeling that appear to have significant promise for potential efficiency improvements. Speaker materials have not yet been posted in eLibrary.

- **NOPR: Electric Transmission Incentives Policy (RM20-10)**

On March 20, 2020, the FERC issued a NOPR<sup>142</sup> proposing to revise its existing transmission incentives policy and corresponding regulations.<sup>143</sup> 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.

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

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

<sup>143</sup> 18 CFR 35.35 (2020).

- ◆ **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. Over 80 sets of comments on the proposed revisions were filed on or before the July 1, 2020<sup>144</sup> comment date, including comments by: Avangrid, EDF Renewables, EMCOS, Eversource, Exelon, LS Power, MMWEC/NHEC/CMEEC, National Grid, NESOCE, NextEra, UCS, CT PURA, and Potomac Economics. Reply comments were filed by AEP, ITC Holding, the N. California Transmission Agency, and WIRES. The NOPR is now pending before the FERC. If you have any questions concerning this matter, please contact Eric Runge (617-345-4735; [ekrunge@daypitney.com](mailto:ekrunge@daypitney.com)).

- **Order 872: Pricing and Eligibility Changes to PURPA Regulations (RM19-15)**

On July 16, 2020, the FERC issued its final rule<sup>145</sup> approving pricing and eligibility revisions to its long-standing regulations implementing sections 201 and 210 of the Public Utility Regulatory Policies Act of 1978 ("PURPA").<sup>146</sup> Those regulations address the obligation of electric utilities to purchase power produced by "qualifying facilities" or "QFs" at rates that must be "just and reasonable to the electric consumers of the electric utility and in the public interest, and not discriminate against" those QFs.<sup>147</sup> Order 872 implements the following significant revisions:

- **State Flexibility in Setting QF Rates:** Previous regulations required that rates paid to qualifying facilities (QFs) under PURPA must be at "avoided costs" of the purchasing utility, with the QF electing whether to accept avoided cost rates that vary over a contract period or a fixed rate for the duration of the contract. *Order 872* eliminates that requirement; instead, states will have the option of requiring energy rates (but not capacity rates) in QF power sales contracts to vary with changes in the purchasing utility's "as-available" avoided costs at the time energy is delivered. If a state exercises this option, then a QF cannot elect to fix the energy rate but can continue to receive a fixed capacity rate for the term of its agreement with the purchasing utility. In addition, *Order 872* allows states in an ISO/RTO market to set the rate for as-available energy at a variable rate equal to the ISO/RTO LMP, based on a rebuttable presumption (rather than a *per se* rule as FERC proposed in its NOPR) that the LMP represents the as-available avoided costs of utilities located in that market. These regulations provide greater flexibility to the states in determining whether such rates accurately reflect the purchasing utility's avoided cost at the time of delivery. *Order 872* also permits states to set energy and capacity rates pursuant to competitive solicitation processes but only so long as those processes are transparent and nondiscriminatory. FERC, however, declined to adopt a NOPR proposal to permit states with retail competition to relieve their utilities from PURPA's mandatory purchase obligation.
- **Decreases (to 5 MW) the Threshold for Rebuttable Presumption of Access to Nondiscriminatory, Competitive Markets.** PURPA regulations previously provided a rebuttable presumption that certain 20 MW or larger QFs located in ISO/RTO markets had nondiscriminatory access to those markets and exempted utilities from any purchase obligations from such resources. *Order 872* reduces the threshold from 20 MW to 5 MW (rather than 1 MW as proposed in the NOPR). QFs above 5 MW can challenge the presumption that they have nondiscriminatory access to wholesale markets based on a list of factors

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<sup>144</sup> The *Electric Transmission Incentives* NOPR was published in the *Fed. Reg.* on Apr. 2, 2020 (Vol. 85, No. 64) pp. 18,784-18,810. Requests for extension of time to file comments were filed by American Manufacturers, APPA/TAPS, and State Entities; WIRES and EEI each opposed the requested extensions. No extension of time to file comments was granted.

<sup>145</sup> *Qualifying Facility Rates and Requirements; Implementation Issues Under the Public Utility Regulatory Policies Act of 1978*, Order No. 872, 172 FERC ¶ 61,041 (July 16, 2020) ("*Order 872*").

<sup>146</sup> 16 U.S.C. § 2601 et seq. (2018). PURPA was enacted to help lessen the dependence on fossil fuels and promote the development of power generation from non-utility power producers.

<sup>147</sup> 16 U.S.C. § 824a-3; PURPA, Sec. 210(a)-(b).

specified in *Order 872*, including barriers to connecting to the transmission grid and lack of affiliation with entities participating in RTO/ISO markets. This modification does not apply to QFs that are cogenerators, which are still subject to the 20 MW threshold.

- **Updates the “One-Mile Rule”.** Under current PURPA regulations, a small power production facility must be 80 MW or less to be eligible for QF treatment. To prevent gaming of that rule (QF certification of multiple projects that, if combined, would otherwise exceed the 80 MW cap), *Order 872* establishes two irrebuttable presumptions: (1) facilities under common ownership located less than one mile apart that use the same energy resource will be aggregated into a single project for purposes of QF eligibility; and (2) facilities under common ownership located more than 10 miles apart that use the same energy resource will be presumed to be separate projects for QF eligibility. *Order 872* also establishes a rebuttable presumption that facilities under common ownership located more than one mile apart but less than 10 miles apart are located on a separate site and are not aggregated in determining whether they fall below the 80 MW cap. The FERC explained that this rule also will be applied to QFs developed by unaffiliated developers and later acquired by a single entity.
- **Clarifies When a QF Establishes Its Entitlement to a Purchase Obligation.** *Order 872* requires a utility to purchase the power only from QFs that can demonstrate commercial viability and a financial commitment pursuant to objective and reasonable state-defined criteria. The FERC clarified that, to the extent that a permitting factor is relied upon, a QF need only show that it has applied for all required permits and paid all applicable fees, but not that it has obtained such permits or has a reasonable likelihood of obtaining such permits.
- **Provides for Certification Challenges.** *Order 872* provides that interested stakeholders may challenge a QF self-certification or self-recertification. Challenges to recertifications, however, will be limited to those QFs making substantive changes (e.g., a change in electrical generating equipment that increases power production capacity by the greater of 1 MW or 5 percent of the previously certified capacity, or a change in ownership in which an owner increases its equity interest by at least 10 percent from the equity interest previously reported).

*Order 872* will become effective 120 days after its publication in the Federal Register (which as of the date of this Report has not yet happened). Challenges, if any, to *Order 872* must be filed on or before August 17, 2020.

- **Orders 864/864-A: Public Util. Trans. ADIT Rate Changes (RM19-5)**

On November 21, 2019, the FERC issued its final rule (“*Order 864*”)<sup>148</sup> 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 NOPR<sup>149</sup> that were applicable to public utilities with stated rates. *Order 864* became effective January 27, 2020. Requests for rehearing were filed by APPA and Exelon.

**Order 864-A.** On April 16, the FERC denied the requests for rehearing and granted APP’s request for clarification in part.<sup>150</sup> Specifically, the FERC clarified that public utilities with transmission stated rates that have a

<sup>148</sup> *Public Util. Trans. Rate Changes to Address Accumulated Deferred Income Taxes*, Order No. 869, 169 FERC ¶ 61,139 (Nov. 21, 2019), *reh’g denied and clarification granted in part*, 171 FERC ¶ 61,033 (Apr. 16, 2020).

<sup>149</sup> *Public Util. Trans. Rate Changes to Address Accumulated Deferred Income Taxes*, 165 FERC ¶ 61,117 (Nov. 15, 2018) (“ADIT NOPR”).

<sup>150</sup> *Public Util. Trans. Rate Changes to Address Accumulated Deferred Income Taxes*, 171 FERC ¶ 61,033, Order No. 864-A (Apr. 16, 2020) (“*Order 864-A*”).



FERC-approved ratemaking method for addressing excess and deficient ADIT return the appropriate amount of excess ADIT resulting from the Tax Cuts and Jobs Act to customers through their transmission stated rates. For public utilities with transmission stated rates that lack a FERC-approved ratemaking method, the ratemaking method used to make provision for excess and deficient ADIT will be subject to case-by-case determination in a later rate proceeding.<sup>151</sup>

**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** – The following New England compliance filings have been submitted:

Date Filed	Docket	Transmission Provider	Date Accepted
Aug 4, 2020	ER20-2607	NEP – Seabrook Transmission Support Agreement	pending
Jul 31, 2020	ER20-2594	VTransco	pending
Jul 30, 2020	ER20-2551	New England Power	pending
Jul 30, 2020	ER20-2553	NEP – LSA with MECO/Nantucket	pending
Jul 15, 2020	ER20-2429	CMP	pending
Jun 29, 2020	ER20-2219	New England Power	pending
Jun 23, 2020	ER20-2133	Versant Power	pending
May 18, 2020	ER20-1839	VETCO	Pending
Feb 26, 2020	ER20-1089	New England Elec. Trans. Corp.	pending
Feb 26, 2020	ER20-1088	New England Hydro Trans. Elec. Co.	pending
Feb 26, 2020	ER20-1087	New England Hydro Trans. Corp.	pending

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

In *Order 841*<sup>152</sup> (see RM16-23 below), the FERC initiated a new proceeding in order to continue to explore the proposed distributed energy resource (“DER”) aggregation reforms it was considering in the *Storage NOPR*.<sup>153</sup> All comments filed in response to the *Storage NOPR* will be incorporated by reference into Docket No. RM18-9 and further comments regarding the proposed distributed energy resource aggregation reforms, including comments regarding the April 10-11 technical conference in AD18-10,<sup>154</sup> were also to be filed in RM18-9. On June 26, 2018, over 50 parties submitted post-technical conference comments in this proceeding, including comments from ISO-NE, Calpine, Direct, Eversource, Ictec, NRG, Utility Services, EEI, EPRI, EPSA, NARUC, NRECA, and SEI. On February 11, 2019, a group of 18 US Senators submitted a letter urging the FERC to adopt a final rule that enable all DERs the opportunity to participate in the RTO/ISO markets and requesting an update no later than March 1,

<sup>151</sup> *Order 864-A* at PP 18-19

<sup>152</sup> *Elec. Storage Participation in Mkts. Operated by Regional Trans. Orgs. and Indep. Sys. Operators*, Order No. 841, 162 FERC ¶ 61,127 (Feb. 15, 2018), reh’g and/or clarif. requested (“*Order 841*”).

<sup>153</sup> *Elec. Storage Participation in Mkts. Operated by Regional Trans. Orgs. and Indep. Sys. Operators*, 157 FERC ¶ 61,121 (Nov. 17, 2016) (“*Storage NOPR*”).

<sup>154</sup> On April 10-11, 2018, the FERC held a technical conference to gather additional information to help the FERC determine what action to take on DER aggregation reforms proposed in the *Storage NOPR* and to explore issues related to the potential effects of DERs on the bulk power system. Technical conference materials are posted on the FERC’s eLibrary. Interested persons were invited to file post-technical conference comments on the topics concerning the Commission’s DER aggregation proposal discussed during the technical conference, including on follow-up questions from FERC Staff related to the panels. Comments related to DER aggregation were to be filed in RM18-9; comments on the potential effects of DERs on the bulk power system, in AD18-10.

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, 2019, 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)**

As previously reported, *Order 860*,<sup>155</sup> issued three years after the FERC's *Data Collection NOPR*,<sup>156</sup> (i) revises the FERC's MBR regulations by establishing a relational database of ownership and affiliate information for MBR Sellers (which, among other uses, will be used to create asset appendices and indicative screens), (ii) reduces the scope of information that must be provided in MBR filings, modifies the information required in, and format of, a MBR Seller's asset appendix, (iii) changes the process and timing of the requirements to advise the FERC of changes in status and affiliate information, and (iv) eliminates the requirement adopted in *Order 816* that MBR Sellers submit corporate organization charts. In addition, the FERC stated that it will *not* adopt the *Data Collection NOPR* proposal to collect Connected Entity data from MBR Sellers and entities trading virtuals or holding FTRs. The FERC will post on its website high-level instructions that describe the mechanics of the relational database submission process and how to prepare filings that incorporate information that is submitted to the relational database. As recently extended (*see below*), *Order 860* will become effective April 1, 2021, and submitters will have until close of business on August 2, 2021 to make their initial baseline submissions. Submitters will be required to obtain in Spring 2021 FERC-generated IDs for reportable entities that do not have CIDs or LEIs, as well as Asset IDs for reportable generation assets without an EIA code so that every ultimate upstream affiliate or other reportable entity has a FERC-assigned company identifiers ("CID"), Legal Entity Identifier,<sup>157</sup> or FERC-generated ID and that all reportable generation assets have an code from the Energy Information Agency ("EIA") Form EIA-860 database or a FERC-assigned Asset ID. Requests for rehearing and/or clarification of *Order 860* were denied,<sup>158</sup> 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."

**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](#).

**Effective Date Extended by 6 Months.** On May 6, 2020, EEI requested a four-month extension of implementation of *Order 860*. EPSA supported that request on May 13, 2020. On May 20, the FERC issued a notice extending the effective and associated implementation dates of *Order 860* by six months. The new

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<sup>155</sup> *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).

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

<sup>157</sup> An LEI is a unique 20-digit alpha-numeric code assigned to a single entity. They are issued by the Local Operating Units of the Global LEI System.

<sup>158</sup> *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*").

*Order 860* effective date will be April 1, 2021, and the deadline for baseline submissions to and including August 2, 2021. First change in status filings under these new timelines will be due August 31, 2021.

- **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*,<sup>159</sup> 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”).<sup>160</sup> The Version 003.2 Standards included NAESB’s Version 003.1 revisions, which were the subject of an earlier NOPR.<sup>161</sup> 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.<sup>162</sup> Requests for clarification and/or rehearing of *Order 676-I* were filed by EEI and Southern Companies. On April 6, the FERC issued a tolling order to afford it additional time to consider those requests, which remain pending before the FERC.

**Compliance dates:** Public utilities must make a compliance filing to comply with the requirements of *Order 676-I* through eTariff no later than July 27, 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 October 27, 2020.

- **Waiver of Tariff Requirements (PL20-7)**

On May 21, 2020, the FERC issued a Proposed Policy Statement that would clarify its policy regarding requests for waiver of tariff provisions.<sup>163</sup> The *Proposed Policy Statement* sets forth the approach the FERC would take going forward to ensure compliance with the filed rate doctrine and the rule against retroactive making. The proposed policy will both clarify and modify waiver standards, and in some instances, make it harder to obtain waivers.

Specifically, the FERC proposed the following guidance on filing procedures to implement its new approach for granting waivers of tariff provisions and to no longer grant retroactive waivers except as consistent with the *Proposed Policy Statement*:

1. *Style Requests as Requests for Remedial Relief.* Filings seeking relief in connection with actions or omissions that have already occurred prior to the date relief is sought from the FERC would be characterized as a request for remedial relief (rather than as a request for a waiver). In response to such a request, the FERC will focus on what remedy, if any, is required to cure acknowledged or alleged deviations from a filed tariff. “Waiver” is to be limited to (a) requests for prospective relief when a requested future deviation from the filed tariff has not yet occurred at the time a request is filed; or (b) petitions for remedial relief when a tariff expressly authorizes regulated entities to seek a remedial waiver from the FERC for past non-compliance with the filed tariff.

<sup>159</sup> *Standards for Business Practices and Communication Protocols for Public Utilities*, Order No. 676-I, 170 FERC ¶ 61,062 (Feb. 4, 2020) (“*Order 676-I*”), *reh’g and/or clarif. pending*.

<sup>160</sup> *Standards for Business Practices and Communication Protocols for Public Utilities*, 167 FERC ¶ 61,127 (May 16, 2019) (“*NAESB WEQ v. 003.2 Standards NOPR*”).

<sup>161</sup> *Standards for Business Practices and Communication Protocols for Public Utilities*, 156 FERC ¶ 61,055 (July 21, 2016), (“*WEQ v. 003.1 NOPR*”).

<sup>162</sup> *Order 676-I* was published *Fed. Reg.* on Feb. 25, 2020 (Vol. 85, No. 37) pp. 10,571-10,586.

<sup>163</sup> *Waiver of Tariff Requirements*, 171 FERC ¶ 61,156 (May 21, 2020) (“*Proposed Policy Statement*”).

2. *Form of Filing.* When the entity requesting remedial relief is the entity that acted (or believes it may have acted) in a manner inconsistent with the tariff, such requests should be filed as petitions for declaratory order under Rule 207 of the FERC's Rules of Practice and Procedure. When the filing entity alleges a different entity has acted in a manner inconsistent with the tariff, such requests should be filed as complaints under Rule 206. Given the filing fees associated with petitions for declaratory order, the industry was encouraged to directly address this aspect of the proposal.
3. *Expressly Request FERC Action pursuant to FPA section 309 or NGA section 16.4.* These provisions have been found to afford the FERC the latitude to remedy past non-compliance "provided the agency's action conforms with the purposes and policies of Congress and does not contravene any terms of the Act."

The FERC acknowledged that this Policy would represent a change from its past approach, particularly in situations where inadvertent failures to comply with ministerial tariff requirements have not been protested. The FERC suggested a few ways tariffs may be modified to avoid what may appear by comparison to be harsh outcomes, including expressly stating in the tariff that a failure to comply with a certain deadline may be waived by order of the FERC or by allowing various kinds of errors to be cured within a reasonable period of time after a default has occurred or an error has been discovered, but is difficult to imagine how feasible or how well these options might work in practice.

The FERC proposed to incorporate its current four-part analysis<sup>164</sup> in considering both requests for prospective waiver and petitions for remedial relief, but cautioned that it would apply that analysis only in those limited circumstances where the request for remedial relief would not violate the filed rate doctrine or the rule against retroactive ratemaking due to adequate prior notice, or the requested relief is within the FERC's authority to grant under FPA section 309 or NGA section 16.

Finally, the FERC proposed requiring a stronger showing when a petitioner is seeking remedial relief for its own failure to comply with a tariff – petitions will be more compelling when the failure to comply was due to something more than inadvertent error or administrative oversight. Petitions for remedial relief will generally be denied when a protestor credibly contends, or the FERC independently determines, that the requested remedial relief will result in undesirable consequences (e.g. harm to third parties).

With respect to prospective requests to waive the 60-day prior notice requirement under FPA section 205(d) (or the 30-day prior notice requirement under NGA section 4(d)), which the FERC has discretion to waive "for good cause shown," the FERC proposes to leave in effect its policy of generally granting such waivers,<sup>165</sup> to the extent that entities seek an effective date no earlier than the day *after* the date a rate change is submitted to the FERC.

Comments on the Proposed Policy Statement were due on or before June 18, 2020 and were filed by the IRC, AEE, APPA, AWEA/SEIA, EEI, EPSA, Indicated Generators,<sup>166</sup> INGAA, Kansas Electric Power Coop. ("KEPC"), NGA, NGSA, NRECA, Public Citizen, Sunflower Electric Power, and TAPS. Reply comments were filed

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<sup>164</sup> Under current practice, the FERC grants tariff provision waivers where: (1) the underlying error was made in good faith; (2) the waiver is of limited scope; (3) the waiver addresses a concrete problem; and (4) the waiver does not have undesirable consequences, such as harming third parties.

<sup>165</sup> See *Cent. Hudson Gas & Elec. Corp.*, 60 FERC ¶ 61,106, order on reh'g, 61 FERC ¶ 61,089 (1992) ("*Central Hudson*"). Factors that will generally support a waiver of prior notice include: (1) uncontested filings that do not change rates; (2) filings that reduce rates and charges; and (3) filings that increase rates as prescribed by a previously accepted contract or settlement on file with the FERC.

<sup>166</sup> "Indicated Generators" are Vistra, NRG, FirstLight, Cogentrix, and LS Power.

by APPA, Joint Trade Associations,<sup>167</sup> KEPC, and the Sustainable FERC Project. The proposed Policy Statement is pending before the FERC.

- **FERC's ROE Policy for Natural Gas and Oil Pipelines (PL19-4)**

On May 21, 2020, the FERC issued a Policy Statement that applies to natural gas and oil pipelines, with certain exceptions to account for the statutory, operational, organizational and competitive differences among the electric, natural gas and oil pipeline industries, the FERC's ROE methodology adopted in *Opinion No. 569-A*.<sup>168</sup> Specifically, the FERC revised its policy and will determine natural gas and oil pipeline ROEs by averaging the results of the DCF and CAPM, but will not use the risk premium model discussed in *Opinion 569/569-A* ("Risk Premium").<sup>169</sup> In addition, the FERC clarified its policies governing the formation of proxy groups and the treatment of outliers in proceedings addressing natural gas and oil pipeline ROEs. Finally, the FERC encouraged oil pipelines to file revised FERC Form No. 6, page 700s for 2019 reflecting the revised ROE policy. This Policy Statement became effective May 27, 2020.<sup>170</sup> On July 7, the FERC issued a notice that pipelines choosing to file updated FERC Form No. 6, page 700 data consistent with the ROE Policy Statement should file such data on or before July 21, 2020.

Complainant-Aligned Parties<sup>171</sup> answered the New England TO's May 10 supplemental comments. On June 15, 2020, Joint Parties<sup>172</sup> submitted supplemental comments arguing that the FERC should use the midpoint, rather than the median, as the measure of central tendency for public utilities that file individually to establish a ROE. Joint Parties' comments were opposed by Six Cities.<sup>173</sup> WIRES submitted supplemental comments on June 18, 2020 requesting that the FERC take further action in this proceeding to "resolve the uncertainty surrounding its base ROE methodology and establish a policy consistent with the recommendations made in these comments" (recommending a framework that employs all four of the previously proposed ROE models, including the Expected Earnings model, along with certain modifications, to ensure that ROEs attract capital investment in needed transmission infrastructure). On June 24, EEI and WIRES requested the FERC issue a NOI regarding the FERC's policy for determining base ROE applicable to the electric industry as a whole. Six Cities answered Joint Parties on June 30. APPA answered EEI and WIRES' June 24 motion.

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<sup>167</sup> "Joint Trade Associations" are AEE, AWEA, EEI, EPSA, INGAA, NGSAA, NRECA and SEIA.

<sup>168</sup> *Inquiry Regarding the Commission's Policy for Determining Return on Equity*, 171 FERC ¶ 61,155 (May 21, 2020) ("*Natural Gas and Oil Pipeline ROE Policy Statement*").

<sup>169</sup> As previously reported, the FERC issued a notice of inquiry on March 21, 2019 seeking information and views to help the FERC explore whether, and if so how, it should modify its policies concerning the determination of ROE to be used in designing jurisdictional rates charged by public utilities.<sup>169</sup> The FERC also sought comment on whether any changes to its policies concerning public utility ROEs should be applied to interstate natural gas and oil pipelines. This NOI followed *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).

<sup>170</sup> The *Natural Gas and Oil Pipeline ROE Policy Statement* was published *Fed. Reg.* on May 27, 2020 (Vol. 85, No. 102) pp. 31,760-31,773.

<sup>171</sup> For this purpose, "Complainant-Aligned Parties" are: Connecticut Public Utilities Regulatory Authority, Connecticut Office of the Attorney General, Connecticut Department of Energy and Environmental Protection, Connecticut Office of Consumer Counsel, Massachusetts Office of the Attorney General, Massachusetts Department of Public Utilities, Massachusetts Municipal Wholesale Electric Company, and New Hampshire Electric Cooperative.

<sup>172</sup> "Joint Parties" are: AEP, Avista, Evergy Companies, Entergy Services, Exelon, FirstEnergy, Portland Gen. Elec., PG&E, Corporation, Puget Sound Energy, PacifiCorp, Idaho Power, PSEG, So. Cal. Edison, and San Diego Gas & Elec.

<sup>173</sup> "Six Cities" are the Cities of Anaheim, Azusa, Banning, Colton, Pasadena, and Riverside, California.

- **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 NOI<sup>174</sup> seeks comments from interested parties on four broad issue categories: (1) project need, including whether precedent agreements are still the best demonstration of need; (2) exercise of eminent domain; (3) environmental impact evaluation (including climate change and upstream and downstream greenhouse gas emissions); and (4) the efficiency and effectiveness of the FERC certificate process. Pursuant to a May 23 order extending the comment deadline by 30 days,<sup>175</sup> comments were due on or before July 25, 2018. Literally thousands of individual and mass-mailed comments were filed. This matter remains pending before the FERC.

### XIII. Natural Gas Proceedings

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

- **Natural Gas-Related Enforcement Actions**

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

**BP (IN13-15).** On July 11, 2016, the FERC issued *Opinion 549*<sup>176</sup> affirming Judge Cintron's August 13, 2015 Initial Decision finding that BP America Inc., BP Corporation North America Inc., BP America Production Company, and BP Energy Company (collectively, "BP") violated Section 1c.1 of the Commission's regulations ("Anti-Manipulation Rule") and NGA Section 4A.<sup>177</sup> Specifically, after extensive discovery and hearing procedures, Judge Cintron found that BP's Texas team engaged in market manipulation by changing their trading patterns, between September 18, 2008 through the end of November 2008, in order to suppress next-day natural gas prices at the Houston Ship Channel ("HSC") trading point in order to benefit correspondingly long position at the Henry Hub trading point. The FERC agreed, finding that the "record shows that BP's trading practices during the Investigative Period were fraudulent or deceptive, undertaken with the requisite scienter, and carried out in connection with Commission-jurisdictional transactions."<sup>178</sup> Accordingly, the FERC assessed a **\$20.16 million civil penalty** and required BP to **disgorge \$207,169** in "unjust profits it received as a result of its manipulation of the Houston Ship Channel Gas Daily index." The \$20.16 million civil penalty was at the top of the FERC's Penalty Guidelines range, reflecting increases for having had a prior adjudication within 5 years of the violation, and for BP's violation of a FERC order within 5 years of the scheme. BP's penalty was mitigated because it cooperated during the investigation, but BP received no deduction for its compliance program, or for self-reporting. The *BP Penalties Order* also denied BP's request for rehearing of the order establishing a hearing in this proceeding.<sup>179</sup> BP was

<sup>174</sup> The NOI was published in the *Fed. Reg.* on Apr. 26, 2018 (Vol. 83, No. 80) pp. 18,020-18,032.

<sup>175</sup> *Certification of New Interstate Natural Gas Facilities*, 163 FERC ¶ 61,138 (May 23, 2018).

<sup>176</sup> *BP America Inc.*, Opinion No. 549, 156 FERC ¶ 61,031 (July 11, 2016) ("*BP Penalties Order*").

<sup>177</sup> *BP America Inc.*, 152 FERC ¶ 63,016 (Aug. 13, 2015) ("*BP Initial Decision*").

<sup>178</sup> *BP Penalties Order* at P 3.

<sup>179</sup> *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 to afford it additional time to consider BP's request for rehearing of the *BP Penalties Order*, which remains pending.

On September 7, 2016, BP submitted a motion for modification of the *BP Penalties Order's* disgorgement directive because it cannot comply with the disgorgement directive as ordered. BP explained that the entity to which disgorgement was to be directed, the Texas Low Income Home Energy Assistance Program ("LIHEAP"), is not set up to receive or disburse amounts received from any person other than the Texas Legislature. In response, on September 12, 2016, the FERC stayed the disgorgement directive (until an order on BP's pending request for rehearing is issued), but indicated that interest will continue to accrue on unpaid monies during the pendency of the stay.<sup>180</sup>

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

***Total Gas & Power North America, Inc. et al. (IN12-17)***. On April 28, 2016, the FERC issued a show cause order<sup>181</sup> in which it directed Total Gas & Power North America, Inc. ("TGPNA") and its West Desk traders and supervisors, Therese Tran f/k/a Nguyen ("Tran") and Aaron Hall (collectively, "Respondents") to show cause why Respondents should not be found to have violated NGA Section 4A and the FERC's Anti-Manipulation Rule through a scheme to manipulate the price of natural gas at four locations in the southwest United States between June 2009 and June 2012.<sup>182</sup>

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

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<sup>180</sup> *BP America Inc.*, 156 FERC ¶ 61,174 (Sep. 12, 2016) ("*Order Staying BP Disgorgement*").

<sup>181</sup> *Total Gas & Power North America, Inc.*, 155 FERC ¶ 61,105 (Apr. 28, 2016) ("*TGPNA Show Cause Order*").

<sup>182</sup> The allegations giving rise to the Total Show Cause Order were laid out in a September 21, 2015 FERC Staff Notice of Alleged Violations which summarized OE's case against the Respondents. Staff determined that the Respondents violated section 4A of the Natural Gas Act and the Commission's Anti-Manipulation Rule by devising and executing a scheme to manipulate the price of natural gas in the southwest United States between June 2009 and June 2012. Specifically, Staff alleged that the scheme involved making largely uneconomic trades for physical natural gas during bid-week designed to move indexed market prices in a way that benefited the company's related positions. Staff alleged that the West Desk implemented the bid-week scheme on at least 38 occasions during the period of interest, and that Tran and Hall each implemented the scheme and supervised and directed other traders in implementing the scheme.

- **New England Pipeline Proceedings**

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

- **Iroquois ExC Project (CP20-48)**

- ▶ 125,000 Dth/d of incremental firm transportation service to ConEd and KeySpan by building and operating new natural gas compression and cooling facilities at the sites of four existing Iroquois compressor stations in Connecticut (Brookfield and Milford) and New York (Athens and Dover)
- ▶ Three-year construction project; service request by November 1, 2023
- ▶ Application for a certificate of public convenience and necessity pending.
- ▶ Since the Last Report, the NYS DEC filed comments on the Sensitive Species Habitat Assessment Report that had been filed in this proceeding, to which Iroquois responded. In addition, Iroquois filed supplemental information on July 30 and was requested by the FERC to respond on or before August 7 to a data request asking for information on the EC Project's first year O&M costs and expected revenues.

- **Non-New England Pipeline Proceedings**

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

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

- ▶ The New York State Department of Environmental Conservation ("NY DEC") and the Sierra Club requested rehearing of the *Northern Access Certificate Rehearing Order* on August 14 and September 5, 2018, respectively. On August 29, National Fuel Gas Supply Corporation and Empire Pipeline ("Applicants") answered the NY DEC's August 14 rehearing request and request for stay. On April 2, 2019, the FERC denied the NY DEC and Sierra Club requests for rehearing.<sup>183</sup> 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*.<sup>184</sup> Further, in an interesting twist, the FERC found that a December 5, 2017 "Renewed Motion for Expedited Action" filed by National Fuel Gas Supply Corporation and Empire Pipeline, Inc. (the "Companies"), in which the Companies asserted a separate basis for their claim that the NY DEC waived its authority under section 401 of the Clean Water Act ("CWA") to issue or deny a water quality certification for the Northern Access Project, served as a motion requesting a waiver determination by the FERC,<sup>185</sup> and proceeded to find that the NY DEC was obligated to act on the application within one year, failed to do so, and so waived its authority under section 401 of the CWA.
- ▶ The FERC authorized the Companies to construct and operate pipeline, compression, and ancillary facilities in McKean County, Pennsylvania, and Allegany, Cattaraugus, Erie, and Niagara Counties, New York ("Northern Access Project") in an order issued February 3,

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<sup>183</sup> *Nat'l Fuel Gas Supply Corp. and Empire Pipeline, Inc.*, 167 FERC ¶ 61,007 (Apr. 2, 2019).

<sup>184</sup> *Nat'l Fuel Gas Supply Corp. and Empire Pipeline, Inc.*, 164 FERC ¶ 61,084 (Aug. 6, 2018) ("*Northern Access Rehearing & Waiver Determination Order*"), *reh'g denied*, 167 FERC ¶ 61,007 (Apr. 2, 2019).

<sup>185</sup> The DC Circuit has indicated that project applicants who believe that a state certifying agency has waived its authority under CWA section 401 to act on an application for a water quality certification must present evidence of waiver to the FERC. *Millennium Pipeline Co., L.L.C. v. Seggos*, 860 F.3d 696, 701 (D.C. Cir. 2017).



2017.<sup>186</sup> The Allegheny Defense Project and Sierra Club (collectively, “Allegheny”) requested rehearing of the *Northern Access Certificate Order*.

- ▶ Despite the FERC’s *Northern Access Certificate Order*, the project remained halted pending the outcome of National Fuel’s fight with the NY DEC’s April denial of a Clean Water Act permit. NY DEC found National Fuel’s application for a water quality certification under Section 401 of the Clean Water Act, as well as for stream and wetlands disturbance permits, failed to comply with water regulations aimed at protecting wetlands and wildlife and that the pipeline failed to explore construction alternatives. National Fuel appealed the NY DEC’s decision to the 2nd Circuit on the grounds that the denial was improper.<sup>187</sup> On February 2, 2019, the 2nd Circuit vacated the decision of the NY DEC and remanded the case with instructions for the NY DEC to more clearly articulate its basis for the denial and how that basis is connected to information in the existing administrative record. The matter is again before the NY DEC.
- ▶ On November 26, 2018, the Applicants filed a request at FERC for a 3-year extension of time, until February 3, 2022, to complete construction and to place the certificated facilities into service. The Applicants cited the fact that they “do not anticipate commencement of Project construction until early 2021 due to New York’s continued legal actions and to time lines required for procurement of necessary pipe and compressor facility materials.” The extension request was granted on January 31, 2019.
- ▶ On August 8, 2019, the NY DEC again denied Applicants request for a Water Quality Certification, and as directed by the Second Circuit,<sup>188</sup> provided a “more clearly articulate[d] basis for denial.”
- ▶ On August 27, 2019, 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.<sup>189</sup>

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

- **Executive Order on Securing the United States Bulk-Power System**

On May 1, 2020, President Trump signed an Executive Order that authorizes U.S. Secretary of Energy Dan Brouillette to work with the Cabinet and energy industry to secure America’s Bulk-Power System (“BPS”). The Executive Order prohibits Federal agencies and U.S. persons from “acquiring, transferring, or installing BPS equipment in which any foreign country or foreign national has any interest and the transaction poses an unacceptable risk to national security or the security and safety of American citizens. Evolving threats facing our critical infrastructure have only served to highlight the supply chain risks faced by all sectors, including energy, and the need to ensure the availability of secure components from American companies and other trusted sources.” The Secretary of Energy is accordingly authorized to (i) establish and publish criteria for recognizing particular equipment and vendors as “pre-qualified” (pre-qualified vendor list); (ii) identify any now-prohibited equipment already in use, allowing the government to develop strategies and work with asset owners to identify, isolate, monitor, and replace this equipment as appropriate; and (iii) work closely with the

<sup>186</sup> *Nat’l Fuel Gas Supply Corp.*, 158 FERC ¶ 61,145 (2017) (“*Northern Access Certificate Order*”), *reh’g denied*, 164 FERC ¶ 61,084 (Aug 6, 2018) (“*Northern Access Certificate Rehearing Order*”).

<sup>187</sup> *Nat’l Fuel Gas Supply Corp. v. NYSDEC et al.* (2d Cir., Case No. 17-1164).

<sup>188</sup> Summary Order, *Nat’l Fuel Gas Supply Corp. v. N.Y. State Dep’t of Env’tl. Conservation*, Case 17-1164 (2d Cir, issued Feb. 5, 2019).

<sup>189</sup> See *Sierra Club v. FERC*, No. 19-01618 (2d Cir. filed May 30, 2019); *NYSDEC v. FERC*, No. 19-1610 (2d. Cir. filed May 28, 2019) (consolidated).

Departments of Commerce, Defense, Homeland Security, Interior; the Director of National Intelligence; and other appropriate Federal agencies to carry out the authorities and responsibilities outlined in the Executive Order. A Task Force led by Secretary Brouillette will develop energy infrastructure procurement policies to ensure national security considerations are fully integrated into government energy security and cybersecurity policymaking. The Task Force will consult with the energy industry through the Electricity and Oil and Natural Gas Subsector Coordinating Councils to further its efforts on securing the BPS. A copy of the Executive Order may be accessed [here](#).

## XV. Federal Courts

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

- **2013/14 Winter Reliability Program Order on Compliance and Remand (20-1289)**

**Underlying FERC Proceeding: ER13-2266<sup>190</sup>**

**Petitioner: TransCanada**

On July 30, 2020, TransCanada Power Marketing ("Petitioner") again petitioned the DC Circuit Court of Appeals for review of the FERC's action on the 2013/2014 Winter Reliability Program, this time in the FERC's April 1, 2020 *2013/14 Winter Reliability Program Order on Compliance and Remand*.<sup>191</sup> Among other submissions, TransCanada must file by August 31, 2020 a docketing statement, statement of issues, and any procedural motions. Dispositive motions and a Certified Index to the Record must be filed by September 14. Appearances by others in this case must be filed by August 31, 2020.

- **ISO-NE's Inventoried Energy Program (Chapter 2B) Proposal (19-1224\*\*\*; 19-1247; 19-1252; 19-1253)(consolidated); Underlying FERC Proceeding: ER19-1428<sup>192</sup>**

**Petitioners: ENECOS (Belmont et al.) (19-1224); MA AG (19-1247); NH PUC/NH OCA (19-1252); Sierra Club/UCS (19-1253)**

At the unopposed request of the FERC, the Court issued an order suspending the briefing schedule and remanded the record back to the FERC. In the request to suspend the briefing schedule and remand the record, the FERC stated that it "now has a quorum of Commissioners who can participate in the review of the ISO New England tariff filing," that remand "could obviate the need for a subsequent appeal by Petitioners", and it "anticipates issuing an order on remand within 90 days of this Court's order remanding the agency record and an order addressing the merits of any subsequent requests for rehearing within 180 days of the close of the 30-day period for applying for rehearing". (As reported in Section III above, the FERC issued the *IEP Remand Order* on June 18, 2020.) The Court directed the FERC to file status reports at 90-day intervals beginning July 20, 2022 and the parties to file motions to govern further proceedings in these consolidated cases within 30 days of the completion of the remand proceedings.

<sup>190</sup> 171 FERC ¶ 61,003 (Apr. 1, 2020) ("*2013/14 Winter Reliability Program Order on Compliance and Remand*") (accepting ISO-NE's January 23, 2017 compliance filing, finding that the bid results from the 2013/14 Winter Reliability Program were just and reasonable, and providing for this finding the further reasoning requested by the DC Circuit in *TransCanada Power Mktg. Ltd. v. FERC*, 811 F.3d 1 (DC Cir. 2015) ("*TransCanada*").)

<sup>191</sup> In *TransCanada*, the DC Circuit granted *TransCanada's* prior petition in part, and directed the FERC to either better justify its determination or revise its disposition to ensure that the rates under the Program are just and reasonable. *TransCanada* at 1.

<sup>192</sup> 162 FERC ¶ 61,127 (Feb. 15, 2018) ("*Order 841*"); 167 FERC ¶ 61,154 (May 16, 2019) ("*Order 841-A*").

- **Order 841 (Electric Storage Participation in RTO/ISO Markets) (19-1142, 19-1147) (consol.)**  
**Underlying FERC Proceeding: RM16-23; AD16-<sup>193</sup>**  
**Petitioners: NARUC, APPA et al.**

On July 10, 2020, the DC Circuit denied the petitions filed by NARUC and APPA et al.<sup>194</sup> for review of *Orders 841* and *841-A* (Electric Storage Participation in RTO/ISO Markets).<sup>195</sup> Writing for the Court, Judge Wilkins summarized the case and the Court's ruling as follows:

In this consolidated action, the Court must once again referee the [FPA]'s jurisdictional line separating the [FERC]'s jurisdiction over the federal wholesale market and States' jurisdiction over facilities used in local distribution. This time, Petitioners argue FERC is off-sides in Order No. 841 by prohibiting States from barring electric storage resources on their distribution and retail systems from participating in federal markets. We find no foul here, so we deny the Petitions.

In explaining its reasoning, the Court did acknowledge that "Petitioners are likely correct that litigation will follow" as States try to navigate the line between Federal and State jurisdiction and should they challenge, as they will be free to do, the application of *Order 841* to their own state regulations or imposed conditions. But, "[b]ecause the challenged Orders do nothing more than regulate matters concerning federal transactions — and reiterate ordinary principles of federal preemption — they do not facially exceed FERC's jurisdiction under the [FPA]." Having failed "to show that Order Nos. 841 and 841-A run afoul of the Federal Power Act's jurisdictional bifurcation or that they are otherwise arbitrary and capricious .... we therefore deny the petitions."

No petitions for rehearing *en banc* were filed, effectively concluding this proceeding.

#### Other Federal Court Activity of Interest

- **Allegheny Defense Project v. FERC (17-1098)**  
**Underlying FERC Proceeding: CP15-138<sup>196</sup>**  
**Petitioner: Allegheny Defense Project**

On June 30, in a decision<sup>197</sup> that will likely have a profound effect on current and future proceedings before the FERC, the DC Circuit ruled that the Natural Gas Act ("NGA") does not allow FERC to delay appellate review of its substantive orders through its common practice of issuing tolling<sup>198</sup> orders. The decision at the very least modifies—if not wholly overrules—a long-unbroken line of cases that rejected as premature appeals from FERC orders while applications for rehearing were pending. While the case was decided under the NGA,<sup>199</sup> there is

<sup>193</sup> 162 FERC ¶ 61,127 (Feb. 15, 2018) ("*Order 841*"); 167 FERC ¶ 61,154 (May 16, 2019) ("*Order 841-A*").

<sup>194</sup> "APPA et al." are APPA, NRECA, EEI, and AMP.

<sup>195</sup> *NARUC v FERC*, \_\_\_ F.3d \_\_\_, 2020 WL 3886199 (D.C. Cir. Jul. 10, 2020).

<sup>196</sup> *Transcontinental Gas Pipe Line Co., LLC*, 159 FERC ¶ 62,181 (Feb. 3, 2017); *Transcontinental Gas Pipe Line Co., LLC*, 161 FERC ¶ 61,250 (Dec. 6, 2017).

<sup>197</sup> *Allegheny Def. Project v. FERC*, 964 F.3d 1, 2020 WL 3525547 (D.C. Cir. June 30, 2020).

<sup>198</sup> A tolling order is a brief order issued within 30 days of receiving an application for rehearing that does not address the merits of the rehearing request, but rather explicitly "grants" rehearing for the purpose of giving the agency more time to consider the arguments. FERC then treats the tolling order as indefinitely suspending the 30-day statutory deadline in order to afford more time to fully address the rehearing request. FERC has for decades routinely issued tolling orders in response to identical language in both the NGA and the FPA that requires any party seeking to challenge a FERC order on appeal to first request a rehearing before FERC, and FERC to act within 30 days after receiving any such requests. If FERC does not act within that time, the rehearing request is deemed denied and the FERC order is final and ripe for appeal.

<sup>199</sup> In this case, the Petitioners challenged the FERC's use of a tolling order in response to their applications for rehearing of a FERC order that issued a certificate of public convenience and necessity to the Atlantic Sunrise Project. Those rehearing applications were pending for nine months before the FERC ruled on them. When the appeals were filed, the FERC and others sought to use the pending rehearing requests as the basis for dismissing the petitions as "incurably premature." Since the applications for rehearing did not stay the FERC's issuance of the certificate, the petitioners also sought a stay from the FERC, which FERC did not act on for almost seven months.

little doubt that the court's rejection of FERC's long-standing tolling policy will impact proceedings arising under the FPA as well.

Following issuance of the decision, the FERC asked the Court for a stay of issuance of the mandate in this case for 90 days (the Court had ordered that the mandate be issued on July 7, 2020). The FERC argued that the stay would permit the FERC time to assess how to implement the Court's decision and would also allow the federal government to consider whether to file a petition for writ of certiorari in the Supreme Court. Petitioners opposed the FERC's motion. On July 23, 2020, the Court issued a *per curiam* order staying issuance of the mandate through October 5, 2020, as requested by the FERC. Also of note, On July 2, 2020, Chairman Chatterjee and Commissioner Glick issued a joint statement asking Congress to consider providing FERC with additional time to act on rehearing requests.

- **FERC orders on PG&E Bankruptcy (19-71615) (9<sup>th</sup> Cir.)**  
**Underlying FERC Proceeding: EL19-35, EL19-36<sup>200</sup>**  
**Petitioner: PG&E**

On June 26, PG&E appealed the FERC's orders finding that it has concurrent jurisdiction with the bankruptcy courts to review and address the disposition of wholesale power contracts sought to be rejected through its bankruptcy. On July 11, PG&E moved to suspend the briefing schedule pending the Court's decision on whether to authorize direct appeal of a decision by the Bankruptcy Court in the Northern District of California. In a declaratory judgment, the Bankruptcy Court came to a completely different conclusion than the FERC and held that it has "original and exclusive jurisdiction over . . . [PG&E's] rights to assume or reject executory contracts under 11 U.S.C. § 365" and that the FERC "does not have concurrent jurisdiction, or any jurisdiction, over the determination of whether any rejections of power purchase contracts by [PG&E] should be authorized."<sup>201</sup> Because of the opposite conclusions, PG&E suggested that, should the Ninth Circuit allow the direct appeal of the Bankruptcy Court decision, the two appeals should proceed together. The PG&E motion was granted on August 1. 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. Remote hearings are scheduled for August 14.

The Court ordered the parties to submit supplemental briefs by July 8, 2020 addressing the impact on this appeal of the confirmation of PG&E's bankruptcy plan. (PG&E has since successfully emerged from bankruptcy). While the parties agreed in their July 9 briefs that the case is moot given PG&E's voluntary assumption of its contracts in its reorganization plan, there was disagreement over whether the FERC's orders should be vacated. Final resolution is pending before the 9<sup>th</sup> Circuit.

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While the rehearings and requests for stay were still before the FERC, the pipeline sponsors of the Atlantic Sunrise Project proceeded to condemn land and begin construction activities. By the time the first panel of the court heard oral arguments on the petitions for review, the project had been built and in service for two months.

<sup>200</sup> *NextEra Energy, Inc. v. PG&E*, 166 FERC ¶ 61,049 (Jan. 25, 2019); *Exelon Corp. v. PG&E*, 166 FERC ¶ 61,053 (Jan. 28, 2019); *Order Denying Rehearing*, 167 FERC ¶ 61,096 (May 1, 2019).

<sup>201</sup> Declaratory Judgment at 1-2, *PG&E v. FERC*, (Bankr. N.D. Cal. June 7, 2019).

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

**Underlying FERC Proceeding: CP15-558<sup>202</sup>**

**Petitioners: NJ DEP, DE and Raritan Canal Commission, NJ Div. of Rate Counsel**

Abeyance continues of the appeal before the DC Circuit of the FERC's orders granting certificates of public convenience and necessity to PennEast Pipeline Company, LLC ("PennEast")<sup>203</sup> for the construction and operation of a new 116-mile natural gas pipeline from Luzerne County, Pennsylvania, to Mercer County, New Jersey, along with three laterals extending off the mainline, a compression station, and appurtenant above ground facilities ("PennEast Project"). The cases are being held in abeyance "pending final disposition of any post-dispositional 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, which is in the midst of proceedings before the Supreme Court, the DC Circuit will not take up this case. Since the last Report, on June 29, 2020, a Joint Status Report was filed, noting developments since the May 4, 2020 Status Report, and reporting that none of the events "constitute any of the conditions that [the DC Circuit] enumerated in its October 1, 2019 Order as triggering an obligation to file a motion governing future proceedings."

- **Opinion 569/569-A: FERC's Base ROE Methodology (16-1325, 20-1227, 20-1240)**

**Underlying FERC Proceeding: EL14-12; EL15-45<sup>204</sup>**

**Petitioners: MISO TOs, FirstEnergy, Transource Energy**

The MISO Transmission Owners (TOs), FirstEnergy and Transource have appealed *Opinion 569/569-A*. The MISO TOs' case has been consolidated with previous appeals that had been held in abeyance, with the lead case number assigned as 16-1325. Motions to govern future proceedings in the MISO TOs' case are now due August 10, 2020. The FirstEnergy case was assigned case number 20-1227; the Transource case, 12-1240. On July 10, 2020, the Court consolidated the FirstEnergy and Transource cases. Initial submissions in the FirstEnergy case were filed July 30, 2020. Dispositive motions and a certified index to the record are due August 14, 2020. Transource was directed to file a Docketing Statement and Statement of Issues by August 10, 2020.

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<sup>202</sup> *PennEast Pipeline Co., LLC*, 162 FERC ¶ 61,053 (Jan. 19, 2018), *reh'g denied*, 163 FERC ¶ 61,159 (May 30, 2018).

<sup>203</sup> PennEast is a joint venture owned by Red Oak Enterprise Holdings, Inc., a subsidiary of AGL Resources Inc.; NJR Pipeline Company, a subsidiary of New Jersey Resources; SJI Midstream, LLC, a subsidiary of South Jersey Industries; UGI PennEast, LLC, a subsidiary of UGI Energy Services, LLC; and Spectra Energy Partners, LP.

<sup>204</sup> *Transcontinental Gas Pipe Line Co., LLC*, 159 FERC ¶ 62,181 (Feb. 3, 2017); *Transcontinental Gas Pipe Line Co., LLC*, 161 FERC ¶ 61,250 (Dec. 6, 2017).

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