

**EXECUTIVE SUMMARY**  
**Status Report of Current Regulatory and Legal Proceedings**  
**as of January 30, 2019**

The following activity, as more fully described in the attached litigation report, has occurred since the report dated January 2, 2019 was circulated. New matters/proceedings since the last Report are preceded by an asterisk '\*'. Page numbers precede the matter description.

**I. Complaints/Section 206 Proceedings**

1	Winter Fuel Security (Chapter 3) (EL18-182)	Jan 18 Jan 23, 24	ISO-NE requests extension of time, to Nov 15, 2019, to file the Chapter 3 Proposal(s); comment date Feb 4 NESCOE, MA AG support ISO-NE extension request
2	PER Settlement Agreement Refund Report (EL16-120)	Jan 30	FERC accepts Refund Report
4	Base ROE Complaints I-IV: (EL11-66, EL13-33; EL14-86; EL16-64)	Jan 7 Jan 11 Jan 24	FERC issues <i>Disclosure Order</i> responding to Customers' request that it identify the sources, data sets, and analyses underlying Figures 2 and 3 in the <i>Order Directing Briefs</i> Initial Briefs filed by EMCOS, Complainant-Aligned Parties, TOs, EEI, Louisiana PSC, Southern California Edison, AEP TOs oppose motions to intervene of AEP, LA PSC, So. Cal. Edison

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

* 7	Dighton Request for Additional Cost Recovery (ER19-853)	Jan 18 Jan 24	ConEd Energy, on behalf of Dighton, requests recovery of roughly \$60,000 in O&M and regulatory costs for under-recovery arising from Nov 14-15, 2018 Reliability Commitment Mitigation of Dighton unit NEPOOL intervenes
7	ICR-Related Values and HQICCs – Annual Reconfiguration Auctions (ER19-447)	Jan 3 Jan 28	ISO-NE answers NESCOE's Dec 21 limited protest FERC accepts ICR-Related Values and HQICCs, eff. Jan 29, 2019
7	ICR-Related Values and HQICCs – 2022-23 Capacity Commitment Period (ER19-291)	Jan 4	FERC accepts values, eff. Jan 5, 2019
8	Mystic 8/9 Cost of Service Agreement (ER18-1639)	Jan 18-22	Repsol, Constellation Mystic Power, CT Parties, EDF, ENECOS, MA AG, NESCOE, and NextEra file requests for clarification and/or rehearing of the <i>Mystic Order</i>

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

11	Post-PRD Implementation Conforming and Clean-Up Changes (ER19-614)	Jan 7	Eversource, National Grid, NESCOE intervene
11	Waiver Request: Vineyard Wind FCA13 Participation (ER19-570)	Jan 3-4 Jan 4 Jan 10 Jan 11 Jan 15	Avangrid, Dominion, ENE, NextEra intervene ISO-NE files comments not opposing Waiver Request, but requesting FERC action by Jan 29, 2019 if the waiver is to be effective for FCA13; NEPGA protests waiver request Vineyard Wind answers NEPGA's Jan 4 protest NESCOE answers NEPGA's Jan 4 protest MA DOER intervenes out-of-time and supports waiver request
11	<i>Order 841</i> Compliance Filing (ER19-470)	Jan 7-24	Exelon, National Grid, Lincoln Clean Energy intervene

12	CASPR Conforming Changes (ER19-444)	Jan 7	NEPOOL answers NEPGA's Dec 20 limited protest; NEPGA moves to lodge DC Circuit's Dec 28 opinion in <i>Exelon v. FERC</i>
		Jan 9	ISO-NE answers NEPGA's protest and motion to lodge
		Jan 29	FERC accepts changes, eff. Jan 29, 2019
12	ICR and Related Values Assumptions Updates (ER19-343)	Jan 8	FERC accepts assumptions updates, eff. Jan 14, 2019
13	Fuel Security Retention Proposal (ER18-2364)	Jan 3	Verso requests rehearing of <i>Fuel Security Retention Proposal Order</i>
15	Economic Life Determination Revisions (ER18-1770)	Jan 8	FERC issues tolling order affording it additional time to consider NEPGA's request for rehearing of Nov 9 <i>Economic Life Determination Revisions Order</i>
19	FCM Resource Retirement Reforms Remand Proceeding (ER16-551)	Jan 14	ISO-NE files comments urging outcome in remand order
		Jan 18	NEPOOL, Exelon file limited responses
		Jan 29	IMM submits comments
		Jan 29	FERC issues order on remand

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

20	Interconnection Process Enhancement: Retiring Resources Treatment (ER19-449)	Jan 28	FERC accepts enhancements, eff. Jan 29, 2019
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#### V. Financial Assurance/Billing Policy Amendments

No Activity to Report

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

21	Schedule 21-EM: Corrections to § 10.2 (ER19-64)	Jan 30	FERC accepts corrections, eff. Dec 9, 2018
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#### VII. NEPOOL Agreement/Participants Agreement Amendments

22	132nd Agreement (Press Membership Provisions) (ER18-2208)	Jan 29	FERC rejects NEPOOL Agreement changes that would have precluded press reporters from becoming NEPOOL End User Participants or representatives of NEPOOL Participants
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#### VIII. Regional Reports

* 23	LFTR Implementation: 41 <sup>st</sup> Quarterly Status Report (ER07-476)	Jan 15	ISO-NE files its 41st quarterly report
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#### IX. Membership Filings

23	December 2018 Membership Filing (ER19-446)	Jan 17	FERC accepts the memberships of Alpha Gas & Electric; Eagle's View Partners ; and Thordin ApS (each, Supplier Sector); (ii) the termination of the Participant status of: Food City & East Ave. Energy (End User Sector); and (iii) the name change of Enel X North America (f/k/a EnerNOC)
* 23	Suspension Notice – Lotus Danbury LMS100 One (not docketed)	Jan 16	ISO-NE files notice of suspension of Lotus Danbury LMS100 One from the New England Markets
* 23	Suspension Notice – Noble Environ. Power (not docketed)	Jan 16	ISO-NE files notice of suspension of Noble Environmental Power from the New England Markets
* 23	Suspension Notice – Viridity Energy Inc. (not docketed)	Jan 16	ISO-NE files notice of suspension of Viridity Energy Inc. from the New England Markets

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

No Activity to Report

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

25	203 Application: Plymouth Rock/Engie (EC19-19)	Jan 3	Plymouth Rock files notice of the Dec 19 consummation of Engie's indirect acquisition of 100% of the equity interests in Plymouth Rock
25	203 Application: VTransco Acquisition of BED/Stowe Highgate Shares (EC18-137)	Jan 2	VTransco files notice of Dec 24 acquisition of BED/Stowe Highgate shares
26	New England Ratepayers Assoc. Complaint (EL19-10)	Jan 4 Jan 7 Jan 22	NH AG, NH Generator Group answer NERA's Dec 20 answer PSNH moves to lodge its Dec 27, 2018 pleading in NHPUC Docket No. DE 18-002 NH Generator Group answers PSNH Jan 7 motion to lodge
27	PJM MOPR-Related Proceedings (EL18-178; ER18-1314; EL16-49)	Jan 15	PJM answers PSEG Dec 28 supplemental comments
* 29	D&E Agreement Cancellation: PSNH/ Essential Power Newington (ER19-817)	Jan 15	PSNH submits notice of cancellation of D&E Agreement; comment date Feb 5
29	Related Facilities Agreement: NSTAR / Clear River Energy (ER19-693)	Jan 7 Jan 17	National Grid intervenes Clear River intervenes
30	Related Facilities Agreement: CL&P / Clear River Energy (ER19-689)	Jan 7 Jan 17	National Grid intervenes Clear River intervenes
30	NSTAR/MATEP Revised Distribution Service Agreement (ER19-431)	Jan 25	FERC accepts Agreement, eff. Jan 30, 2019
30	NSTAR/HQ US MMWEC Use Rights Transfer Agreement (ER19-409)	Jan 18	FERC accepts agreement, eff. Dec 20, 2018

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

32	Grid Resilience in RTO/ISOs; DOE NOPR (AD18-7; RM18-1)	Jan 28	Several AGs, including those of MA and VT, file comments urging Commissioner McNamee to recuse himself from this proceeding
* 33	Order 853: Civil Monetary Penalty Inflation Adjustments (RM19-9)	Jan 8	FERC issues final rule increasing maximum civil monetary penalties it may assess; market manipulation penalties increased to \$1,269,500 per violation, per day; eff. upon publication in the <i>Federal Register</i>
33	NOPR: Public Util. Trans. ADIT Rate Changes (RM19-5)	Jan 22	Comments on <i>ADIT NOPR</i> filed by over 14 parties, including Eversource, EEI, NRECA
34	NOPR: Refinements to Horizontal Market Power Analysis Requirements (RM19-2)	Jan 23	FERC issues notice that publication of the NOPR in the <i>Federal Register</i> would not occur during the partial federal gov't shutdown and encouraged interested entities to submit comments in the meantime

**XIII. Natural Gas Proceedings**

* 38	FERC Enforcement Action: Algonquin Gas Transmission Stipulation & Consent Agreement (IN19-2)	Jan 7	FERC approves Stipulation and Consent Agreement with Algonquin, requiring Algonquin to pay a <b>\$400,000 civil penalty</b> to resolve the FERC's investigation into whether Algonquin violated the terms of the AIM Project Certificate of Public Convenience and Necessity
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| 40 | New England Pipeline Proceedings<br>• Atlantic Bridge Project<br>(CP16-9) | Jan 25 | Intervenors file requests for reh'g of FERC order granting 2-year extension of time for completion of Project construction and availability for service |
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**XIV. State Proceedings & Federal Legislative Proceedings**



No Activity to Report

**XV. Federal Courts**



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| 45 | FCM Resource Retirement Reforms | Jan 29 | FERC submits its <i>FCM Resource Retirement Reforms Remand Order</i> to the DC Circuit |
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## M E M O R A N D U M

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

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

**DATE:** January 30, 2019

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

We have summarized below the status of key ongoing proceedings relating to NEPOOL matters before the Federal Energy Regulatory Commission (“FERC”),<sup>1</sup> state regulatory commissions, and the Federal Courts and legislatures through January 30, 2019. If you have questions, please contact us.

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

RTO Insider’s August 31 Complaint against NEPOOL, requesting that the FERC either (i) find that NEPOOL’s press policy “unlawful, unjust and unreasonable, unduly discriminatory and contrary to the public interest, and direct NEPOOL to cease and desist” from implementing its policy; or (ii) “if the [FERC] finds that NEPOOL can sustain such a ban as a “private” entity, [] direct that NEPOOL’s special powers, privileges and subsidies be terminated and that an open stakeholder process be used by [ISO-NE]” (“Press Policy Complaint”), remains pending. The Press Policy Complaint, which was also filed as a “protest” to NEPOOL’s filing of the 132nd Agreement (dismissed on January 30, 2019 -- see ER18-2208 in Section VIII below), broadens RTO Insider’s efforts to “be in the room” and on terms it prefers.

NEPOOL answered the Complaint on September 20. NEPOOL cited numerous jurisdictional and procedural reasons why RTO Insider’s claims fail and should be summarily rejected. NEPOOL also answered RTO Insider’s arguments on the merits, should the FERC decide not to reject the Complaint summarily. Comments supporting the Complaint were submitted by the New Hampshire Office of Consumer Advocate (“NH OCA”), the Reporters Committee for Freedom of Press (“RCFP”), Bill Short, Public Interest Organizations (“PIOs”), and Public Citizen. Doc-less interventions only were submitted by Conservation Law Foundation (“CLF”), National Grid, NESCOE, New York Transmission Owners (“NYTOs”), the Sustainable FERC Project and Natural Resources Defense Council (“NRDC”).

On October 5, NEPOOL answered elements of the NH OCA and PIOs’ September 20 pleadings. Also on October 5, RTO Insider and PIOs answered NEPOOL’s September 20 answer. On October 15, NEPOOL filed a limited response to the October 5 pleadings of RTO Insider and PIOs. The Complaint remains pending before the FERC. If you have any questions concerning this matter, please contact Pat Gerity (860-275-0533; [pmgerity@daypitney.com](mailto:pmgerity@daypitney.com)) or Sebastian Lombardi (860-275-0663; [slombardi@daypitney.com](mailto:slombardi@daypitney.com)).

- **Winter Fuel Security (Chapter 3) (EL18-182)**

As previously reported, the July 2, 2018 *Mystic Waiver Order*<sup>2</sup> (reported on in more detail in ER18-1509 in Section III below) in part instituted this Section 206 proceeding in light of the FERC’s preliminarily finding that the

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

ISO-NE Tariff may be unjust and unreasonable in that it fails to address specific regional fuel security concerns identified in the record (in ER[ ]) that could result in reliability violations as soon as year 2022. Accordingly, the *Mystic Waiver Order* directed ISO-NE, in part, to submit by July 1, 2019 permanent Tariff revisions reflecting improvements to its market design to better address regional fuel security concerns (the “Chapter 3 Proposal”).<sup>3</sup>

**ISO-NE Extension Request.** On January 18, 2019, ISO-NE requested an extension of time, to November 15, 2019, to file its Chapter 3 Proposal. Both NESCOE and the MA AG filed motions supporting ISO-NE’s Extension Request. On January 25, the FERC extended the date for comments on the Extension Request to February 4, 2019, in order to permit NEPOOL an opportunity to report on its consideration of the Extension Request, which is set for discussion as Agenda Item #7 at the February 1 Participants Committee meeting.

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

- **PER Settlement Agreement Refund Report (EL16-120)**

On January 30, 2019, the FERC accepted ISO-NE’s October 19, 2018 refund report addressing its recalculation of hourly PER values using the Adjusted PER Strike Price for the September 30, 2016 through May 31, 2018 period.<sup>4</sup> As previously reported, the Refund Report, submitted pursuant to the FERC’s *September 20 Order*<sup>5</sup> in this proceeding, reported that there was one month (October 2017) during which the initial hourly PER determinations used for settlement were changed by applying the Adjusted PER Strike Price, impacting the settlements for the months of November 2017 through October 2018. For the months of November 2017 through February 2018, the recalculated PER Adjustments were handled through the data reconciliation process. Beginning with March 2018, PER Adjustments associated with the PER values for October 2017 were calculated using the Adjusted PER Strike Price and were included in initial monthly settlement statements. Amounts were identified in the report. Unless the January 30 order is challenged, this proceeding will be concluded. If you have any questions concerning this matter, please contact Joe Fagan (202-218-3901; [jfagan@daypitney.com](mailto:jfagan@daypitney.com)), Jamie Blackburn (202-218-3905; [jblackburn@daypitney.com](mailto:jblackburn@daypitney.com)), or Sebastian Lombardi (860-275-0663; [slombardi@daypitney.com](mailto:slombardi@daypitney.com)).

- **206 Proceeding: RNS/LNS Rates and Rate Protocols (EL16-19; ER18-2235)**

As previously reported, the Settling Parties<sup>6</sup> filed on August 17 in ER18-2235 a Joint Offer of Settlement (the “Settlement”) to resolve all issues in the Section 206 proceeding instituted by the FERC on December 28, 2015.<sup>7</sup> The Settlement proposes 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. If approved,

<sup>3</sup> ISO-NE was also or to show cause why the Tariff remains just and reasonable in the long-term such that the July one or both of Tariff revisions filings is not necessary

<sup>4</sup> *ISO New England Inc.*, Docket No. EL16-120 (Jan. 30, 2019) (unpublished letter order).

<sup>5</sup> *New England Power Generators Assoc. v. ISO New England Inc.*, 164 FERC ¶ 61,190 (Sep. 20, 2018) (“*September 20 Order*”) at P 21, Ordering Paragraph (C) (denying NESCOE’s request for clarification and accepting the compliance filing submitted in ER18-1153).

<sup>6</sup> “Settling Parties” are identified as: CMP; CMEEC/CTMEEC; CT OCC; CT PURA; Emera Maine; Eversource (CL&P, PSNH, NSTAR); Fitchburg and Unital; Green Mountain Power; Maine Electric Power Co.; ME OPA; MPUC, MA AG, MA AG, MA DPU, MMWEC, National Grid; NESCOE; NHEC; NH PUC; New Hampshire Transmission; RI DPUC; UI; VT DPS; VEC; VELCO; and Vermont Transco, LLC (“VTransco”).

<sup>7</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.

the changes to Attachment F are to be effective mid-June, 2019, with the remaining changes to be effective January 1, 2020. The Interim Protocols, as well as the changes to Section II.25 and Schedules 8 and 9 were supported by the Participants Committee at its July 24 meeting.

On September 6, **NESCOE** filed comments supporting the Settlement. Comments opposing the Settlement were filed by Municipal PTF Owners<sup>8</sup> and FERC Trial Staff. The **Municipal PTF Owners** (“Munis”) assert that the Settlement worsens, rather than improves, the issues of “lack of transparency, clarity and specificity that led the Commission [to] find the existing Attachment F formula unjust and unreasonable”, discriminates against load directly connected to PTF and exempted by Section II.12(c) of the ISO-NE Tariff from paying costs associated with service across non-PTF facilities, contravenes numerous settled rate principles without explanation or justification,<sup>9</sup> and imposes an unacceptable moratorium and burden on parties inclined to challenge Attachment F. **FERC Trial Staff** asserted that the Settlement, as filed, is not fair and reasonable nor is it in the public interest “because it would result in unreasonable rates and contains fundamental defects”,<sup>10</sup> and opposed the Settlement terms which would bind non-settling parties to the terms of the Settlement and establish a standard of review for changes to the Settlement. FERC Trial Staff suggested that these defects could be corrected in a comprehensive compliance filing, and requested that the FERC either (i) conditionally approve the Settlement subject to the submission of such a corrective compliance filing, or (ii) reject the Settlement in its entirety and set the entire matter for hearing.

**Reply comments** were submitted by NEPOOL, NESCOE and the MA AG. In its limited comments, **NEPOOL** noted that it supported the Interim Protocols and that it had no objection to the Settlement. **NESCOE** reiterated its support for the Settlement in its reply comments, urging the FERC to reject any arguments that consumer-interested parties “were not familiar with the issues relating to the Settlement or that they reached a settlement for any reason other than their view that it is in the best interests of consumers.”<sup>11</sup> **MA AG** urged the FERC to approve the Settlement as submitted, despite the objections of FERC Trial Staff and Municipal PTF Owners, because it complies with the *RNS/LNS Rates and Rate Protocols Order* and represents a carefully negotiated resolution to numerous complex ratemaking and transparency issues.<sup>12</sup>

**Settlement Judge Report.** On November 5, Settlement Judge Dring submitted the contested settlement to the Commission. In his report, Judge Dring noted his “complete agreement with the statements that were filed in support of this settlement.” He referred the Commission to the TOs’ reply comments for the reasons why Trial Staff’s and Municipal PTF Owners opposition are in error. On November 14, the Munis moved that the Commission expunge from the record in this proceeding the Settlement Judge’s views on the merits of the settlement, arguing that the inclusion of those views exceeds the regulatory limits of the settlement judge’s role.

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

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

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

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

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

On November 29, FERC Trial Staff supported the Munis' motion, providing additional arguments as to how the settlement report exceeds the judge's authority and was otherwise deficient.

The Settlement continues to be pending before the Commission. Given this proceeding's procedural posture, Chief Judge Cintron terminated settlement judge procedures on November 15, subject to final action by the Commission. If you have any questions concerning this matter, please contact Eric Runge (617-345-4735; [ekrunge@daypitney.com](mailto:ekrunge@daypitney.com)) or Jamie Blackburn (202-218-3905; [jblackburn@daypitney.com](mailto:jblackburn@daypitney.com)).

- **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>13</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>14</sup> However, the FERC's orders were challenged, and in *Emera Maine*,<sup>15</sup> the DC Circuit Court vacated the FERC's prior orders, and remanded the case for further proceedings consistent with its order. The FERC's determinations in *Opinion 531* are thus no longer precedential, though the FERC remains free to re-adopt those determinations on remand as long as it provides a reasoned basis for doing so.
- **Base ROE Complaints II & III (EL13-33 and EL14-86) (consolidated).** The second (EL13-33)<sup>16</sup> and third (EL14-86)<sup>17</sup> ROE complaint proceedings were consolidated for purposes of hearing and decision, though the parties were permitted to litigate a separate ROE for each refund period. After hearings were completed, ALJ Sterner issued a 939-paragraph, 371-page *Initial Decision*, which lowered the base ROEs for the EL13-33 and EL14-86 refund periods from 11.14% to 9.59% and 10.90%, respectively.<sup>18</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*.

<sup>13</sup> The TOs' 11.14% pre-existing Base ROE was established in *Opinion 489. Bangor Hydro-Elec. Co.*, Opinion No. 489, 117 FERC ¶ 61,129 (2006), *order on reh'g*, 122 FERC ¶ 61,265 (2008), *order granting clarific.*, 124 FERC ¶ 61,136 (2008), *aff'd sub nom.*, Conn. Dep't of Pub. Util. Control v. FERC, 593 F.3d 30 (D.C. Cir. 2010) ("*Opinion 489*").

<sup>14</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>15</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>16</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% return on equity, and seeks a reduction of the Base ROE to 8.7%.

<sup>17</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.

<sup>18</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*").



- **Base ROE Complaint IV (EL16-64).** The fourth and final ROE proceeding<sup>19</sup> also went to hearing before an ALJ, Judge Glazer, who issued his initial decision on March 27, 2017.<sup>20</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>21</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>22</sup> The FERC indicated its intention that the methodology be its policy going forward, including in the four currently pending New England proceedings. The FERC established a paper hearing on how its proposed methodology should apply to the four pending ROE proceedings.<sup>23</sup>

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

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

The FERC provided preliminary analysis of how it would apply the proposed methodology in the Base ROE I Complaint, suggesting that it would affirm its holding that an 11.14% Base ROE is unjust and unreasonable. The FERC suggested that it would adopt a 10.41% Base ROE and cap any preexisting incentive-based total ROE at 13.08%.<sup>24</sup> The new ROE would be effective as of the date of *Opinion 531-A*, or October 16,

<sup>19</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>20</sup> *Belmont Mun. Light Dept. v. Central Me. Power Co.*, 162 FERC ¶ 63,026 (Mar. 27, 2018) ("*Base ROE Complaint IV Initial Decision*").

<sup>21</sup> *Id.* at P 2.; Finding of Fact (B).

<sup>22</sup> *Coakley v. Bangor Hydro-Elec. Co.*, 165 FERC ¶ 61,030 (Oct. 18, 2018) ("*Order Directing Briefs*" or "*Coakley*").

<sup>23</sup> *Id.* at 19.

<sup>24</sup> *Id.* at P 59.

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>25</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. Reply briefs are due March 8, 2019.

**Disclosure Order.** On January 7, 2019, the FERC granted a November 16 request by CT PURA, EMCOS, MMWEC, and NHEC (“Customers”) that it identify and, where not already in the record in these four proceedings, release, the sources, data sets, and analyses underlying Figure 2 and Figure 3 in the *Order Directing Briefs* (at least one figure appeared to be based on proprietary information not available or included in the record).<sup>26</sup> The FERC attached to the *Disclosure Order* an Appendix A that identified the record exhibits that the FERC relied upon to develop the ROE data points for the test period for Base ROE Complaints II-IV, together with an explanation of adjustments made. The data underlying the Base ROE Complaint I test period was discussed in the *Order Directing Briefs*.<sup>27</sup> With respect to Figure 3, the FERC stated that Evercore ISI produced the chart and the information requested cannot be provided.<sup>28</sup> However, the FERC went on to state that the *Order Directing Briefs* “relied on Figure 3 only for the limited purpose of showing that there had been a substantial increase in utilities’ price to earnings ratio during the period October 2012 to December 2017” and that the FERC “did not rely on Figure 3 for any final determination on the use of the DCF model to determine utility ROEs.”<sup>29</sup> The FERC emphasized that it “did not reach any final conclusions or make any final determinations with respect to the proposed new ROE methodology in the [*Order Directing Briefs*]”, “did not reach any final conclusions or make any final determinations ... with respect to the use of the DCF in determining the ROE or whether the DCF alone has ceased to be sufficient to estimate investors’ expectations for a [ROE]”, and “did not rely on Figure 2 and Figure 3 to make any final determinations.”<sup>30</sup> The FERC noted that “participants may present evidence either in support of, or opposing, the [*Order Directing Briefs*], including whether stock prices during the periods at issue in these proceedings have performed in a manner inconsistent with the theory underlying the DCF methodology, as illustrated by Figure 3 ..., and whether various financial models may move in different directions over time, as illustrated by Figure 2.”

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<sup>25</sup> For purposes of the motion seeking clarification, “Customers” are CT PURA, MA AG, and EMCOS.

<sup>26</sup> *Coakley et al.*, 166 FERC ¶ 61,013 (Jan. 7, 2019) (“*Disclosure Order*”).

<sup>27</sup> *Disclosure Order* at P 8.

<sup>28</sup> *Id.* at P 9.

<sup>29</sup> *Id.* at P 10.

<sup>30</sup> *Id.*

If you have any questions concerning this matter, please contact Eric Runge (617-345-4735; [ekrunge@daypitney.com](mailto:ekrunge@daypitney.com)), Joe Fagan (202-218-3901; [jfagan@daypitney.com](mailto:jfagan@daypitney.com)) or Jamie Blackburn (202-218-3905; [jblackburn@daypitney.com](mailto:jblackburn@daypitney.com)).

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

- **Dighton Request for Additional Cost Recovery (ER19-853)**

On January 18, 2019, pursuant to Section III.A.15 of Appendix A to Market Rule 1,<sup>31</sup> Consolidated Edison Energy, Inc. (“ConEd Energy”), as lead Market Participant for Dighton Power, LLC (“Dighton”), requested that the FERC authorize recovery of \$42,030 in Operating and Maintenance (“O&M”) costs that were not recovered due to Reliability Commitment Mitigation applied to Dighton on November 14 and 15, 2018. ConEd Energy also seeks recovery of associated regulatory costs (\$18,143 to date). ConEd represented that ISO-NE supports the request. Comments on the Dighton request are due on or before February 8. Thus far, a doc-less intervention has been filed by NEPOOL. If you have any questions concerning this proceeding, please contact Sebastian Lombardi (860-275-0663; [slombardi@daypitney.com](mailto:slombardi@daypitney.com)) or Pat Gerity (860-275-0533; [pmgerity@daypitney.com](mailto:pmgerity@daypitney.com)).

- **ICR-Related Values and HQICCs – Annual Reconfiguration Auctions (ER19-447)**

On January 28, 2019, the FERC accepted<sup>32</sup> ISO-NE’s and NEPOOL’s November 30, 2018 filing that identified the Installed Capacity Requirement (“ICR”), Local Sourcing Requirements (“LSR”), Maximum Capacity Limits (“MCL”), Hydro Quebec Interconnection Capability Credits (“HQICCs”), and capacity requirement values for the System-Wide and Marginal Reliability Impact Capacity Demand Curves (collectively, the “ARA ICR-Related Values”) for the third annual reconfiguration auction (“ARA”) for the 2019-20 Capability Year to be held March 1, 2019, the second ARA for the 2020-21 Capability Year to be held August 1, 2019, and the first ARA for the 2021-22 Capability Year to be held June 3, 2019. The ARA ICR-Related Values were accepted effective January 29, 2019, as requested. In accepting the ARA ICR-Related Values, the FERC found that the increase in system reserves was just and reasonable, consistent with its findings in its *2022-23 ICR-Related Values Order* (see ER19-291 below), and denied NESCOE’s arguments with respect to that increase for the same reasons articulated in the *2022-23 ICR-Related Values Order*. Challenges, if any, to the *ARA ICR-Related Values Order* are due on or before February 27, 2019. If you have any questions concerning these matters, please contact Eric Runge (617-345-4735; [ekrunge@daypitney.com](mailto:ekrunge@daypitney.com)).

- **ICR-Related Values and HQICCs – 2022-23 Capacity Commitment Period (ER19-291)**

On January 4, 2019, the FERC accepted the ICR, LSR for SENE, MCL for NNE, HQICCs, and Marginal Reliability Impact (“MRI”) Demand Curves (collectively, the “2022-23 ICR-Related Values” or “Values”) for the 2022-23 Capacity Commitment Period (“CCP”).<sup>33</sup> The values will be used in FCA13 to be held in February 2019. With a 2022-23 ICR of 34,719 MW (reflecting tie benefits of 2,000 MW) and HQICCs of 969 MW/mo., the net amount of capacity to be purchased in FCA13 to meet the ICR will be 33,750 MW. The LSR for the SENE Capacity Zone is 10,141. The MCL for the NNE Capacity Zone is 8,545 MW. The 2022-23 ICR-Related Values were accepted effective as of January 5, 2019, as requested. In accepting the Values, the FERC found the underlying system reserves assumption (which increased from 200 MW to 700 MW) just and reasonable<sup>34</sup> and the use of different tie benefits and outages assumptions to calculate the ICR-Related Values than those used in the Fuel Security Study

<sup>31</sup> Under Appendix A Section III.A.15, a Market Participant has the right to make a Section 205 filing seeking additional cost recovery if, as a result of mitigation applied under Appendix A or the Energy Offer Cap, it will not recover the fuel and variable operating and maintenance (“O&M”) costs of a Resource for all or part of one or more Operating Days.

<sup>32</sup> *ISO New England Inc.*, 166 FERC ¶ 61,052 (Jan. 28, 2019).

<sup>33</sup> *ISO New England Inc. and New England Power Pool*, 166 FERC ¶ 61,007 (Jan. 4, 2019) (“*2022-23 ICR-Related Values Order*”). The Values accepted were those that do not take Clear River into account.

<sup>34</sup> *Id.* at PP 32-38.

sufficiently supported.<sup>35</sup> Unless the January 4 order is challenged, with any challenges due on or before February 4, this proceeding will be concluded. If you have any questions concerning this matter, please contact Eric Runge (617-345-4735; [ekrunge@daypitney.com](mailto:ekrunge@daypitney.com)).

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

On December 20, in a 2-1 decision (Commissioner Glick dissenting; Commissioner McIntyre not voting; Commissioner McNamee not participating), which followed an evidentiary proceeding and two rounds of briefing, the FERC conditionally accepted the Cost-of-Service Agreement (“COS Agreement”)<sup>36</sup> among Constellation Mystic Power (“Mystic”), Exelon Generation Company (“ExGen”) and ISO-NE.<sup>37</sup> The COS Agreement will provide compensation for the continued operation of the Mystic 8 & 9 units from June 1, 2022 through May 31, 2024. The *Mystic Order* directed Mystic to submit a compliance filing (intended to modify aspects of the COS Agreement that FERC rejected or directed be changed) on or before February 18, 2019, and established a paper hearing to ascertain whether and how the ROE methodology that FERC proposed in *Coakley* should apply in the case. Initial briefs on the ROE issue are due on or before April 19, 2019, and reply briefs are due on or before July 18, 2019.<sup>38</sup> Requests for clarification and/or rehearing of the *Mystic Order* were filed by Constellation Mystic Power, CT Parties, EDF, ENECOS, MA AG, NESCOE, NextEra, and Repsol. The requests for clarification and/or rehearing are pending, with FERC action required on or before February 19, 2019,<sup>39</sup> or the requests will be deemed denied by operation of law.

***Mystic’s Compliance Filing.*** Among others, changes and modifications are to include:

- ◆ ***Cost of Capital/Cost of Service.*** The Mystic Order directs Mystic to (i) use its corporate parent’s (Exelon’s) capital structure for ratemaking purposes, not ExGen’s;<sup>40</sup> and (ii) to recalculate the net original cost,<sup>41</sup> accumulated depreciation,<sup>42</sup> and excess deferred taxes and liability amounts<sup>43</sup> that were included in its initial cost of service presentation.
- ◆ ***Fuel Supply Charge.*** The Mystic Order also directed Mystic to revise the COS Agreement by reducing Mystic’s 100% proposed recovery of the costs of the Everett Facility to 91%, by adopting a sliding-scale incentive to induce Mystic make third-party gas sales, and by requiring a provision for maintaining a record of third-party sales for the purposes of verifying how revenues are credited. The FERC rejected Mystic’s proposed \$60 million recovery of its purchase price for the Everett Facility, noting that it was “unjust and unreasonable for Mystic to pass through Everett’s gross plant-in-service value, whatever that value may be, given that ExGen purchased Everett to ensure that it could comply with ExGen’s existing CSOs, and not for Everett to provide service to

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<sup>35</sup> *Id.* at PP 44-46.

<sup>36</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>37</sup> *Constellation Mystic Power, LLC*, 165 FERC ¶ 61,267 (Dec. 20, 2018) (“*Mystic Order*”).

<sup>38</sup> *Id.* at PP 31-34.

<sup>39</sup> Feb. 19, 2019 is the first business day that is 30 days from the date of the first request for rehearing (Repsol’s) was received (Jan. 18, 2019).

<sup>40</sup> *Id.* at PP 48-52.

<sup>41</sup> *Id.* at PP 63-65.

<sup>42</sup> *Id.* at PP 70-71.

<sup>43</sup> *Id.* at PP 73, 92.

- ISO-NE ratepayers during the term of th[e Mystic COS] Agreement.” The FERC further disallowed any inclusion in rate base or cost-of-service any cost “unrelated to the operation of Mystic,” and directed Mystic to identify and exclude such costs when calculating its Fuel Supply Charge.<sup>44</sup>
- ◆ **True-Up Mechanism.** In the Mystic Order, the FERC (i) directed Mystic to modify the COS Agreement to require a demonstration that it would not be delaying projects until the term of the COS Agreement that it would otherwise have undertaken sooner with the purpose of recovering excessive costs from ratepayers;<sup>45</sup> (ii) clarified that the true-up mechanism would apply to all aspects of the COS Agreement, with the exception of those that are fixed or must be modified by filing an FPA section 205 filing (such as ROE);<sup>46</sup> and (iii) required Mystic to include revenues in the true-up process to ensure that the rate ultimately charged are just and reasonable, and that Mystic recover only its prudently incurred costs.<sup>47</sup>
  - ◆ **Clawback Provision.** The FERC also ordered Mystic to include a clawback provision in the COS Agreement that would require Mystic to refund with interest the costs of repairs and capital expenditures needed to continue operations during the term of the COS Agreement – in the event Mystic were to return to the market after the term of the COS Agreement or after an extension.<sup>48</sup>

**July Mystic COS Agreement Order.** Rehearing remains pending of the FERC’s July order. As previously reported, the FERC issued an initial order regarding the COS Agreement, accepting the COS Agreement but suspending its effectiveness and setting it for accelerated hearings and settlement discussions.<sup>49</sup> The *Mystic COS Agreement Order* was approved by a 3-2 vote, with dissents by Commissioners Powelson and Glick. Challenges to the *July Mystic COS Agreement Order* were filed by NESCOE, ENECOS, MA AG, and the NH PUC. Constellation answered the NESCOE request for reconsideration On August 21. On September 10, 2018, the FERC issued a tolling order affording it additional time to consider the requests for rehearing, which remain pending.

If you have questions on this proceeding, please contact Joe Fagan (202-218-3901; [jfagan@daypitney.com](mailto:jfagan@daypitney.com)); Sebastian Lombardi (860-275-0663; [slombardi@daypitney.com](mailto:slombardi@daypitney.com)) or Sunita Paknikar (202-218-3904; [spaknikar@daypitney.com](mailto:spaknikar@daypitney.com)).

- **VTransco Recovery of Highgate Ownership Share Acquisition Costs (ER18-1259)**

On June 28, VTransco requested clarification and/or rehearing of the FERC’s May 29 order rejecting, without prejudice, VTransco’s request for authorization to recover in transmission rates property transfer taxes, closing fees, and advisory fees related to its acquisition of ownership shares in the Highgate Transmission Facility.<sup>50</sup> In rejecting the request,<sup>51</sup> the FERC found that “VTransco has not made a showing ... that these transaction-related costs have ‘specific, measurable, and substantial benefits to ratepayers.’

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<sup>44</sup> *Id.* at PP 148-152.

<sup>45</sup> *Id.* at P 174.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at P 179.

<sup>48</sup> *Id.* at PP 208-212.

<sup>49</sup> *Constellation Mystic Power*, 164 FERC ¶ 61,022 (July 13, 2018) (“*July Mystic COS Agreement Order*”), *reh’g requested*.

<sup>50</sup> *Vermont Transco, LLC*, 163 FERC ¶ 61,152 (May 29, 2018) (“*Highgate Acquisition Cost Recovery Order*”).

<sup>51</sup> VTransco requested (and the MA AG challenged its request for) authorization to recover, under the regional formula rate, \$639,780 in costs, including property transfer taxes, closing fees, and advisory fees, related to its acquisition recent of Highgate Transmission Facility ownership shares. VTransco stated that, absent FERC action, it would recover the expenses solely from Vermont customers (under its grandfathered 1991 Vermont Transmission Agreement (“VTA”). VTransco asserted that, because the costs are related to VTransco’s acquisition of ownership shares in the Highgate Transmission Facility, a facility utilized solely to provide Regional Network Service, it is just and reasonable to allow VTransco to recover the Highgate Transaction costs through the ISO-NE Tariff formula rate, rather than through the VTA.

Accordingly, we reject VTransco's filing, without prejudice to it making a future filing that makes this showing."<sup>52</sup> The FERC also rejected "the pass-through of transaction-related costs to ratepayers in any Commission-jurisdictional rate, without prejudice to VTransco submitting a request with the required showing of 'specific, measurable, and substantial benefits' to ratepayers."<sup>53</sup>

In its June 28 request for clarification and/or rehearing, VTransco asked the FERC (i) to clarify whether, in light of the *Highgate Acquisition Cost Recovery Order's* disallowance of the requested rate treatment, VTransco was directed to recover the transaction costs from local service customers (since the FERC directed VTransco to book those costs to an account explicitly included in charges to local customers under the VTA); (ii) to clarify its approach with respect to VTransco's hold harmless commitment; and (iii) if taking a new policy approach, to grant rehearing and apply any new policy prospectively. The FERC issued a tolling order on July 30, 2018, affording it additional time to consider VTransco's request for rehearing, which remains pending. If you have any questions concerning this matter, please contact Pat Gerity ([pmgerity@daypitney.com](mailto:pmgerity@daypitney.com); 860-275-0533).

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

On December 31, 2018, the Maine Customer Group<sup>54</sup> filed a formal challenge (the "Challenge") to Emera Maine's May 15, 2018 annual informational filing.<sup>55</sup> The Challenge seeks certain cost reductions/exclusions to be effective June 1, 2018. Maine Customer Group stated that the relief sought<sup>56</sup> had already been sought, unsuccessfully, directly from Emera Maine MPD through informal resolution procedures in accordance with the Protocols. No formal notice of the Challenge has been issued. If there are questions on this matter, please contact Pat Gerity (860-275-0533; [pmgerity@daypitney.com](mailto:pmgerity@daypitney.com)).

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

Rehearing remains pending of the FERC's October 6, 2017 order rejecting the TOs' June 5, 2017 filing in this proceeding.<sup>57</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>58</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>59</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

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<sup>52</sup> *Id.* at P 16.

<sup>53</sup> *Id.* at P 18.

<sup>54</sup> For purposes of this proceeding, "Maine Customer Group" is the MPUC, MOPA, Houlton water Co., and Van Buren Light & Power District, and Eastern Maine Electric Cooperative.

<sup>55</sup> The May 15 filing, submitted in accordance with the Protocols for Implementing and Reviewing Charges Established by the MPD OATT Attachment J Rate Formulas ("Protocols"), set forth for the June 1, 2018 to May 31, 2019 rate year, the charges for transmission service under the MPD OATT ("MPD Charges"). See May 31, 2018 Litigation Report.

<sup>56</sup> The formal challenge seeks (i) exclusion of certain regulatory expenses allocated or directly assigned to the MPD transmission customers; (ii) exclusion of costs that would otherwise constitute a double-recovery for amortization of losses incurred as a result of a merger; (iii) correction of MPD-acknowledged errors in its Annual Update Filing; (iv) exclusion of certain costs for land associated with a project not in service; (v) exclusion from transmission rates certain costs for distribution equipment; (vi) exclude of costs improperly attributed to line 6901; and (vii) a flowback of excess ADIT resulting from the corporate tax reduction, and a requirement for Emera MPD to include a worksheet in its tariff to track excess/deficient ADIT.

<sup>57</sup> *ISO New England Inc.*, 161 FERC ¶ 61,031 (Oct. 6, 2017) ("*Order Rejecting Filing*"), *reh'g requested*.

<sup>58</sup> *Emera Maine v. FERC*, 854 F.3d 9 (D.C. Cir. 2017) ("*Emera Maine*").

<sup>59</sup> *Order Rejecting Filing* at P 1.

variability in rates,” the FERC has temporarily left in place the ROEs set in *Opinion 531-A*, pending an order on remand.<sup>60</sup> On November 6, the TOs requested rehearing of the *Order Rejecting Filing*. On December 4, 2017, the FERC issued a tolling order providing it additional time to consider the TOs’ request for rehearing of the *Order Rejecting Filing*, which remains pending. If you have any questions concerning this matter, please contact Joe Fagan (202-218-3901; [jfagan@daypitney.com](mailto:jfagan@daypitney.com)) or Eric Runge (617-345-4735; [ekrunge@daypitney.com](mailto:ekrunge@daypitney.com)).

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

- **Post-PRD Implementation Conforming and Clean-Up Changes (ER19-614)**

On December 20, 2018, ISO-NE and NEPOOL jointly filed changes to the Tariff to reflect the full implementation of Price-Responsive Demand (“PRD”) and related clean-up changes (“Post-PRD Implementation Changes”). The Post-PRD Implementation Changes revised Tariff provisions related to: demand resource audits; the injection into the grid of electric power by demand resources; defined terms describing the measurement of facility load; Distributed Generation; and rules governing the aggregation of Demand Response Resources. A February 19, 2019 effective date was requested. Comments on this filing were due January 10, 2019; none were filed. Doc-less interventions were filed by Eversource, National Grid and NESCOE. This matter is pending before the FERC. If you have any questions concerning this proceeding, please contact Sebastian Lombardi (860-275-0663; [slombardi@daypitney.com](mailto:slombardi@daypitney.com)).

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

On December 14, Vineyard Wind petitioned the FERC for a waiver of the ISO-NE Tariff provisions necessary to allow it to participate in FCA13 as a Renewable Technology Resource (“RTR”). Vineyard Wind’s request for RTR designation was earlier rejected by ISO-NE on the basis that the resources is to be located in federal waters. Under the CASPR Conforming Changes (see ER19-444 below), Vineyard Wind would not have been precluded from utilizing the RTR exemption. Consistent with the discussion in the November 30 filing, Vineyard Wind has asked that the proration requirement that would be triggered by Vineyard Wind’s participation in FCA13 as an RTR (following acceptance of the CASPR Conforming Changes) be limited for FCA13 to it and any other similarly situated entities (i.e. new offshore wind resources located in federal waters seeking RTR treatment); there would be no impact on resources currently qualified to use the RTR exemption in FCA13. Comments on Vineyard Wind’s request were due on or before January 4, 2019. ISO-NE filed comments not opposing the Waiver Request, but requesting FERC action by January 29, 2019 if the waiver is 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, NextEra, and NESCOE. 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).

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

On December 3, 2018, ISO-NE and NEPOOL jointly filed changes to Market Rule 1 and the OATT (and the PTO AC joined in the filing of the OATT revisions) in response to the requirements of *Order 841*.<sup>61</sup> For the majority of the revisions, ISO-NE requested a December 3, 2019 effective date; for a limited number of revisions, ISO-NE requested a January 1, 2024 effective date. The *Order 841* compliance changes were supported by the Participants Committee at its November 2 meeting. Following a request for a 45-day

<sup>60</sup> *Id.* at P 36.

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

extension of time,<sup>62</sup> comments on this filing are now due February 7, 2019. Thus far, doc-less interventions have been filed by Exelon, EPSA, ESA, AEE, LS Power, NESCOE, RENEW Northeast (“RENEW”), and Lincoln Clean Energy. If you have any questions concerning this proceeding, please contact Sebastian Lombardi (860-275-0663; [slombardi@daypitney.com](mailto:slombardi@daypitney.com)).

- **CASPR Conforming Changes (ER19-444)**

On January 29, 2019, the FERC accepted the enhancements and conforming changes, jointly filed by ISO-NE and NEPOOL, to support the implementation of ISO-NE’s Competitive Auctions with Sponsored Policy Resource (“CASPR”) rules (“CASPR Conforming Changes”).<sup>63</sup> As previously reported, the changes include clarifications to the core CASPR rules, the introduction of a “test price” mechanism that will apply to existing resources that are seeking to retire capacity through the substitution auction, market settlement, FCM Financial Assurance, resource adequacy parameter and planning study rule changes, and an ancillary clarification necessary to permit off-shore wind resources located in federal waters to qualify for use of the RTR Exemption. The changes were accepted effective January 29, 2019 (though some of the rule changes, e.g. changes to the qualification rules, will be used starting with the FCA14 qualification process), as requested. In accepting the changes, the FERC found the test price mechanism “a just and reasonable means to address the potential incentive for bid-shading.”<sup>64</sup> Further, in an interpretation consistent with clarification provided in the FCM Resource Retirement Reforms Remand Proceeding (see ER16-551 below), the FERC further explained that the “the [FER]C will consider the entirety of the record, including the information and justification submitted by the Market Participant, and accept the Market Participant’s test price so long as the Market Participant persuades the [FERC] that its test price is just and reasonable.”<sup>65</sup> Challenges to the *CASPR Conforming Changes Order* are due on or before February 28, 2019. If you have any questions concerning this proceeding, please contact Sebastian Lombardi (860-275-0663; [slombardi@daypitney.com](mailto:slombardi@daypitney.com)).

- **ICR and Related Values Assumptions Updates (ER19-343)**

On January 8, 2019, the FERC accepted changes to the assumptions used in the calculation of the ICR and its Related Values.<sup>66</sup> The changes update assumptions used in the calculation of ICR, the Local Resource Adequacy Requirement (“LRA”) (which is an input into the LSR, DCL, the Marginal Reliability Impact values, HQICCs (which are all probabilistically calculated), and the Transmission Security Analysis Requirement (“TSA”) (which is deterministically calculated and an input into the LSR). The changes were accepted effective January 14, 2019, as requested. Unless the January 8 order is challenged, this proceeding will be concluded. If you have any questions concerning this proceeding, please contact Eric Runge (617-345-4735; [ekrunge@daypitney.com](mailto:ekrunge@daypitney.com)).

- **Enhanced Storage Participation Changes (ER19-84)**

The changes to the Tariff to enable emerging storage technologies to more fully participate in the New England markets (the “Storage Revisions”), jointly filed by ISO-NE and NEPOOL (“Filing Parties”) on October 10, 2018, remain pending before the FERC. The Storage Revisions will allow emerging storage technologies to be dispatched in the Real-Time Energy Market in a manner that more fully recognizes their ability to transition

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<sup>62</sup> The request for an extension of the previously noticed Dec. 24 comment deadline was requested by the Energy Storage Association (“ESA”) and by a group comprised of Advanced Energy Economy (“AEE”), American Wind Energy Association (“AWEA”), Solar Energy Industries Association (“SEIA”), Solar RTO Coalition, and The Wind Coalition. The request was supported by the Acadia Center, NRDC, UCS, and the Sierra Club Environmental Law Program (“Public Interest Organizations”).

<sup>63</sup> *ISO New England Inc. and New England Power Pool Participants Comm.*, 166 FERC ¶ 61,061 (Jan. 29, 2019) (“*CASPR Conforming Changes Order*”).

<sup>64</sup> *Id.* at P 28.

<sup>65</sup> *Id.* at P 31.

<sup>66</sup> *ISO New England and New England Power Pool Participants Comm.*, Docket No. ER19-343 (Jan. 8, 2019) (unpublished letter order).



continuously and rapidly between a charging state and a discharging state and that provides a means for their simultaneous participation in the energy, reserves, and regulation markets. The Filing Parties requested an April 1, 2019 effective date for the Storage Changes. Comments on the Storage Changes were due October 31. Doc-less interventions were filed by Calpine, Dominion, Eversource, FirstLight, National Grid, NextEra, NRG, and PSEG. The Energy Storage Association (“ESA”) protested one element of the Storage Changes, specifically the proposal to automatically de-rate the amount of energy that a continuous storage facility can discharge into the energy market (the “automatic redeclaration” of Economic Maximum Limit and Maximum Consumption Limit). ESA asserted that the operational result of that approach “fails to account for the physical and operational characteristics of electric storage resources and imposes a market-inefficient choice on energy storage to forgo selling all of their stored energy rather than to conserve a significant fraction as operating reserves – for which they receive no compensation more often than not.” On November 15, NEPOOL and ISO-NE answered the ESA protest. As noted, 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 Jamie Blackburn (202-218-3905; [jblackburn@daypitney.com](mailto:jblackburn@daypitney.com)).

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

As previously reported, the FERC accepted ISO-NE’s Fuel Security Retention Proposal on December 3, 2018.<sup>67</sup> The *Fuel Security Retention Proposal Order* accepted in all respects changes filed by ISO-NE on August 31, 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. Requests for rehearing and/or clarification of the *Fuel Security Retention Proposal Order* remain pending before the FERC.

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”.<sup>68</sup> 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”).<sup>69</sup> ISO-NE stated that the interim provisions would sunset after FCA15, with a longer-term market solution to be filed by July 1, 2019, as directed in the *Mystic Waiver Order*. In addition, the ISO-NE transmittal letter described (i) the generally-applicable fuel security reliability review standard that will be used to determine whether a retiring generating resource is needed for fuel security reliability reasons; (ii) the proposed cost allocation methodology (Real-Time Load Obligation, though ISO-NE indicated an ability to implement NEPOOL’s alternative allocation methodology if determined appropriate by the FERC); and (iii) the proposed treatment in the FCA of a retiring generator needed for fuel security reasons that elects to remain in service. The ISO-NE Fuel Security Changes were considered but not supported by the Participants Committee at its August 24 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”). Comments on the Fuel Security Retention Proposal were due September 21.

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<sup>67</sup> *ISO New England Inc.*, 165 FERC ¶ 61,202 (Dec. 3, 2018) (“*Fuel Security Retention Proposal Order*”).

<sup>68</sup> *Mystic Waiver Order* at P 55.

<sup>69</sup> The three sets of provisions include: (1) a trigger mechanism for authorizing ISO-NE action to retain capacity resources it determines are needed for fuel security reliability, as contained in a new Appendix L to Market Rule 1 (the “Appendix L Proposal”); (2) a new Section 13.2.5.2.5A of Market Rule 1 and revisions to Section III.13.2.5.2.5.1, to effectuate ISO-NE’s proposed treatment of resources retained for fuel security in the FCA, the timing and integration of fuel security reliability reviews (including the ISO-NE’s proposed application in the Substitution and Reconfiguration Auctions), and a proposal to allocate the costs associated with retaining units for fuel security (the “Section 13 Revisions”); and (iii) detailed reliability review implementation rules contained in revisions to ISO-NE Planning Procedure 10, Appendix I (the “PP-10 Revisions”).

On September 14, NEPOOL protested the filing and submitted the NEPOOL Alternative. Comments and protests were submitted numerous parties, including by Avangrid, Calpine, Cogentrix, Connecticut,<sup>70</sup> Constellation Mystic Power (“Constellation”), Dominion, ENECOS,<sup>71</sup> Environmental Defense Fund (“EDF”), Eversource, FirstLight, ISO-NE EMM, MA AG, MA DPU, MPUC, National Grid, NEPGA, NESCOE, NextEra, NH PUC, NRG, Participant Parties,<sup>72</sup> Verso, Vistra, American Petroleum Institute (“API”), APPA, EPSA, “Public Interest Organizations”,<sup>73</sup> and RENEW Northeast (“RENEW”). Doc-less interventions only were filed by Brookfield, Calpine, CLF, ConEd, Energy New England (“ENE”), Exelon, IECG, Invenergy, MMWEC, NESCOE, NHEC, NRG, Repsol (out-of-time), Citizens Energy Corporation, Public Citizen, and NRECA. On October 1, Direct Energy submitted an answer highlighting their view that fuel security costs should be allocated to Regional Network Load. On October 2, NH PUC answered the MA DPU September 21 comments. The MA AG and MA DPU each answered NH PUC, on October 5 and 12, respectively. Answers were also filed by ISO-NE and Constellation (October 9); Answers to ISO-NE’s October 9 answer were filed by FirstLight and NEPGA (October 17); NEPOOL (October 18); NextEra (October 22); NRG (October 23); and Vistra/Dynegy (October 24).

**Dec 3 Fuel Security Retention Proposal Order.** In accepting the ISO-NE Proposal, the FERC addressed, among others, the following topics:

- ◆ **The trigger and assumptions for the fuel security reliability review for retention of resources:** The FERC found the ISO-NE proposal to be reasonable,<sup>74</sup> 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. The informational filing should also include a description of lessons learned, and explain if changes to study assumptions and triggers are necessary for future studies.”<sup>75</sup>
- ◆ **Cost allocation:** The FERC found that cost allocation on a regional basis to Real-Time Load Obligation was just and reasonable and consistent with precedent regarding the past Winter Reliability Programs.<sup>76</sup>
- ◆ **Price treatment:** The FERC 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. The FERC said its determination on pricing is consistent with precedent in a 2017 NYISO order.<sup>77</sup>
- ◆ **Term of the interim fuel security provisions and Chapter 3:** The FERC found that it was appropriate to include FCAs 13, 14 and 15 in the term.<sup>78</sup> The FERC stated:

<sup>70</sup> For purposes of this proceeding, “Connecticut” is the Connecticut Dept. of Energy and Environ. Protection (“DEEP”), Office of Consumer Counsel (“OCC”) and Public Utilities Regulatory Authority (“PURA”).

<sup>71</sup> “ENECOS” in this proceeding are: Braintree, Concord, Georgetown, Hingham, Littleton, Middleborough, Middleton, Norwood, Pascoag, Reading, Taunton, Wellesley, and Westfield.

<sup>72</sup> “Participant Parties” are: Direct Energy Business, NextEra Energy Marketing, the Associated Industries of Massachusetts (“AIM”), The Energy Consortium (“TEC”), and PowerOptions.

<sup>73</sup> “Public Interest Organizations” for purposes of this proceeding are: the Sustainable FERC Project, Acadia Center, Natural Resources Defense Council (“NRDC”), and the Sierra Club.

<sup>74</sup> *Fuel Security Retention Proposal Order* at PP 35-39.

<sup>75</sup> *Id.* at P 39.

<sup>76</sup> *Id.* at PP 53-56.

<sup>77</sup> *Id.* at PP 82-88. See *New York Indep. Sys. Operator, Inc.*, 161 FERC ¶ 61,189 (Nov 16, 2017) (NYISO order).

<sup>78</sup> *Fuel Security Retention Proposal Order* at PP 96-97.

Given the limited amount of time between the July 1, 2019 filing deadline for the longer-term market solution, directed by the Commission, and the close of the FCA 15 retirement submission window in March 2020, we agree that the extension of the ability to retain resources through FCA 15 is a reasonable approach. We agree that it is necessary to implement a longer-term market solution as soon as possible, as discussed by commenters that request limiting the proposal to FCA 13 and 14. This interim solution is solely a stop-gap measure to address the fuel security challenges facing the region while ISO-NE develops its long-term market-based approach.<sup>79</sup>

Additionally, the FERC stated:

Although the July 2 Order required ISO-NE to file its longer-term market solution no later than June 1, 2019, ISO-NE is free to file that solution earlier and we encourage it do so, if possible. In addition, we anticipate that the long-term market solution will obviate the need to continue to use the interim solution approved in this order. Accordingly, ISO-NE's filing must contain language that will remove from its tariff the short-term solution, if accepted.<sup>80</sup>

The FERC declined to provide guidance on what the long-term solution(s) should be.<sup>81</sup>

Challenges to the *Fuel Security Retention Proposal Order* were filed by NEPGA, NRG, Verso, Vistra/Dynegy Marketing & Trade, and PIOs. The requests for rehearing are pending, with FERC action required on or before February 1, 2019, or the requests will be deemed denied by operation of law. If you have further questions concerning this proceeding, please contact Sebastian Lombardi (860-275-0663; [slombardi@daypitney.com](mailto:slombardi@daypitney.com)).

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

Rehearing of the FERC's November 9 order,<sup>82</sup> accepting the revised Tariff language that changed the determination of economic life under Section III.13.1.2.3.2.1.2.C of the Tariff, is pending before the FERC. As previously reported, the Economic Life Revisions provide that the economic life of an Existing Capacity Resource is calculated as the evaluation period in which the net present value of the resource's expected future profit is maximized. The Economic Life Revisions were accepted effective as of August 10, 2018, as requested. In accepting the revisions, the FERC found that "it is just and reasonable to consider as part of the Economic Life calculation that a rational resource, in exercising competitive bidding behavior, would seek to exit the market, or retire, before it starts incurring consecutive losses."<sup>83</sup> The FERC found, contrary to NEPGA's assertions, that the "Economic Life Revisions do not represent a violation of the filed rate doctrine or constitute retroactive ratemaking."<sup>84</sup> Further, while the FERC was "mindful of the importance of not disrupting settled expectations based on existing market rules," the FERC concluded "that under these specific facts, the benefits of the proposed Economic Life Revisions outweigh potential disruptions to market participants' settled expectations and harm caused by reliance on the existing FCM rules."<sup>85</sup> On December 10, 2018, NEPGA requested rehearing of the *Economic Life Determination Revisions Order*. On January 8, 2019, the FERC issued a tolling order affording it

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<sup>79</sup> *Id.* at P 96.

<sup>80</sup> *Id.* at P 93.

<sup>81</sup> *Id.* at P 102.

<sup>82</sup> *ISO New England Inc. and New England Power Pool Participants Comm.*, 165 FERC ¶ 61,088 (Nov. 9, 2018) ("*Economic Life Determination Revisions Order*")

<sup>83</sup> *Economic Life Determination Revisions Order* at P 23.

<sup>84</sup> *Id.* at P 24.

<sup>85</sup> *Id.* at P 27.

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

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

On July 2, 2018, the FERC issued an order<sup>86</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. In addition, the FERC *sua sponte* extended the deadline in two Tariff provisions to enable Exelon to postpone its Mystic 8 and 9 retirement decision to and including January 4, 2019.

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>87</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>88</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>89</sup> The FERC directed ISO-NE to consider the possibility that a resource owner may need to decide, prior to receiving approval of a COS Agreement, whether to unconditionally retire, and provided examples of how to address that possibility.<sup>90</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>91</sup> and an *ex ante* cost allocation proposal that appropriately identifies beneficiaries and adheres to FERC cost causation precedent.<sup>92</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:

<sup>86</sup> *ISO New England Inc.*, 164 FERC ¶ 61,003 (July 2, 2018), *reh'g requested* ("Mystic Waiver Order").

<sup>87</sup> *Id.* at P 47.

<sup>88</sup> *Id.* at P 48.

<sup>89</sup> *Id.* at P 55.

<sup>90</sup> *Id.* at PP 56-57.

<sup>91</sup> *Id.* at P 57.

<sup>92</sup> *Id.* at P 58.

- ◆ **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>93</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>94</sup> (requesting clarification that (i) the central purpose of ISO-NE’s July 1, 2019 filing is to assure that New England adds needed new infrastructure to address the fuel supply shortfalls and associated threats to electric reliability that ISO-NE identified in its OFSA and (ii) that, in developing the July 1, 2019 filing, ISO-NE is to evaluate Tariff revisions (such as those the EDCs described in their request), through which ISO-NE customers would pay for the costs of natural gas pipeline capacity additions via rates under the ISO-NE Tariff);
- ◆ **PIOs**<sup>95</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

<sup>93</sup> “Connecticut Parties” are the Conn. Pub. Utils. Regulatory Authority (“CT PURA”) and the Conn. Dept. of Energy and Environ. Protection (“CT DEEP”).

<sup>94</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).

<sup>95</sup> “PIOs” are the Sierra Club, Natural Resources Defense Council (“NRDC”), and Sustainable FERC Project.

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

If you have any questions concerning this proceeding, please contact Dave Doot (860-275-0102; [dtodoot@daypitney.com](mailto:dtodoot@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 and ISO-NE's Competitive Auctions with Sponsored Policy Resources ("CASPR") revisions,<sup>96</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>97</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>98</sup> (which challenged the CASPR construct in its entirety, asserting that state-sponsored resources should not be subject to the MOPR); and (iv) **Public Citizen** (which also challenged the CASPR construct in its entirety and the CASPR Order's failure to define "investor confidence"). On April 24, ISO-NE answered Clean Energy Advocates' answer. On May 7, the FERC issued a tolling order affording it additional time to consider the requests for rehearing, which remain pending. If you have any questions concerning this proceeding, please contact Dave Doot (860-275-0102; [dtodoot@daypitney.com](mailto:dtodoot@daypitney.com)) or Sebastian Lombardi (860-275-0663; [slombardi@daypitney.com](mailto:slombardi@daypitney.com)).

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

Rehearing remains pending of the FERC's October 6, 2017 order accepting updated FCM CONE, Net CONE and ORTP values.<sup>99</sup> In accepting the changes, the FERC disagreed with the challenges to ISO-NE's choice of reference technology (gas-fired simple cycle combustion-turbine) and on-shore wind capacity factor (32%). The changes were accepted effective as of March 15, 2017, as requested. On November 6, NEPGA requested rehearing of the *CONE/ORTP Updates Order*. On December 4, 2017, the FERC issued a tolling order providing it additional time to consider NEPGA's request for rehearing of the *CONE/ORTP Updates Order*, which remains pending. If you have any questions concerning this proceeding, please contact Sebastian Lombardi (860-275-0663; [slombardi@daypitney.com](mailto:slombardi@daypitney.com)).

<sup>96</sup> *ISO New England Inc.*, 162 FERC ¶ 61,205 (Mar. 9, 2018) ("CASPR Order").

<sup>97</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>98</sup> "Clean Energy Advocates" are, collectively the NRDC, Sierra Club, Sustainable FERC Project, CLF, and RENEW Northeast, Inc.

<sup>99</sup> *ISO New England Inc.*, 161 FERC ¶ 61, 035 (Oct. 6, 2017) ("*CONE/ORTP Updates Order*"), *reh'g requested*.

- **FCM Resource Retirement Reforms Remand Proceeding (ER16-551)**

As previously reported, on December 28, 2018, the DC Circuit Court of Appeals, following oral argument in Exelon’s appeal of the FERC’s Resource Retirement Reforms Orders,<sup>100</sup> directed the FERC to clarify “what [the FERC] really means” in the context of its orders on the FCM Resource Retirement Reforms.<sup>101</sup> Specifically, the Court directed the FERC to issue an order, not later than February 1, 2019, clarifying its position on the proper reading, process and legal standards associated with the Tariff changes that have ISO-NE file mitigated retirement bids for FERC review under § 205 of the FPA. In its appeal of those orders, Exelon continued its objection to the replacement of its De-List Bid for an IMM-mitigated De-List Bid in that FERC review under FPA § 205, which Exelon asserted “trample[s] on its § 205 rights”.

**Post-Remand Comments.** On January 14, 2019, ISO-NE submitted a filing urging the FERC, in response to the remand decision, to affirm the holdings of its *FCM Resource Retirement Reforms Orders* that (i) suppliers’ FCA Retirement Bids are inputs to rates, not “rates” under FPA § 205 and therefore are not entitled to FERC assessment under § 205’s “just and reasonable” standard (proposing instead that ISO-NE’s filing of Retirement Bids be treated as an informational filing), and (ii) ISO-NE’s mitigation of Retirement Bids does not usurp generators’ § 205 rights. On January 18, NEPOOL and Exelon submitted limited responses to ISO-NE’s January 14 filing.<sup>102</sup> **NEPOOL** requested that the FERC reject ISO-NE’s January 14 suggestion that its Section 205 filing be deemed an informational filing, and to the extent ISO-NE seeks to revise Section III.13.8.1(a), direct ISO-NE to seek such changes through the NEPOOL stakeholder process. **Exelon’s** comments suggested the FERC should revise its Orders to be consistent with the position taken by FERC Solicitor’s office in oral arguments before the DC Circuit, which indicated that the FERC’s Orders intended that a supplier’s retirement bid would be accepted so long as it is in the zone of reasonableness—even if the Market Monitor’s alternative proxy bid for that supplier is also in the zone of reasonableness and, to the extent there is a disagreement between a supplier and the Market Monitor, the supplier need only demonstrate that its own bid is just and reasonable and if so demonstrated then its bid is to be used in the auction. An order is expected to be issued on February 1. On January 29, **the IMM** submitted comments that concurred with ISO-NE’s Jan 14 comments, indicating that it was writing separately to emphasize the long-standing practice, as agreed to in the original Settlement Agreement establishing the [FCA], and the practical importance of having only the IMM-reviewed bids, and not the suppliers’ own bids, as inputs into ISO’s [FCA] in order to mitigate the potential exercise of market power by participants and to ensure that the ultimate clearing prices are just and reasonable.”

**Order on Remand.**<sup>103</sup> On January 29, in response to the DC Circuit Court’s opinion and remand, the FERC issued the *FCM Resource Retirement Reforms Remand Order* which (i) revised PP 18, 19 and 25 of its October 30, 2017 order, and (ii) stated that the FERC interprets the relevant Tariff language to mean that (a) ISO-NE’s section 205 filing must include the relevant information and justification submitted by both the capacity supplier and the IMM; and (b) the FERC will consider the entirety of the record and accept the capacity supplier’s bid so long as the capacity supplier persuades the FERC that its bid is just and reasonable, despite contrary assertions by the IMM.<sup>104</sup>

<sup>100</sup> *ISO New England Inc.*, 155 FERC ¶ 61,029 (Apr. 12, 2016) (“*Resource Retirement Reforms Order*”), *reh’g and clarif. denied*, 161 FERC ¶ 61,115 (Oct. 30, 2017) (“*FCM Resource Retirement Reforms Orders*”).

<sup>101</sup> *Exelon Corporation v. FERC*, 911 F.3d 1236 (D.C. Cir., Dec. 28, 2018) (Case No. 17-1275).

<sup>102</sup> The Jan. 14 filing was assigned a Jan. 15 filing date as a result of the FERC’s Jan. 14 closure due to adverse weather conditions.

<sup>103</sup> *ISO New England Inc.*, 166 FERC ¶ 61,060 (Jan. 29, 2019) (“*FCM Resource Retirement Reforms Remand Order*”).

<sup>104</sup> *Id.* at P 8.

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

Still pending before the FERC is ISO-NE's compliance filing in response to the FERC's August 8, 2016 remand order.<sup>105</sup> In the *2013/14 Winter Reliability Program Remand Order*, the FERC directed ISO-NE to request from Program participants the basis for their bids, including the process used to formulate the bids, and to file with the FERC a compilation of that information, an IMM analysis of that information, and ISO-NE's recommendation as to the reasonableness of the bids, so that the FERC can further consider the question of whether the Bid Results were just and reasonable.<sup>106</sup> ISO-NE submitted its compliance filing on January 23, 2017, reporting the IMM's conclusion that "the auction was not structurally competitive and a 'small proportion' of the total cost of the program may be the result of the exercise of market power" but that the "vast majority of supply was offered at prices that appear reasonable and that, for a number of reasons, it is difficult to assess the impact of market power on cost." Based on the IMM and additional analysis, ISO-NE recommended that "there is insufficient demonstration of market power to warrant modification of program." In February 13 comments, both TransCanada and the MA AG protested ISO-NE's conclusion and recommendation that modification of the program was unwarranted. TransCanada requested that FERC establish a settlement proceeding where Market Participants could "exchange confidential information to determine what the rates should be" and refunds and "such other relief as may be warranted" provided. On February 28, ISO-NE answered the TransCanada and MA AG protests. On March 10, 2017, TransCanada answered ISO-NE's February 28 answer. This matter remains pending before the FERC. If you have any questions concerning these matters, please contact Sebastian Lombardi (860-275-0663; [slombardi@daypitney.com](mailto:slombardi@daypitney.com)).

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

- **Interconnection Process Enhancement: Retiring Resources Treatment (ER19-449)**

On January 28, 2019, the FERC accepted changes to Schedules 22, 23 and 25 of the OATT and Section III.13.1.1.2.3 of Market Rule 1 designed to enhance the manner in which capacity retirements are accounted for in certain interconnection studies performed for new resources seeking Capacity Network Resource Interconnection Service ("CNRIS") and Capacity Network Import Interconnection Service ("CNIIS") in order to participate in the FCM.<sup>107</sup> These revisions also included a minor conforming change to the definition of Capacity Network Resource Capability ("CNR Capability") in Schedules 22 and 23 of the OATT. The changes were accepted effective as of January 29, 2019, as requested (which allows for implementation for FCA13). Unless the January 28 order is challenged, this proceeding will be concluded. If you have any questions concerning this proceeding, please contact Eric Runge (617-345-4735; [ekrunge@daypitney.com](mailto:ekrunge@daypitney.com)).

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

***No Activity to Report***

<sup>105</sup> *ISO New England Inc.*, 156 FERC ¶ 61,097 (Aug. 8, 2016) ("*2013/14 Winter Reliability Program Remand Order*"). As previously reported, the DC Circuit remanded the FERC's decision in ER13-2266, agreeing with TransCanada that the record upon which the FERC relied is devoid of any evidence regarding how much of the 2013/14 Winter Reliability Program cost was attributable to profit and risk mark-up (without which the FERC could not properly assess whether the Program's rates were just and reasonable), and directing the FERC to either offer a reasoned justification for the order in ER13-2266 or revise its disposition to ensure that the Program rates are just and reasonable. *TransCanada Power Mktg. Ltd. v. FERC*, 2015 U.S. App. LEXIS 22304 (D.C. Cir. 2015).

<sup>106</sup> *2013/14 Winter Reliability Program Remand Order* at P 17.

<sup>107</sup> *ISO New England Inc., et al.*, Docket No. ER19-449 (Jan. 28, 2019) (unpublished letter order).



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

- **Schedule 21-NEP: BIPCO LSA Amendments (ER19-707)**

On December 28, 2018, National Grid filed clarifying and ministerial amendments to its local service agreement (“LSA”) under Schedule 21-NEP with Block Island Power Company (“BIPCO”) and ISO-NE. The changes included: (i) clarifications that BIPCO is responsible for telecommunications circuits; (ii) updates to the list of interconnection facilities and associated equipment; (iii) specification that BIPCO has elected to pay for the interconnection facilities via a Direct Assignment Facilities charge with no Contribution in Aid of Construction; (iv) identification of the transformer nameplate rating; (v) clarification as to the point of change in ownership (at the interconnection point); and (vi) other updates and corrections. A January 1, 2019 effective date was requested. Comments on this filing were due on or before January 18, 2019; none were filed. This matter is pending before the FERC. If there are questions on this matter, please contact Pat Gerity (860-275-0533; [pmgerity@daypitney.com](mailto:pmgerity@daypitney.com)).

- **Schedule 21-EM: Stored Solar J&WE LSA Extension (ER19-706)**

On December 28, 2018, Emera Maine and ISO-NE filed an amended LSA (“Second Stored Solar LSA”) by and among Emera Maine, Stored Solar J&WE, and ISO-NE for Local Non-Firm Point-to-Point Transmission Service under Schedule 21-EM of the ISO-NE OATT (the “Stored Solar LSA”). The Second Stored Solar LSA extends the discounted service rate accepted in February 2018 in Docket No. ER18-387. The term of the Second Stored Solar LSA is January 11, 2019 to December 31, 2020. A January 1, 2019 effective date was requested. Comments on the Second Stored Solar LSA were due on or before January 18, 2019; none were filed. This matter is pending before the FERC. If there are any questions on these matters, please contact Pat Gerity (860-275-0533; [pmgerity@daypitney.com](mailto:pmgerity@daypitney.com)).

- **Schedule 21-EM: Corrections to § 10.2 (ER19-64)**

On January 30, 2019, the FERC accepted Emera Maine’s October 9 changes to Schedule 21-EM Section 10.2 (Emera Maine Penalties for Exceeding Non-Firm Capacity Reservation).<sup>108</sup> As previously reported, Emera Maine stated the changes were needed to correct errors in that section that date back to an October 11, 2007 *Order 890* compliance filing in which changes addressing unreserved use penalties were incorporated. Emera Maine hypothesized that the errors were the result of parallel changes to the section addressing penalties for unreserved use of *firm* transmission service being copied verbatim to the section addressing penalties for unreserved use of *non-firm* transmission service (without then changing references to firm to non-firm). In addition to changing references to firm to non-firm, Emera Maine also changed the basis upon which the penalty for exceeding non-firm reserved capacity for a greater than one-month period will be based.<sup>109</sup> The corrections were accepted effective as of December 9, 2018, as requested. Unless the January 30 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)).

- **Schedule 21-EM: Recovery of Bangor Hydro/Maine Public Service Merger-Related Costs (ER15-1434 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>110</sup> remains pending before the FERC. As previously reported, under the Settlement, permitted cost

<sup>108</sup> *ISO New England Inc.*, Docket No. ER19-64-000 and -001 (Jan. 30, 2019) (unpublished letter order).

<sup>109</sup> The basis for the penalty changed from “a rate for *annual* Non-Firm Point-to-Point Transmission Service” to “a rate of 12 times the rate for *monthly* Non-Firm Point-To-Point Transmission Service”.

<sup>110</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

recovery over a period from June 1, 2018 to May 31, 2021 will be \$390,000 under Attachment P-EM of the BHD OATT and \$260,000 under the MPD OATT. Comments on the MPS Merger Cost Recovery Settlement were due on or before May 29, 2018; none were filed. On June 11, Settlement Judge Dring<sup>111</sup> certified the MPS Merger Cost Recovery Settlement to the FERC.<sup>112</sup> The MPS Merger Cost Recovery Settlement is pending before the FERC. If you have any questions concerning these matters, please contact Pat Gerity ([pmgerity@daypitney.com](mailto:pmgerity@daypitney.com); 860-275-0533).

## VII. NEPOOL Agreement/Participants Agreement Amendments

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

On January 30, 2019, the FERC rejected the changes to the NEPOOL Agreement that would have precluded press reporters from becoming NEPOOL End User Participants or representatives of NEPOOL Participants.<sup>113</sup> In rejecting the changes, the FERC concluded that NEPOOL had not supported that “barring members of the press from exercising the privileges unique to NEPOOL membership—i.e. attending, speaking, and voting at NEPOOL meetings—will meaningfully advance its aim for candid deliberation in light of” NEPOOL’s Bylaws and Standard Conditions Waivers & Reminders “currently in place—which this order does not affect—[that] already prohibit reporting on deliberations or attributing statements to other NEPOOL members.”<sup>114</sup> The FERC further indicated that the *Press Provisions Order* only addressed NEPOOL’s proposed changes to the NEPOOL Agreement, and not the pending RTO Insider Complaint (see EL18-196 above) that it will address in a separate order. Challenges, if any, to the *Press Provisions Order* must be filed on or before February 28, 2019. In light of this order, the Membership Subcommittee will meet to consider the pending application from the RTO Insider press reporter and recommend to the Participants Committee whether any additional conditions should apply to such a membership. If you have any questions concerning this proceeding, please contact Pat Gerity (860-275-0533; [pmgerity@daypitney.com](mailto:pmgerity@daypitney.com)), Dave Doot (860-275-0102; [dt\\_doot@daypitney.com](mailto:dt_doot@daypitney.com)), or Sebastian Lombardi (860-275-0663; [slombardi@daypitney.com](mailto:slombardi@daypitney.com)).

## 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)).

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>111</sup> ALJ John Dring was the settlement judge for these proceedings. There were five settlement conferences: three in 2016 and two in 2017. In his most recent May 24, 2018 status report, Judge Dring indicated that the parties reached a settlement in principle, had filed a joint offer of settlement on May 8 (“MPS Merger Cost Recovery Settlement”), and recommended that settlement judge procedures be continued. The Settlement remains pending before the FERC and settlement judge procedures, for now, have not been terminated.

<sup>112</sup> *Emera Maine and BHE Holdings*, 163 FERC ¶ 63,018 (June 11, 2018).

<sup>113</sup> *New England Power Pool Participants Comm.*, 166 FERC ¶61,062 (Jan. 29, 2019) (“*Press Provisions Order*”). The rejected changes were identified in the One Hundred Thirty-Second Agreement Amending New England Power Pool Agreement (“132nd Agreement”), which was approved in balloting following the 2018 Summer Meeting.

<sup>114</sup> *Id.* at P 50.

- **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>115</sup> and *531-B*<sup>116</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: 41<sup>st</sup> Quarterly Status Report (ER07-476; RM06-08)**

ISO-NE filed the 41<sup>st</sup> of its Quarterly Status Reports regarding LFTR implementation on January 15, 2019. ISO-NE again reported its plan to implement monthly reconfiguration auctions (accepted in ER12-2122) beginning with the month of October 2019 and to renew after that implementation efforts to address the financial assurance issues associated with LFTRs. These status reports are not noticed for public comment.

## IX. Membership Filings

- **January 2019 Membership Filing (ER19-748)**

On December 31, 2018, NEPOOL requested that the FERC accept (i) the memberships of ADG Group (Supplier Sector) and Dominion Bridgeport Fuel Cell LLC [Related Person to Dominion Energy Marketing (Generation Sector)]; and (ii) the termination of the Participant status of: Solea Energy (Supplier Sector), New England Confectionery Company and EmpireCo LP (each, Generation Sector Group Seat). This filing is pending before the FERC.

- **December 2018 Membership Filing (ER19-446)**

On January 17, 2019, the FERC accepted (i) the memberships of Alpha Gas & Electric (Supplier Sector); Eagle's View Partners (Supplier Sector); and Thordin ApS (Supplier Sector); (ii) the termination of the Participant status of: Food City & East Ave. Energy (End User Sector); and (iii) the name change of Enel X North America (f/k/a EnerNOC).<sup>117</sup> Unless the January 17 order is challenged, this proceeding will be concluded.

- **Suspension Notices (not docketed)**

Since the last Report, ISO-NE filed, pursuant to Section 2.3 of the Information Policy, a notice with the FERC noting that the following Participants were suspended from the New England Markets on the date indicated (at 8:30 a.m.) due to a Financial Assurance Default:

<sup>115</sup> *Martha Coakley, Mass. Att'y Gen.*, 149 FERC ¶ 61,032 (Oct. 16, 2014) ("*Opinion 531-A*").

<sup>116</sup> *Martha Coakley, Mass. Att'y Gen.*, Opinion No. 531-B, 150 FERC ¶ 61,165 (Mar. 3, 2015) ("*Opinion 531-B*").

<sup>117</sup> *New England Power Pool Participants Comm.*, Docket No. ER19-446 (Jan. 17, 2019).

<i>Date of Suspension/ FERC Notice</i>	<i>Participant Name</i>	<i>Date Reinstated</i>
Jan 14/16	Lotus Danbury LMS100 One	--
Jan 14/16	Noble Environmental Power	--
Jan 14/16	Viridity Energy Inc.	--

Suspension notices are for the FERC's information only and are not docketed or noticed for public comment.

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

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

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

On December 7, 2018, NERC filed for approval a revised Reliability Standard -- TPL-001-5 (Transmission System Planning Performance Requirements), and associated implementation plan, VRFs and VSLs (together, the "TPL-001 Changes"). NERC stated that the TPL-001 Changes improve upon the currently effective standard by enhancing Requirements for the study of Protection System single points of failure. Additionally, the TPL-001 Changes address two FERC directives from Order 786: (1) the TPL-001 Changes provide for a more complete consideration of factors for selecting which known outages will be included in Near-Term Transmission Planning Horizon studies, addressing the FERC's concern that the exclusion of known outages of less than six months in TPL-001-4 could result in outages of significant facilities not being studied; and (2) the TPL-001 Changes modify Requirements for Stability analysis to require an entity to assess the impact of the possible unavailability of long lead time equipment, consistent with the entity's spare equipment strategy. As of the date of this Report, the FERC has not noticed a proposed rulemaking proceeding or otherwise invited public comment.

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

On September 18, 2018, NERC filed for approval a new Reliability Standard -- CIP-012-1 (Cyber Security – Communications between Control Centers), and associated Glossary definitions, implementation plan, VRFs and VSLs (together, the "Control Center Cyber Security Communication Changes"). NERC stated that the changes modify the Critical Infrastructure Protection ("CIP") Reliability Standards to require Responsible Entities to implement controls to protect communication links and sensitive Bulk Electric System ("BES") data communicated between BES Control Centers. CIP-012-1 requires Responsible Entities to develop a plan to mitigate the risks posed by unauthorized modification (integrity) and unauthorized disclosure (confidentiality) of Real-time Assessment and Real-time monitoring data. The plan must include the following three components: (1) identification of security protection used to meet the security objective; (2) identification of where the Responsible Entity applied the security protection; and (3) identification of the responsibilities of each Responsible Entity for applying the security protection. As of the date of this Report, the FERC has not noticed a proposed rulemaking proceeding or otherwise invited public comment.

## XI. Misc. - of Regional Interest

- **203 Application: FirstLight Restructuring (EC19-44)**

On January 2, 2019, FirstLight Hydro Generating Company (FirstLight Hydro) and the FirstLight Project Companies<sup>118</sup> requested FERC authorization for the disposition of jurisdictional facilities that will result from a proposed corporate restructuring involving the transfer of 100% of FirstLight Hydro's electric generating facilities

<sup>118</sup> The "FirstLight Project Companies" are FirstLight CT Housatonic, FirstLight CT Hydro, FirstLight MA Hydro, and Northfield Mountain.

and related assets (“Facilities”) to the FirstLight Project Companies (“FirstLight Restructuring”). Following the FirstLight Restructuring, which the parties expect to be completed on or about March 31, 2019, the Facilities will be directly owned by the FirstLight Project Companies. Comments on this application were due on or before January 23, 2019; none were filed. This matter is pending before the FERC.

- **203 Application: Emera / Revere Power (EC19-35)**

On December 14, 2018, Bridgeport Energy LLC (“Bridgeport”), Rumford Power Inc. (“Rumford”), Tiverton Power LLC (“Tiverton”, and together with Bridgeport and Rumford, the “Project Companies”), and Revere Power, LLC (“Buyer” or “Revere”), requested FERC authorization for a proposed transaction that will result in the transfer of 100% of the indirect ownership interests in the Project Companies from Emera US Holdings Inc. (“Seller”) to Revere. Following consummation of the transaction, the Project Companies will be wholly-owned, indirect subsidiaries of Revere, and Related Persons to Nautilus Power (Generation Sector) and its affiliates. Comments on this application are due on or before February 12, 2019.

- **203 Application: Dominion Bridgeport Fuel Cell, LLC (EC19-22)**

On December 20, 2018, the FERC authorized the acquisition of Dominion Bridgeport Fuel Cell, LLC, owner of a 15 MW fuel cell power plant in Bridgeport, CT and a new member as of January 1, 2019 (see ER19-784 in Section IX above) by FuelCell Energy Finance, LLC (“Fuel Cell”). Fuel Cell is a Related Person of DFC ERG CT, a member of the AR Sector.<sup>119</sup> Among other conditions, the December 20 order required notice within 10 days of the acquisition’s consummation, which has not yet been filed.

- **203 Application: Plymouth Rock/Engie (EC19-19)**

On December 14, 2018, the FERC authorized a transaction pursuant to which, on December 19, ENGIE Resources (“Engie”) indirectly acquired 100% of the equity interests in Plymouth Rock Energy, LLC (“Plymouth Rock”).<sup>120</sup> As a result of the transaction, Plymouth Rock and Engie are Related Persons. Plymouth Rock filed a notice of the acquisition’s consummation on January 3, 2019. Reporting on this proceeding has concluded.

- **203 Application: ECP/Fawkes Holdings (Wheelabrator) (EC19-14)**

On December 6, 2018, the FERC authorized the acquisition by Fawkes Holdings, LLC (a Related Person to Macquarie Energy) of all of the issued and outstanding shares of common stock of Wheelabrator Technologies Inc. (“Wheelabrator”) currently held by the Energy Capital Partners companies (“ECP”).<sup>121</sup> Following the consummation of the transaction, notice of which, as of the date of this Report, has not been filed, Wheelabrator will be a Macquarie Related Person and no longer a Calpine Related Person.

- **203 Application: VTransco Acquisition of BED/Stowe Highgate Share (EC18-137)**

On December 17, 2018, the FERC authorized the acquisition by VTransco of the Burlington and Stowe Electric Department ownership shares in the Highgate Transmission Facility.<sup>122</sup> On January 2, VTransco notified the FERC that it acquired those shares on December 24, 2018. VTransco is now the sole owner of the Highgate Transmission Facility. VTransco committed to hold transmission customers harmless and not to include transaction-related costs in its transmission revenue requirements for a period of five years following the acquisition. And should it ever seek to recover the transaction-related costs in rates, VTransco further committed

<sup>119</sup> *Dominion Bridgeport Fuel Cell, LLC*, Docket No. EC19-22 (Dec. 20, 2018).

<sup>120</sup> *Plymouth Rock Energy, LLC*, 165 FERC ¶ 62,164 (Dec. 14, 2018) (“*Plymouth Rock/Engie Order*”).

<sup>121</sup> *Wheelabrator Technologies Inc.*, 165 FERC ¶ 62,141 (Dec. 6, 2018).

<sup>122</sup> *Vermont Transco LLC*, 165 FERC ¶ 62,176 (Dec. 17, 2018). The Highgate Transmission Facility is the United States portion of a line that extends from a site near Bedford Substation, in Québec, to a substation in Highgate, Vermont, crossing the International Boundary near Saint Armand, Québec, and Franklin, Vermont, and provides an interconnection between Hydro-Québec TransÉnergie and the transmission system in Vermont owned by VTransco.

to demonstrate off-setting benefits in a separate filing under section 205 of the FPA. Reporting on this proceeding is now concluded.

- **203 Application: Linde Energy Services (EC18-132)**

On September 14, 2018, the FERC authorized a transaction pursuant to which Linde AG will divest the parent of Linde Energy Services (“Linde”), Linde North America, Inc. to an unaffiliated third-party, now known as “Messer Industries GmbH” (the divestiture was expected to be a condition to FTC approval of the Linde AG/Praxair Inc. merger).<sup>123</sup> Among other conditions, the order required notice within 10 days of the acquisition’s consummation, which has not yet been filed.

- **203 Application: Wheelabrator Technologies (EC18-130)**

On September 19, 2018, the FERC authorized the disposition of up to 49% of the indirect ownership interests in Wheelabrator Technologies (“WTI”) indirectly held public utility subsidiaries resulting from an initial public offering of up to approximately 49% of WTI’s common stock. Among other conditions, the order required notice within 10 days of the acquisition’s consummation, which has not yet been filed.

- **New England Ratepayers Association Complaint (EL19-10)**

As previously reported, the New England Ratepayers Association (“NERA”) filed a complaint on November 2, 2018 seeking declaratory order finding that (i) New Hampshire Senate Bill 365 (“SB 365”),<sup>124</sup> which mandates a purchase price for wholesale sales by seven generators operating in NH, (i) is preempted by the Federal Power Act; (ii) SB 365 violates Section 210 of the Public Utility Regulatory Policies Act of 1978 (“PURPA”) (because SB 365 does not satisfy the requirement under PURPA and the FERC’s implementing regulations<sup>125</sup> that rates set by the states for wholesale sales by QFs may not exceed the purchasing utilities’ avoided costs; and (iii) NH is pre-empted from ordering purchases that are contrary to the FERC’s order terminating PSNH’s mandatory purchase obligation on a service territory-wide basis for QFs with a net capacity in excess of 20 MW. NERA asked the FERC to issue a ruling by February 1, 2019 (the date NH customers may first bear the costs of SB 365). Doc-less interventions were filed by Calpine, Eversource, National Grid, NRG, and the DC Office of People’s Counsel. Comments supporting the Petition were filed by: NH OCA, the NH Generator Group,<sup>126</sup> EPSA, and a group of NH customers; a Protest was filed by the State of New Hampshire.<sup>127</sup> The New England Small Hydro Coalition filed comments that, while not taking a position on NERA’s preemption argument, disagreed with the premise that underlies NERA’s argument as to what constitutes an avoided cost rate in New Hampshire. NH OCA and the NH Generator Group amended/supplemented their December 3 comments. A group of NH Legislators that supported SB 365 filed comments on December 17 urging the FERC to deny the Petition. On December 20, NERA answered the protests and comments.

Since the last report, on January 4, 2019, the NH AG answered NERA’s December 20 answer, asserting that NERA’s Petition is premature, the evidentiary record before the FERC is inadequate to support the declaratory order sought, and the FERC should dismiss the Petition to allow time for the NHPUC to rule on pending issues before the NHPUC related to the implementation of SB 365. The New Hampshire Generator Group similarly answered NERA’s December 20 answer, also asserting that the NERA motion misstated the

<sup>123</sup> *Linde Energy Services, Inc.*, 164 FERC ¶62,147 (Sep. 14, 2018).

<sup>124</sup> SB 365, 2018 N.H. Laws Ch. 379, An Act relative to the use of renewable generation to provide fuel diversity, codified at N.H. Rev. Stat. Chapter 362-H.

<sup>125</sup> 18 C.F.R. §§ 292.304(a); 292.101(b)(6) (2018).

<sup>126</sup> The NH Generator Group is comprised of the following entities: Bridgewater Power Company, L.P., DG Whitefield LLC, Pinetree Power – Tamworth LLC, Pinetree Power, Inc., Springfield Power, LLC, and Wheelabrator Concord Company, L.P.

<sup>127</sup> Although the State of New Hampshire requested and was eventually granted a two-week extension of time to file its comments, that extension was noticed on December 4, 2018, after the initial comment date and the submission of NH’s comments.

relevant facts and law. On January 7, PSNH moved to lodge its December 27, 2018 pleading in NHPUC Docket No. DE 18-002 (which objected to the request that the NHPUC determine certain IPP PPAs conform with SB 365/RSA Chap 362-H and noted uncertainties to be resolved in connection with any purchases). On January 22, the NH Generator Group answered the motion to lodge, providing additional material and context. 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).

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

On June 29, 2018, the FERC issued an order (“*PJM Order*”)<sup>128</sup> regarding out-of-market support affecting the PJM capacity market.<sup>129</sup> Opening with the statement that “the integrity and effectiveness of the capacity market administered by [PJM] have become untenably threatened by out-of-market payments provided or required by certain states for the purpose of supporting the entry or continued operation of preferred generation resources,” the *PJM Order* determined that the PJM Tariff is currently unjust and unreasonable, rejected PJM’s Section 205 Filing, granted in part Calpine’s Complaint, and established a paper hearing to resolve the “price-suppressive” effects of out-of-market support for certain resources. Commissioners LaFleur and Glick both dissented, and Commissioner Powelson wrote a separate concurrence.

In the *PJM Order*, the FERC found “that it has become necessary to address the price suppressive impact of resources receiving out-of-market support.” The FERC agreed with Calpine and PJM that changes to the PJM Tariff were required, but did not accept the changes proposed in the Calpine Complaint or the PJM Filing, finding that neither had been shown to be just and reasonable, and not unduly discriminatory or preferential. The majority stated that it was unable to determine, based on the record of either proceeding, the just and reasonable rate to replace the rate in PJM’s Tariff. The *PJM Order* therefore found the PJM Tariff unjust and unreasonable, granted the Calpine Complaint, in part, and *sua sponte* initiated a new FPA section 206 proceeding (EL18-178), consolidating the record of the two earlier proceedings, and setting for paper hearing the issue of how to address a proposed alternative put forth in the *PJM Order*,<sup>130</sup> which would modify two existing aspects of the PJM Tariff, “or any other proposal that may be presented.”

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

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<sup>128</sup> *Calpine Corp. et al.*, 163 FERC ¶ 61,236 (June 29, 2018), *clarif. and/or reh’g requested*.

<sup>129</sup> The *PJM Order* addressed two separate, but related proceedings. The first, EL16-49, was initiated by a complaint originally filed by Calpine, joined by additional generation entities (“Calpine Complaint”) on March 21, 2016, and later amended on January 9, 2017. The Calpine Complaint argued that PJM’s MOPR was unjust and unreasonable because it did not address the impact of existing resources receiving out-of-market payments on the capacity market, and proposed interim tariff revisions that would extend the MOPR to a limited set of existing resources. The Calpine Complaint also requested the FERC to direct PJM to conduct a stakeholder process to develop and submit a long-term solution. The second proceeding was PJM’s filing of its proposed revisions to its Tariff, pursuant to section 205 of the FPA in ER18-1314 (“PJM Filing”). The PJM Filing consisted of two alternate proposals designed to address the price impacts of state out-of-market support for certain resources. The first approach, preferred by PJM but not supported by its stakeholders, consisted of a two-stage annual auction, with capacity commitments first determined in stage one of the auction and the clearing price set separately in stage two (“Capacity Repricing”). The second alternative approach, proposed in the event that the FERC determined that Capacity Repricing was unjust and unreasonable, would have revised PJM’s MOPR to mitigate capacity offers from both new and existing resources, subject to certain proposed exemptions (“MOPR-Ex”).

<sup>130</sup> The proposed alternative approach would (i) modify PJM’s MOPR such that it would apply to new and existing resources that receive out-of-market payments, regardless of resource type, but would include few to no exemptions; and (ii) in order to accommodate state policy decisions and allow resources that receive out-of-market support to remain online, establish an option in PJM’s Tariff that would allow, on a resource-specific basis, resources receiving out-of-market support to choose to be removed from the PJM capacity market, along with a commensurate amount of load, for some period of time. That option, which is similar in concept to the Fixed Resource Requirement (“FRR”) that currently exists in PJM’s Tariff, is referred to as the “FRR Alternative.” Unlike the existing FRR construct, the FRR Alternative would apply only to resources receiving out-of-market support. Both aspects of the proposed replacement rate, along with a series of questions that need to be addressed, are more fully explained and raised in the *PJM Order*.

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

Reply testimony, evidence, and/or argument was due on or before November 6, 2018. Over 60 sets of reply briefs, evidence, etc. were filed. Since that time, a few parties submitted answers and additional comments. On December 6, PJM and Direct Energy/NextEra filed limited answers to reply briefs. In addition, a letter from a group of companies representing competitive new generation built in the PJM region since 2010 ("Generator Letter") urged the FERC to "to consider the broadest ramification of a fundamental change in the regulatory compact and the impact it would have on consumers, investors and even the fundamental American belief that markets drive better outcomes than government."<sup>131</sup> Answers to and comments on PJM's answer were filed by "Clean Energy Industries"<sup>132</sup> and UCS. Responses to the December 6 Generators Letter were filed by APPA, ELCON, LPPC, NRECA, and NRDC. On December 28, PSEG submitted supplemental comments. On January 15, PSEG answered PSEG's supplemental comments. These materials, together with all of the initial briefs and reply briefs, are pending before the FERC.

The FERC committed in the *PJM Order* to make every effort to issue an order establishing the just and reasonable replacement rate no later than January 4, 2019 (a date which has since passed). The FERC also established a refund effective date of March 21, 2016, the date of the original Calpine Complaint in EL16-49. For further information on this proceeding, please contact Jamie Blackburn (202-218-3905; [jblackburn@daypitney.com](mailto:jblackburn@daypitney.com)).

- **Deepwater Wind PURPA Complaint (EL18-171)**

The June 7 complaint filed by Kathryn Leonard, an individual ratepayer and councilwoman for the City of Newport RI ("Complainant"), against the RI PUC, National Grid, and Deepwater Wind Block Island ("Deepwater Wind") remains ending before the FERC. The Complaint seeks, among other things, declaratory and injunctive relief barring the continued implementation of the Deepwater Wind Rhode Island PPA and prohibiting the RI PUC from "designating renewable power costs as 'distribution' costs in any way that prevents consumers from the benefits of purchasing power from competitive sources". Following a partially granted request for an extension of time by the RI PUC, answers to and comments on this Complaint were due on or before July 13. Answers were filed by Deepwater Wind, National Grid and the RI PUC. On July 23, Complainant objected separately to each of the answers. 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).

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

This proceeding, which could impact potentially impact New England's markets, remains pending. As previously reported, CPV Power Holdings, L.P. ("CPV"), Calpine Corporation ("Calpine"), and Eastern Generation, LLC ("Eastern Generation") (collectively, "PJM MOPR Complainants") filed a complaint on May 31, 2018 requesting that the FERC protect PJM's Reliability Pricing Model ("RPM") market from below-cost offers for resources receiving out-of-market subsidies by requiring PJM to adopt a "Clean MOPR" (i.e. a MOPR

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<sup>131</sup> Those companies included: Ares Power and Infrastructure Group, Caithness, Calpine, Carroll County and South Field Energy, CPV, J-POWER USA Development Co., Panda Power Funds, and Tenaska Energy.

<sup>132</sup> "Clean Energy Industries" are AWEA, the Solar RTO Coalition, Solar Energy Industries Assoc., Advanced Energy Economy ("AEE"), the American Council on Renewable Energy ("ACORE"), and the Mid-Atlantic Renewable Energy Coalition ("MAREC").



applicable to all subsidized resources and without categorical exemptions like those in PJM's MOPR-Ex proposal). PJM MOPR Complainants state that the Complaint offers the FERC a procedural vehicle to require adoption of the "Clean MOPR" that Complainants opine is not otherwise available in pending FERC proceedings (EL16-49 (PJM MOPR Complaint)<sup>133</sup> and ER18-1314 (PJM's pending MOPR changes)). They assert that the "Clean MOPR" is required to effectively address the impacts of state subsidy programs, and is consistent with the FERC's MOPR principles identified in the *CASPR Order*. Comments on the PJM Clean MOPR Complaint were due on or before June 20. PJM's answer, as well as comments and protests from over 25 parties were filed. Given its potential to impact New England, NEPOOL filed a doc-less motion to intervene. More than 30 other parties also intervened. This matter is pending before the FERC. If you have any questions concerning this proceeding, please contact Sebastian Lombardi (860-275-0663; [slombardi@daypitney.com](mailto:slombardi@daypitney.com)) or Sunita Paknikar (202-218-3904; [spaknikar@daypitney.com](mailto:spaknikar@daypitney.com)).

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

As in the PJM MOPR Proceeding, NEPOOL filed limited comments requesting that any FERC action or decision be limited narrowly to the facts and circumstances as presented, and that any changes ordered by the FERC not circumscribe the results of NEPOOL's stakeholder process or predetermine the outcome of that process through dicta or a ruling. The NYISO MOPR Proceeding remains pending before the FERC.

If you have any questions concerning these proceedings, 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)).

- **D&E Agreement Cancellation: PSNH/Essential Power Newington (ER19-817)**

On January 15, 2019, PSNH filed a notice of cancellation of the Design and Engineering Agreement ("D&E Agreement") between PSNH and Essential Power Newington (designated as service agreement IA-ES-44). The D&E Agreement set forth the terms and conditions under which PSNH undertook certain design and engineering activities for the replacement of certain interconnection facilities, the cost for which was the responsibility of Essential Power pursuant to both the Agreement and a LGIA among PSNH, Essential Power Newington and ISO-NE (LGIA-ISONE-PSNH-16-01). With the work and associated billings completed, the D&E Agreement is now terminated. A January 15, 2019 effective date was requested. Comments, if any, on this filing are due on or before February 5. If you have any questions concerning this matter, please contact Pat Gerity ([pmgerity@daypitney.com](mailto:pmgerity@daypitney.com); 860-275-0533).

- **Related Facilities Agreement: NSTAR / Clear River Energy (ER19-693)**

On December 27, 2018, NSTAR filed a Related Facilities Agreement ("RFA") between NSTAR and Clear River Energy LLC ("Clear River") for the purpose of providing the terms and conditions governing NSTAR's activities, and Clear River's associated cost responsibility, in completing the required upgrades on NSTAR's transmission line #3361 in connection with Clear River's LGIA with ISO-NE and National Grid.<sup>134</sup> A February 26, 2019 effective date was requested. Comments on this filing were due on or before January 17, 2019; none were filed. National Grid and Clear River filed doc-less interventions. This matter is pending before the FERC. If there are questions on this matter, please contact Pat Gerity ([pmgerity@daypitney.com](mailto:pmgerity@daypitney.com); 860-275-0533).

<sup>133</sup> The "PJM MOPR Complaint" seeks a FERC order expanding the PJM MOPR in the Base Residual Auction for the 2019/2020 Delivery Year to prevent the artificial suppression of prices in the Reliability Pricing Model ("RPM") market by below-cost offers for existing resources whose continued operation is being subsidized by State-approved out-of-market payments. Complainants in the MOPR Complaint are Calpine, Dynegy, Eastern Generation, Homer City Generation, the NRG Companies, Carroll County Energy, C.P. Crane, the Essential Power PJM Companies, GDF SUEZ Energy Marketing NA, Oregon Clean Energy, and Panda Power Generation Infrastructure Fund.

<sup>134</sup> Clear River plans to construct an approximately 1,100 MW combined cycle generation project in Burrillville, Rhode Island that will be interconnected to the National Grid transmission system.

- **Related Facilities Agreement: CL&P / Clear River (ER19-689)**

Also on December 27, 2018, CL&P filed a RFA with Clear River for the purpose of providing the terms and conditions governing CL&P's activities, and Clear River's associated cost responsibility, in completing the required upgrades to CL&P's protection and control facilities in connection with Clear River's LGIA with ISO-NE and National Grid. A February 26, 2019 effective date was requested. Comments on this filing were also due on or before January 17, 2019; none were filed. National Grid and Clear River filed doc-less interventions. This matter is pending before the FERC. If there are questions on this matter, please contact Pat Gerity ([pmgerity@daypitney.com](mailto:pmgerity@daypitney.com); 860-275-0533).

- **Related Facilities Agreement: CL&P / Cricket Valley (ER19-590)**

On December 18, 2018, CL&P filed a RFA with Cricket Valley Energy Center LLC ("Cricket Valley") governing the activities and associated cost responsibility for completing the required reconductoring of approximately five miles of 345 kV transmission line owned by CL&P (Line 398) from the NY-CT border – connecting to ConEd's 345 kV transmission line – to the CL&P Long Mountain Substation, and other associated upgrades described in the RFA ("Cricket Valley Reconductoring Project").<sup>135</sup> The Cricket Valley Reconductoring Project is required under the LGIA among Cricket Valley, NYISO and ConEd. A February 17, 2019 effective date was requested. Comments on this filing were due on or before January 8, 2019; none were filed. This matter is pending before the FERC. If there are questions on this matter, please contact Pat Gerity ([pmgerity@daypitney.com](mailto:pmgerity@daypitney.com); 860-275-0533).

- **NSTAR/MATEP Revised Distribution Service Agreement (ER19-431)**

On January 25, 2019, the FERC accepted a revised Distribution Service Agreement ("Revised Distribution Agreement") for wholesale distribution service between NSTAR and MATEP LLC ("MATEP").<sup>136</sup> The Revised Distribution Agreement amended the original distribution agreement primarily (i) by expanding the definition of the Brighton Tie Lines to include an incremental, fourth radial 13.8 kV circuit that will be used to enhance MATEP's ability to meet the needs of its own retail customers and to provide wholesale distribution service to MATEP for the purposes of continuing its power sales in the capacity and energy markets in New England, and (ii) by amending various terms and conditions to clarify and enhance those provisions stemming from the expansion of the definition of the Brighton Tie Lines. The Revised Distribution Agreement was accepted effective as of January 30, 2019, as requested. Unless the January 25 order is challenged, this proceeding will be concluded. If there are questions on this matter, please contact Pat Gerity ([pmgerity@daypitney.com](mailto:pmgerity@daypitney.com); 860-275-0533).

- **NSTAR/HQ US MMWEC Use Rights Transfer Agreement (ER19-409)**

On January 18, 2019, the FERC accepted the agreement by which NSTAR will transfer MMWEC's use rights over the Phase I/II HVDC facilities to HQUS (MMWEC itself does not have a mechanism to effectuate the transfer).<sup>137</sup> The agreement was accepted effective as of December 20, 2018, as requested. Unless the January 18 order is challenged, this proceeding will be concluded. If there are questions on this matter, please contact Eric Runge (617-345-4735; [ekrunge@daypitney.com](mailto:ekrunge@daypitney.com)).

- **TSAs: First Amendments to EDC New England Clean Energy Connect TSAs (ER19-324 et al.)**

On November 9, 2018, CMP filed executed first amendments to 3 of its previously filed and accepted, cost-based transmission service agreements ("TSAs") with the participants that will fund the construction, operation and maintenance of CMP's portion of a the NECEC Transmission Line. The amendments to the agreements with Eversource (NSTAR), National Grid and Unitil (the "EDC Agreements") make only two

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<sup>135</sup> Cricket Valley plans to construct an approximately 1,177 MW combined cycle generation project in Dover, New York that will be interconnected to the ConEd transmission system.

<sup>136</sup> *NSTAR Electric Co.*, Docket No. ER19-431 (Jan. 5, 2019) (unpublished letter order).

<sup>137</sup> *NSTAR Electric Co.*, Docket No. ER19-409 (Jan. 18, 2019) (unpublished letter order).

changes – (i) extension of the date that triggers an increase in monthly transmission service payments by the EDCs to CMP while Regulatory Approval for the Project is pending (from January 25, 2019 to June 25, 2019) and (ii) extension of the date by which any party to the EDC Agreements may terminate the EDC Agreement if Regulatory Approval is not received (from January 25, 2020 to June 25, 2020). Comments on the first amendments were due on or before November 30; none were filed. Doc-less interventions were filed by Eversource and National Grid. On December 26, as a result of discussions with FERC Staff, CMP submitted an amended eTariff record (not included with the November 9 filing) to reflect the amendments. Comments on the December 26 filing, if any, are due on or before January 16, 2019; 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).

- **FERC Enforcement Action: Show Cause Order – Footprint Power (IN18-7)**

As previously reported, the FERC issued an order<sup>138</sup> on June 18, 2018 directing Footprint Power LLC and Footprint Power Salem Harbor Operations LLC (collectively, “Footprint”) to show cause why they should not (i) be found to have violated the ISO-NE Tariff and FERC regulations by submitting what Enforcement Staff has concluded were false and misleading supply offers for, and by failing to report the fuel status and related operational status of, Salem Harbor Unit 4 in June and July of 2013; and as a result (ii) disgorge \$2.05 million in CSO payments and be assessed a \$4.2 million civil penalty. Enforcement Staff alleged that from June 26 through July 25, 2013, Footprint submitted supply offers that Unit 4 could not satisfy because Salem Harbor lacked usable fuel, and failed to report to ISO-NE that Salem Harbor’s lack of usable fuel reduced Unit 4’s output capabilities and availability as a capacity resource. In addition, Staff alleged that Footprint omitted material information from and/or misrepresented the fuel status of Salem Harbor and related operational status of Unit 4 in its communications with ISO-NE. On July 13, Footprint submitted a “Notice of De Novo Election”, which requires the FERC to institute an action in the appropriate United States district court for a *de novo* review of the matter should the FERC assess civil penalties that Footprint fails to pay within 60 days. Following a FERC-granted extension of time to answer, Footprint filed its answer on August 2.

On September 19, OE Staff submitted its response to Footprint’s August 2 answer. Finding merit in Footprint’s defense relating to the start-up requirements of Salem Harbor Unit 4, Staff agreed with Footprint that its conduct during the June 27 through July 17, 2013 portion (the “Cold Start Period”) of the “Relevant Period” (i.e., June and July 2013) did not violate the ISO-NE Tariff provisions and FERC regulations at issue,<sup>139</sup> re-evaluated its position and recommended that the FERC vacate the Order to Show Cause. On September 26, Footprint answered OE Staff’s residual findings, and urged the Commission to promptly and definitively end this matter. This matter is again pending before the FERC.

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

**MISO Zone 4 Planning Resource Auction Offers.** On October 1, 2015, the FERC issued an order authorizing Enforcement to conduct a non-public, formal investigation, with subpoena authority, regarding violations of FERC’s regulations, including its prohibition against electric energy market manipulation, that may have occurred in connection with, or related to, MISO’s April 2015 Planning Resource Auction for the 2015/16 power year.

Unlike a staff NOV, a FERC order converting an informal, non-public investigation to a formal, non-public investigation does not indicate that the FERC has determined that any entity has engaged in market manipulation or otherwise violated any FERC order, rule, or regulation. It does, however, give OE’s Director, and employees designated by the Director, the authority to administer oaths and affirmations, subpoena

<sup>138</sup> *Footprint Power LLC and Footprint Power Salem Harbor Ops. LLC*, 163 FERC ¶ 61,198 (June 18, 2018).

<sup>139</sup> Staff still believes that Footprint violated the ISO-NE Tariff and FERC regulations during the remaining portion of the Relevant Period, from July 18 to July 25, when Footprint submitted Day-Ahead Limited Energy Generator (“LEG”) offers to which the Cold Start Period defense does not apply.

witnesses, compel their attendance and testimony, take evidence, compel the filing of special reports and responses to interrogatories, gather information, and require the production of any books, papers, correspondence, memoranda, contracts, agreements, or other records.

## XII. Misc. - Administrative & Rulemaking Proceedings

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

On January 8, 2018, the FERC initiated a new Grid Resilience in RTO/ISOs proceeding (AD18-7)<sup>140</sup> and terminated the DOE NOPR rulemaking proceeding (RM18-1).<sup>141</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, FRS requested rehearing of the January 8 order terminating the DOE NOPR proceeding. The FERC issued a tolling order on March 8, 2018 affording it additional time to consider the FRS request for rehearing, which remains pending.

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

**ISO-NE Response.** In its response, ISO-NE identified fuel security<sup>142</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 3 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, 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 4 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.

<sup>140</sup> *Grid Rel. and Resilience Pricing*, 162 FERC ¶ 61,012 (Jan. 8, 2018), *reh'g requested*.

<sup>141</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>142</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."

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). Since the last Report, reply comments were filed by APPA and American Municipal Power (“AMP”) and the Nuclear Energy Institute (“NEI”) moved to lodge presentations by the National Infrastructure Advisory Council. Since the last Report, on December 6, the 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>143</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 request is pending.

- **Order 853: Civil Monetary Penalty Inflation Adjustments (RM19-9)**

On January 8, 2019, the FERC issued *Order 853*<sup>144</sup> to amend its regulations governing the maximum civil monetary penalties assessable for violations of statutes, rules, and orders within FERC’s jurisdiction. The FERC is required to update each such civil monetary penalty on an annual basis every January 15.<sup>145</sup> Of particular interest is the increase in potential civil penalties for market manipulation, which were increased from \$1,213,503 to \$1,269,500 per violation, per day. *Order 853* will become effective upon publication in the *Federal Register*, which as of the date of this Report, has not yet happened.

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

On November 15, 2018, the FERC issued a NOPR (“*ADIT NOPR*”) proposing to require all public utility transmission providers with transmission rates under an OATT, a transmission owner tariff, or a rate schedule to revise those rates to account for changes caused by the 2017 Tax Cuts and Jobs Act (“2017 Tax Law”).<sup>146</sup> Specifically, for transmission formula rates, the FERC is proposing (i) to require that public utilities deduct excess accumulated deferred income taxes (“ADIT”) from or add deficient ADIT to their rate bases and adjust their income tax allowances by amortized excess or deficient ADIT; (ii) to require all public utilities with transmission formula rates to incorporate a new permanent worksheet into their transmission formula rates that will annually track ADIT information; (iii) to require all public utilities with transmission stated rates to determine the amount of excess and deferred income tax caused by the 2017 Tax Law’s reduction to the federal corporate income tax rate and return or recover this amount to or from customers. As previously reported, comments on the *ADIT NOPR* were due on or before January 22, 2019. Comments were filed by over 14 parties, including Eversource, EEI, and NRECA. The *ADIT NOPR* is pending before the FERC.

<sup>143</sup> For purposes of these proceedings, “Clean Energy Advocates” are NRDC, Sierra Club and UCS.

<sup>144</sup> *Civil Monetary Penalty Inflation Adjustments*, Order No. 853, 166 FERC ¶ 61,041 (Jan. 8, 2019) (“*Order 853*”).

<sup>145</sup> See Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Sec. 701, Pub. L. 114-74, 129 Stat. 584, 599. The FERC made its first adjustment under the Act in July 2016. See *Civil Monetary Penalty Inflation Adjustments*, Order No. 826, 81 FR 43937 (July 6, 2016), FERC Stats. & Regs. ¶ 31,386 (2016). The second adjustment was made January 9, 2017. *Civil Monetary Penalty Inflation Adjustments*, Order No. 834, 158 FERC ¶ 61, 170 (Jan. 9, 2017). The third adjustment was made January 8, 2018. *Civil Monetary Penalty Inflation Adjustments*, Order No. 839, 162 FERC ¶ 61,010 (Jan. 8, 2018).

<sup>146</sup> *Public Util. Trans. Rate Changes to Address Accumulated Deferred Income Taxes*, 165 FERC ¶ 61,117 (Nov. 15, 2018).

- **NOPR: Amended FPA Section 203(a)(1)(B) (RM19-4)**

Also on November 15, 2018, the FERC issued a NOPR proposing to revise its regulations relating to mergers or consolidations by a public utility ("*Section 203(a)(1)(B) NOPR*").<sup>147</sup> Specifically, the FERC proposes to revise its regulations (i) to establish that a public utility must seek authorization under amended section 203(a)(1)(B) of the Federal Power Act to merge or consolidate, directly or indirectly, its facilities subject to the jurisdiction of the Commission, or any part thereof, with the facilities of any other person, or any part thereof, that are subject to the jurisdiction of the FERC *and have a value in excess of \$10 million*, by any means whatsoever; and (ii) to establish a notification requirement for mergers or consolidations by a public utility if the facilities to be acquired have a value in excess of \$1 million and such public utility is not required to secure FERC authorization under amended section 203(a)(1)(B). Comments on the *Section 203(a)(1)(B) NOPR* were due on or before December 31, 2018.<sup>148</sup> Comments were filed by American Antitrust Institute ("AAI"), APPA, EEI, Idaho Power Company, International Transmission Company, NRECA, Public Citizen, and Transmission Access Policy Group ("TAPS") The *Section 203(a)(1)(B) NOPR* is pending before the FERC.

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

On December 20, 2018, the FERC issued a NOPR proposing to relieve market-based rate sellers of the obligation, when seeking to obtain or retain market-based rate authority in any RTO/ISO market with RTO/ISO-administered energy, ancillary services, and capacity markets subject to FERC-approved RTO/ISO monitoring and mitigation, to submit indicative screens ("*Horizontal Market Power Analysis Refinements NOPR*").<sup>149</sup> In RTOs and ISOs that lack an RTO/ISO-administered capacity market, market-based rate sellers would be relieved of the requirement to submit indicative screens if their market-based rate authority is limited to sales of energy and/or ancillary services. The FERC's regulations would continue to require RTO/ISO sellers to submit indicative screens for authorization to make capacity sales in any RTO/ISO markets that lack an RTO/ISO-administered capacity market subject to FERC-approved RTO/ISO monitoring and mitigation. The *NOPR* also proposes to eliminate the rebuttable presumption that FERC-approved RTO/ISO market monitoring and mitigation is sufficient to address any horizontal market power concerns regarding sales of capacity in RTOs/ISOs that do not have an RTO/ISO-administered capacity market. Comments on the *Horizontal Market Power Analysis Refinements NOPR* are due 45 days after publication in the *Federal Register*.<sup>150</sup> On January 23, the FERC issued a notice that publication of the *NOPR* in the *Federal Register* would not occur during the partial shutdown of the federal government and encouraged interested entities to submit comments in the meantime.

- **Order 849: Pipeline Rates (RM18-11)**

Rehearing of *Order 849*<sup>151</sup> remains pending. As previously reported, in *Order 849*, the FERC adopted procedures through which the cost-based rates of natural gas pipelines are to be examined to determine which, if any, of those entities are collecting unjust and unreasonable rates in light of the 2017 Tax Law's reduction in the corporate tax rate from 35% to 21% and the disallowance in the Tax Policy Statement (see PL17-1 below) of income tax allowances for MLP pipelines. With certain exceptions,<sup>152</sup> the procedures adopted are generally the

<sup>147</sup> *Implementation of Amended Section 203(a)(1)(B) of the Federal Power Act*, 165 FERC ¶ 61,091 (Nov. 15, 2018).

<sup>148</sup> The *Section 203(a)(1)(B) NOPR* was published in the *Fed. Reg.* on Nov. 29, 2018 (Vol. 31, No. 230) pp. 61,338-61,342.

<sup>149</sup> *Refinements to Horizontal Market Power Analysis for Sellers in Certain Regional Trans. Org. and Indep. Sys. Op. Mkts.*, 165 FERC ¶ 61,091 (Dec. 20, 2018)

<sup>150</sup> The *Horizontal Market Power Analysis Refinements NOPR*, as of the date of this Report, has still not been published in the *Fed. Reg.*

<sup>151</sup> *Interstate and Intrastate Natural Gas Pipelines; Rate Changes Relating to Fed. Income Tax Rate*, Order No. 849, 164 FERC ¶ 61,031 (July 18, 2018) ("*Order 849*").

<sup>152</sup> *Order 849* modifies the *Pipeline Rates NOPR*'s proposed treatment of master limited partnership (MLP) pipelines and other pass-through entities in several respects, makes several changes to proposed FERC Form 501-G, and provides a guarantee that the FERC will not initiate a NGA section 5 rate investigation for a three-year moratorium period of an interstate pipeline that makes a limited NGA section 4 rate reduction filing that reduces its ROE to 12 percent or less.

same as the FERC proposed in its March 15, 2018 *Pipeline Rates NOPR*<sup>153</sup> and require interstate pipelines to (a) file a one-time report, FERC Form No. 501-G, that will provide financial information from the pipeline's 2017 FERC Form 2; and (b) voluntarily make a filing to address the changes to the pipeline's recovery of tax costs, or explain why no action is needed.<sup>154</sup> *Order 849* became effective September 13, 2018.<sup>155</sup>

Requests for rehearing of *Order 849* were filed by Enable Mississippi River Transmission and Enable Gas Transmission, Natural Gas Pipeline Company of America, and Process Gas Consumers Group and American Forest and Paper Association. On September 17, the FERC issued a tolling order affording it additional time to consider the requests for rehearing, which remain pending before the FERC.

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

In *Order 841*<sup>156</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>157</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>158</sup> were also to be filed in RM18-9. On June 26, 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. This matter is pending before the FERC.

- **Order 845: LGIA/LGIP Reforms (RM17-8)**

As previously reported, the FERC issued on April 19, 2018, its final rule,<sup>159</sup> *Order 845*, revising its *pro forma* Large Generator Interconnection Procedures ("LGIP") and *pro forma* LGIA to implement 10 specific reforms designed to improve certainty for interconnection customers,<sup>160</sup> promote more informed interconnection decisions,<sup>161</sup> and enhance the interconnection process.<sup>162</sup> Based on the comments received

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<sup>153</sup> *Interstate and Intrastate Natural Gas Pipelines; Rate Changes Relating to Fed. Income Tax Rate*, 162 FERC ¶ 61,226 (Mar. 15, 2018) ("*Pipeline Rates NOPR*").

<sup>154</sup> Pipelines could respond in one of four ways: (1) A limited Natural Gas Act ("NGA") section 4 filing to reduce the pipeline's cost-based rates by the percentage reduction in its cost of service shown in its FERC Form No. 501-G; (2) A commitment to file either a prepackaged uncontested rate settlement or a general NGA section 4 rate case by December 31, 2018; (3) The filing of a statement explaining why no change in rates is required; or (4) The taking of no other action (other than the submittal of the one-time report). If the pipeline chooses options (3) or (4), the FERC will consider, after reviewing both the one-time report and the comments of others, whether to initiate a NGA Section 5 investigation.

<sup>155</sup> *Order 849* was published in the *Fed. Reg.* on July 30, 2018 (Vol. 83, No. 146) pp. 36,672-36,717.

<sup>156</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>157</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>158</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.

<sup>159</sup> *Reform of Generator Interconnection Procedures and Agreements*, Order No. 845, 163 FERC ¶ 61,043 (Apr. 19, 2018) ("*Order 845*").

<sup>160</sup> To improve certainty for interconnection customers, *Order 845* (1) removes the limitation that interconnection customers may only exercise the option to build a transmission provider's interconnection facilities and stand-alone network upgrades in instances when the transmission provider cannot meet the dates proposed by the interconnection customer; and (2) requires that transmission providers establish interconnection dispute resolution procedures that allow a disputing party to unilaterally seek non-binding dispute resolution.

on its December 15, 2016 NOPR<sup>163</sup> in this proceeding as well as other factors, *Order 845* declined to adopt four proposed reforms related to requiring periodic restudies, self-funding of network upgrades, the posting of congestion and curtailment information, and the modeling of electric storage resources. *Order 845* took no action on two additional issues raised in the NOPR -- cost caps for network upgrades and affected system coordination (which is being addressed in a separate proceeding). *Order 845* became effective July 23, 2018.

**Requests for Rehearing.** The Requests for rehearing and/or clarification of *Order 845* remain pending. Those requests were filed by APPA, Arizona Public Service Company, AWEA, California Utilities,<sup>164</sup> Duke, EEI, EON Climate & Renewables, MISO Transmission Owners, NYISO, SCE, and Southern Company Services. On June 6, ISO-NE answered AWEA's request for clarification. AWEA answered ISO-NE's answer on June 14. Answers to AWEA's answers were filed by Ameren on June 21 and the MISO Transmission Owners on June 29. On June 18, the FERC issued a tolling order affording it additional time to consider the requests for rehearing and/or clarification, which remain pending before the FERC.

**Compliance Filing Deadline – Now 90 Days from the FERC's To-Be-Issued Order on Rehearing.** *Order 845* initially required compliance filings to be filed on or before August 7, 2018. On May 17, the ISO/RTO Council ("IRC") requested a 70-day extension of time, to October 16, 2018, for the submission of compliance filings, which NEPOOL supported in comments submitted on May 23. On May 26, Southern Companies separately moved for a 90-day extension of time. On June 1, the FERC issued a notice extending the compliance date by 90 days for all, to November 5. EEI then asked for a further extension of time for transmission providers to submit their required compliance filings, 90 days following a FERC order on the pending rehearing requests. The American Wind Energy Association ("AWEA") opposed the EEI request. On October 3, the FERC issued a notice ("Oct 3 Extension Notice") granting EEI's request and indicating that compliance filings are now due within 90 days of the FERC's order addressing the pending requests for rehearing, which remain pending before the FERC. In light of the extension, ISO-NE has deferred final consideration of New England's proposed compliance changes pending the FERC's order on rehearing. On October 15, AWEA requested rehearing of the Oct 3 Extension Notice. On November 13, the FERC dismissed AWEA's request (i) because the Oct 3 Extension Notice is not procedurally subject to rehearing pursuant to Rule 713(a); (ii) the timing of compliance filings submissions is within the FERC's discretion; and (iii) the Oct 3 Extension Notice did not change or stay *Order 845's* effective date (rather, it simply extends the date that compliance filings are due).

- **Order 841: Electric Storage Participation in RTO/ISO Markets (RM16-23; AD16-20)**

On February 15, the FERC issued *Order 841*, which requires each RTO/ISO to revise its tariff "to establish a participation model consisting of market rules that, recognizing the physical and operational characteristics of electric storage resources, facilitates their participation in the RTO/ISO markets."<sup>165</sup>

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<sup>161</sup> To promote more informed interconnection decisions, *Order 845* (1) requires transmission providers to outline and make public a method for determining contingent facilities; (2) requires transmission providers to list the specific study processes and assumptions for forming the network models used for interconnection studies; (3) revises the definition of "Generating Facility" to explicitly include electric storage resources; and (4) establishes reporting requirements for aggregate interconnection study performance.

<sup>162</sup> To enhance the interconnection process, *Order 845* (1) allows interconnection customers to request a level of interconnection service that is lower than their generating facility capacity; (2) requires transmission providers to allow for provisional interconnection agreements that provide for limited operation of a generating facility prior to completion of the full interconnection process; (3) requires transmission providers to create a process for interconnection customers to use surplus interconnection service at existing points of interconnection; and (4) requires transmission providers to set forth a procedure to allow transmission providers to assess and, if necessary, study an interconnection customer's technology changes without affecting the interconnection customer's queued position.

<sup>163</sup> *Reform of Generator Interconnection Procedures and Agreements*, 157 FERC ¶ 61,212 (Dec. 15, 2016) ("*LGIP/LGIA Reforms NOPR*"). The *LGIP/LGIA Reforms NOPR* was published in the *Fed. Reg.* on Jan. 13, 2017 (Vol. 82, No. 9) pp. 4,464-4,501.

<sup>164</sup> "California Utilities" are Pacific Gas and Elec. ("PG&E"), So. Cal. Edison ("SCE"), and San Diego Gas & Elec. ("SDG&E").

<sup>165</sup> The participation model must: (1) ensure that a resource using the participation model is eligible to provide all capacity, energy and ancillary services that the resource is technically capable of providing in the markets; (2) ensure that a resource using the participation model can be dispatched and can set the wholesale market clearing price as both a wholesale seller and wholesale buyer consistent with existing market rules that govern when a resource can set the wholesale price; (3) account for the physical and operational



Additionally, each RTO/ISO must specify that the sale of electric energy from the RTO/ISO markets to an electric storage resource that the resource then resells back to those markets must be at the wholesale locational marginal price. *Order 841* became effective June 4, 2018.

*Order 841* did not adopt the *Storage NOPR's* proposed reforms related to DER aggregations. Instead, *Order 841* instituted a new rulemaking proceeding and technical conference (see RM18-9 above) to gather additional information to help the FERC determine what action to take with respect to DER aggregation. Requests for Clarification and/or Rehearing of *Order 841* were filed by CAISO, MISO, PJM, the AES Companies, AMP/APPA/NRECA, California Energy Storage Alliance, EEI, NARUC, PG&E, TAPS, and Xcel Energy Services. On April 13, 2018, the FERC issued a tolling order affording it additional time to consider the requests for clarification and/or rehearing, which remain pending.

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

The FERC's *Data Collection NOPR* remains pending. As previously reported, the FERC issued a July 21, 2016 NOPR, which superseded both its *Connected Entity NOPR* (RM15-23) and *Ownership NOPR* (RM16-3), proposing to collect certain data for analytics and surveillance purposes from market-based rate ("MBR") sellers and entities trading virtual products or holding FTRs and to change certain aspects of the substance and format of information submitted for MBR purposes.<sup>166</sup> The *Data Collection NOPR* presents substantial revisions from what the FERC proposed in the *Connected Entity NOPR*, and responds to the comments and concerns submitted by NEPOOL in that proceeding. Among other things, the changes proposed in the *Data NOPR* include: (i) a different set of filers; (ii) a reworked and substantially narrowed definition of Connected Entity; and (iii) a different submission process. With respect to the MBR program, the proposals include: (i) adopting certain changes to reduce and clarify the scope of ownership information that MBR sellers must provide; (ii) reducing the information required in asset appendices; and (iii) collecting currently-required MBR information and certain new information in a consolidated and streamlined manner. The FERC also proposes to eliminate MBR sellers' corporate organizational chart submission requirement adopted in *Order 816*. Comments on the *Data Collection NOPR* were due on or before September 19, 2016<sup>167</sup> and were filed by over 30 parties, including: APPA, Avangrid, Brookfield, EPSA, Macquarie/DC Energy/Emera Energy Services, NextEra, and NRG.

- **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>168</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>169</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.

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characteristics of electric storage resources through bidding parameters or other means; and (4) establish a minimum size requirement for participation in the RTO/ISO markets that does not exceed 100 kW.

<sup>166</sup> *Data Collection for Analytics and Surveillance and Market-Based Rate Purposes*, 156 FERC ¶ 61,045 (July 21, 2016) ("*Data Collection NOPR*").

<sup>167</sup> The *Data Collection NOPR* was published in the *Fed. Reg.* on Aug. 4, 2016 (Vol. 81, No. 150) pp. 51,726-51,772.

<sup>168</sup> The NOI was published in the *Fed. Reg.* on Apr. 26, 2018 (Vol. 83, No. 80) pp. 18,020-18,032.

<sup>169</sup> *Certification of New Interstate Natural Gas Facilities*, 163 FERC ¶ 61,138 (May 23, 2018).

- **NOI: FERC's Policy for Recovery of Income Tax Costs & ROE Policies (PL17-1)**

On March 15, 2018, the FERC found that an impermissible double recovery results from granting a Master Limited Partnership pipeline ("MLP") both an income tax allowance and an ROE pursuant to the DCF methodology.<sup>170</sup> Accordingly, the FERC issued a revised policy statement that it will no longer permit an MLP to recover an income tax allowance in its cost of service. The finding follows an NOI<sup>171</sup> that sought comments regarding how to address any double recovery resulting from the FERC's income tax allowance and ROE policies in light of the D.C. Circuit's *United Airlines*<sup>172</sup> holding. The FERC indicated that it will address the application of *United Airlines* to non-MLP partnership forms as those issues arise in subsequent proceedings. The revised policy statement took effect on March 21, 2018. Requests for rehearing of the March 15 order were filed by the Dominion, Enable Mississippi River Transmission and Enable Gas Transmission, Enbridge and Spectra Energy Partners, EQT Midstream Partners, Kinder Morgan, Master Limited Partnership Association ("MLPA"), NGAA, SPPP, LP, Oil Pipe Lines, Plains Pipeline, Tallgrass Pipelines, and TransCanada. On July 18, the FERC issued its order on rehearing,<sup>173</sup> dismissing the requests for rehearing and clarification and providing guidance regarding the treatment of Accumulated Deferred Income Taxes ("ADIT") where the income tax allowance is eliminated from cost-of-service rates under the FERC's post-*United Airlines* policy. On August 17, the MLPA requested clarification and/or reconsideration of the *Order on Rehearing*, which is pending before the FERC. On September 4, R. Gordon Gooch answered MLPA's August 17 pleading. Petitions for review were filed in the D.C. Circuit by Enable Mississippi River Transmission, LLC and Enable Gas Transmission, LLC, as well as by SFPP, L.P., in September 2018. Those appeals are pending in Case Nos. 18-1252, et al. in the D.C. Circuit.

### XIII. Natural Gas Proceedings

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

- **Natural Gas-Related Enforcement Actions**

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

***Algonquin Gas Transmission (IN19-2)***. On January 7, the FERC approved a Stipulation and Consent Agreement<sup>174</sup> that resolves its investigation into whether Algonquin Gas Transmission ("Algonquin") violated the terms of the Algonquin Incremental Market ("AIM") Project Certificate,<sup>175</sup> when it entered wetlands on the banks of the Hudson River outside the AIM Project's right of way ("ROW") with construction equipment in an attempt to retrieve a broken drill stem without obtaining a variance from the FERC as required pursuant to the Certificate.<sup>176</sup>

<sup>170</sup> *Inquiry Regarding the FERC's Policy for Recovery of Income Tax Costs*, 162 FERC ¶ 61,227 (Mar. 15, 2018), *order on reh'g*, 164 FERC ¶ 61,030 (July 18, 2018).

<sup>171</sup> *Inquiry Regarding the FERC's Policy for Recovery of Income Tax Costs*, 157 FERC ¶ 61,210 (Dec. 15, 2016).

<sup>172</sup> *United Airlines Inc. v. FERC*, 827 F.3d 122, 134, 136 (D.C. Cir. 2016) ("*United Airlines*") (holding that the FERC failed to demonstrate that there is no double recovery of taxes for a partnership pipeline as a result of the income tax allowance and ROE determined pursuant to the DCF methodology, and remanding the decisions to the FERC to develop a mechanism "for which the Commission can demonstrate that there is no double recovery" of partnership income tax costs). *Id.* at 137.

<sup>173</sup> *Inquiry Regarding the FERC's Policy for Recovery of Income Tax Costs*, 164 FERC ¶ 61,030 (July 18, 2018) ("*Order on Rehearing*").

<sup>174</sup> *Algonquin Gas Trans. LLC*, 166 FERC ¶ 61,012 (Jan. 7, 2019) ("*AIM Enforcement Project Order*").

<sup>175</sup> *Algonquin Gas Trans. LLC*, 150 FERC ¶ 61,163 (2015) (the "*Certificate*").

<sup>176</sup> FERC's on-site compliance monitor informed Algonquin personnel that construction to retrieve the drill stem could not take place without an approved variance from the FERC. Some of Algonquin's on-site personnel appeared to believe that work could begin while the variance approval was being sought, and rather than seeking clarification from the on-site compliance monitor as to whether they needed to wait for approval of the variance, entered the area without that approval.

Under the Settlement, in which Algonquin neither admits nor denies the alleged violations, Algonquin agreed to pay a \$400,000 civil penalty to the United States Treasury, and to submit semi-annual environmental compliance monitoring reports for at least one year and up to two years.<sup>177</sup> If you have any questions concerning this matter, please contact Pat Gerity (860-275-0533; [pmgerity@daypitney.com](mailto:pmgerity@daypitney.com)).

**BP (IN13-15).** On July 11, 2016, the FERC issued *Opinion 549*<sup>178</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>179</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>180</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>181</sup> BP was directed to pay the civil penalty and disgorgement amount within 60 days of the *BP Penalties Order*. On August 10, 2016 BP requested rehearing of the *BP Penalties Order*. On September 8, the FERC issued a tolling order, affording it additional time to consider BP's request for rehearing of the *BP Penalties Order*, which remains pending.

On September 7, 2016, BP submitted a motion for modification of the *BP Penalties Order's* disgorgement directive because it cannot comply with the disgorgement directive as ordered. BP explained that the entity to which disgorgement was to be directed, the Texas Low Income Home Energy Assistance Program ("LIHEAP"), is not set up to receive or disburse amounts received from any person other than the Texas Legislature. In response, on September 12, 2016, the FERC stayed the disgorgement directive (until an order on BP's pending request for rehearing is issued), but indicated that interest will continue to accrue on unpaid monies during the pendency of the stay.<sup>182</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.

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<sup>177</sup> *AIM Project Enforcement Order* at P 1; PP 12-13.

<sup>178</sup> *BP America Inc.*, Opinion No. 549, 156 FERC ¶ 61,031 (July 11, 2016) ("*BP Penalties Order*").

<sup>179</sup> *BP America Inc.*, 152 FERC ¶ 63,016 (Aug. 13, 2015) ("*BP Initial Decision*").

<sup>180</sup> *BP Penalties Order* at P 3.

<sup>181</sup> *BP America Inc.*, 147 FERC ¶ 61,130 (May 15, 2014) ("*BP Hearing Order*"), *reh'g denied*, 156 FERC ¶ 61,031 (July 11, 2016).

<sup>182</sup> *BP America Inc.*, 156 FERC ¶ 61,174 (Sep. 12, 2016) ("*Order Staying BP Disgorgement*")

**Total Gas & Power North America, Inc. et al. (IN12-17).** On April 28, 2016, the FERC issued a show cause order<sup>183</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>184</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.

- **Staff Notices of Alleged Violations**

**Rover.** On July 13, 2017, the FERC issued a notice that Staff has preliminarily determined that, between February 2015 and September 2016, Rover Pipeline, LLC and Energy Transfer Partners, L.P. (collectively, “Rover”) violated Section 7 of the Natural Gas Act by failing to fully and forthrightly disclose all relevant information to the FERC in Rover’s application for a Certificate of Public Convenience and Necessity and attendant filings in Docket No. CP15-93. Staff alleges that Rover falsely promised it would avoid adverse effects to a historic resource that it was simultaneously working to purchase and destroy, and subsequently made several misstatements in its docketed responses to FERC questions about why it had purchased and demolished the resource.

Recall that Notices of Alleged Violations (“NoVs”) are issued only after the subject of an enforcement investigation has either responded, or had the opportunity to respond, to a preliminary findings letter detailing Staff’s conclusions regarding the subject’s conduct.<sup>185</sup> NoVs are designed to increase the transparency of Staff’s nonpublic investigations conducted under Part 1b of its regulations. A NoV does not confer a right on third parties to intervene in the investigation or any other right with respect to the investigation.

- **New England Pipeline Proceedings**

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

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

- 132,700 Dth/d of firm transportation to new and existing delivery points on the Algonquin system and 106,276 Dth/d of firm transportation service from Beverly, MA to various existing delivery points on the Maritimes & Northeast system.

<sup>183</sup> *Total Gas & Power North America, Inc.*, 155 FERC ¶ 61,105 (Apr. 28, 2016) (“TGPNA Show Cause Order”).

<sup>184</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.

<sup>185</sup> See *Enforcement of Statutes, Regulations, and Orders*, 129 FERC ¶ 61,247 (Dec. 17, 2009), *order on requests for reh’g and clarification*, 134 FERC ¶ 61,054 (Jan. 24, 2011).

- ▶ 6.3 miles of replacement pipeline along Algonquin in NY and CT; new 7,700-horsepower compressor station in Weymouth, MA; more horsepower at existing compressor stations in CT and NY.
- ▶ Seven firm shippers: Heritage Gas Limited, Maine Natural Gas Company, NSTAR Gas Company d/b/a Eversource Energy, Exelon Generation Company, LLC (as assignee and asset manager of Summit Natural Gas of Maine), Irving Oil Terminal Operations, Inc., New England NG Supply Limited, and Norwich Public Utilities.
- ▶ Certificate of public convenience and necessity granted Jan. 25, 2017.<sup>186</sup>
- ▶ Certain facilities,<sup>187</sup> providing 40,000 out of the project's total capacity of 132,705 dekatherms per day of incremental firm transportation service, placed into service on November 1, 2017.<sup>188</sup> Remaining Project capacity will be available when the remaining Project facilities are placed into service following Director of OEP authorization.
- ▶ Algonquin files notice that construction of Salem Pike, Needham, Pine Hills and Plymouth meter and regulating stations began on April 2, 2018. Detailed information regarding construction activities can be found in the weekly construction reports filed in this docket.
- ▶ On February 16, 2018, Algonquin filed with the DC Circuit Court of Appeals, pursuant to NGA Section 19(d)(2), a petition for review of the MA DEP's failure to issue, condition, or deny a minor-source air permit for Algonquin's proposed natural gas compressor station in the Town of Weymouth, MA by the July 31, 2016 deadline established by the FERC. Algonquin seeks an order establishing a deadline for the MA DEP to issue, condition, or deny the permit.
- ▶ On May 31, the DC Circuit issued a *per curiam* order that holds this case in abeyance pending further order of the court.<sup>189</sup> The court based its order on the parties' representation that they have agreed on a schedule by which to resolve their dispute. The parties were directed to file status reports at 90-day intervals and to file motions to govern future proceedings within 30 days of respondents' final decision to issue, condition, or deny petitioner's permit application.
- ▶ The first status report was filed on August 24, and indicated that the case should continue to be held in abeyance. A second report was filed November 21. The next status report will be due in late February, 2019.
- ▶ On December 26, 2018, the FERC granted Algonquin a two-year extension of time, to January 25, 2021, to complete the Project.<sup>190</sup> In requesting the extension, Algonquin attributed the need for additional time to permitting delays for the Weymouth Compressor Station and ongoing construction of the Horizontal Directional Drill of the Taconic Parkway in New York. Requests for rehearing of the December 26 order were filed by two parties and are pending before the Commission, with FERC action required on or before February 25, 2019, or the requests will be deemed denied by operation of law.

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<sup>186</sup> Order Issuing Certificate and Authorizing Abandonment, *Algonquin Gas Transmission LLC and Maritimes & Northeast Pipeline, LLC*, 158 FERC ¶ 61,061 (Jan. 25, 2017), *order denying stay*, 160 FERC ¶ 61,015 (2017), *reh'g denied*, 161 FERC ¶ 61,255 (Dec. 13, 2017) ("*Atlantic Bridge Project Order*").

<sup>187</sup> The following facilities placed into service: Southeast Discharge Take-up and Relay (Fairfield County, CT); Modified Oxford Compressor Station (New Haven County, CT); Modified Chaplin Compressor Station (Windham County, CT); Modified Danbury (CT) Meter Station; and Modified Stony Point Compressor Station (Rockland County, NY).

<sup>188</sup> *Algonquin Gas Trans., LLC*, 158 FERC ¶ 61,061 (Oct. 27, 2017).

<sup>189</sup> *Algonquin Gas Trans. v. Mass. Dept. of Env'tl. Protection*, Case No. 18-1045, DC Cir. (May 31, 2018).

<sup>190</sup> *Algonquin Gas Trans., LLC*, Docket No. CP16-9 (Dec. 26, 2018) (unpublished letter order), *reh'g requested*. Absent the extension, and pursuant to the Jan. 25, 2017 Certificate Order, the Project would otherwise have had to have been completed by Jan. 25, 2019.

- **Constitution Pipeline (CP13-499) and Wright Interconnection Project (CP13-502)**
  - ▶ Constitution Pipeline Company and Iroquois Gas Transmission (Wright Interconnection) concurrently filed for Section 7(c) certificates on June 13, 2013.
  - ▶ 650,000 Dth/d of firm capacity from Susquehanna County, PA (Marcellus Shale) through NY to Iroquois/Tennessee interconnection (Wright Interconnection).
  - ▶ New 122-mile interstate pipeline.
  - ▶ Two firm shippers: Cabot Oil & Gas and Southwestern Energy Services.
  - ▶ Final EIS completed on Oct 24, 2014.
  - ▶ Certificates of public convenience and necessity granted Dec 2, 2014.
    - By letter order issued July 26, 2016, the Director of the Division of Pipeline Certificates (Director) granted Constitution’s requested two-year extension of time to construct the project.
    - Construction was expected to begin Spring 2016 (after final Federal Authorizations), but has been plagued by delays (see below).
  - ▶ On April 22, 2016, New York State Department of Environmental Conservation (NY DEC) denied Constitution’s application for a Section 401 permit under the Clean Water Act.
    - On August 18, 2017, the 2nd Circuit denied Constitution’s petition for review of the NY DEC decision, concluding that (1) the court lacked jurisdiction over the Constitution’s claims to the extent that they challenged the timeliness of the decision; and (2) the NY DEC acted within its statutory authority in denying the certification, and its denial was not arbitrary or capricious.
    - Constitution filed a petition for a writ of certiorari of the 2nd Circuit’s decision at the United States Supreme Court in January 2018 alleging, among other things, that the State’s denial of the Clean Water Act permit exceeded the state’s authority, and interfered with FERC’s exclusive jurisdiction. On April 30, 2018, the Supreme Court denied Constitution’s petition, thereby letting stand the 2nd Circuit’s ruling.
  - ▶ On October 11, 2017, Constitution filed with the FERC a petition for declaratory order (“Petition”) requesting that the FERC find that NY DEC waived its authority under section 401 of the Clean Water Act by failing to act within a “reasonable period of time.” (CP18-5)
    - On January 11, 2018, the FERC denied Constitution’s Petition.<sup>191</sup> Although noting that states and project sponsors that engage in repeated withdrawal and refile of applications for water quality certifications are acting, in many cases, contrary to the public interest and to the spirit of the Clean Water Act by failing to provide reasonably expeditious state decisions, the FERC did not conclude that the practice violates the letter of the statute, found factually that Constitution gave the NY DEC new deadlines, and found that the record did not show that the NY DEC in any instance failed to act on Constitution’s application for more than the outer time limit of one year.<sup>192</sup>
    - On February 12, 2018, Constitution Pipeline requested rehearing of the January 11, 2018 order. FERC denied Constitution’s request for rehearing of the January 2018 order.<sup>193</sup> On September 14, 2018, Constitution filed a petition for review in the U.S. Court of Appeals for the D.C. Circuit.<sup>194</sup>

<sup>191</sup> *Constitution Pipeline Co.*, 162 FERC ¶ 61,014 (Jan. 11, 2018), *reh’g requested*.

<sup>192</sup> *Id.* at P 23.

<sup>193</sup> *Constitution Pipeline Co., LLC*, 164 FERC ¶ 61,029 (2018) (September 2018 Waiver Rehearing Order).

<sup>194</sup> *Constitution*, Petition for Review in U.S. Court of Appeals for the D.C. Circuit, Docket No. CP18-5-000 (filed Sept. 14, 2018).

- ▶ On May 16, 2016, the New York Attorney General filed a complaint against Constitution at the FERC (CP13-499) seeking a stay of the December 2014 order granting the original certificates, as well as alleging violations of the order, the Natural Gas Act, and the Commission’s own regulations due to acts and omissions associated with clear-cutting and other construction-related activities on the pipeline right of way in New York.
    - In July 2016, the FERC rejected the NY AG’s filing as procedurally deficient, and declined to stay of the Certificate Order. The NY AG sought rehearing, and the Commission denied rehearing on November 22, 2016, noting again that the NY AG’s complaint was still procedurally deficient.
  - ▶ Tree felling and site preparation continues, but the long-term status of the pipeline is currently unknown.
  - ▶ On June 25, 2018, Constitution requested a further 2-year extension of the deadline to complete construction of its project, given the delays caused by the on-going fight over the water quality certification from the NYSDEC. Iroquois made a similar request on August 1, 2018. Constitution’s request was opposed by several parties and Constitution answered some of the opposition pleadings. The FERC granted the requested two-year extension of time on November 5, 2018.<sup>195</sup>
  - ▶ Rehearing of the November 5, 2018 order was requested by Halleran Landowners and a group of intervenors comprised of Catskill Mountainkeeper; Clean Air Council; Delaware-Otsego Audubon Society; Delaware Riverkeeper Network; Riverkeeper, Inc.; and Sierra Club (“Intervenors”). Constitution answered the requests for rehearing on December 21. The FERC issued a tolling order on December 21, affording it additional time to consider the requests for rehearing. This matter is pending before the FERC.
- **Non-New England Pipeline Proceedings**  
The following pipeline projects could affect ongoing pipeline proceedings in New England and elsewhere:
    - **Northern Access Project (CP15-115)**
      - ▶ The New York State Department of Environmental Conservation (“NY DEC”) and the Sierra Club requested rehearing of the *Northern Access Certificate Rehearing Order* on August 14 and September 5, 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 September 12, 2018 the FERC issued a tolling order affording it additional time to consider the requests for rehearing, which remains pending.
      - ▶ On August 6, the FERC dismissed or denied the requests for rehearing of the *Northern Access Certificate Order*.<sup>196</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>197</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.

<sup>195</sup> *Constitution Pipeline Co.*, 165 FERC ¶ 61,081 (Nov. 5, 2018), *reh’g requested*.

<sup>196</sup> *Nat’l Fuel Gas Supply Corp. and Empire Pipeline, Inc.*, 164 FERC ¶ 61,084 (Aug. 6, 2018) (“*Northern Access Rehearing & Waiver Determination Order*”).

<sup>197</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).

- ▶ As previously reported, the FERC issued an order, on Feb. 3, 2017, authorizing 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”).<sup>198</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>199</sup> Oral argument was held on November 16, 2017. The Court’s decision is pending, and it remains to be seen how the Court will factor in the FERC’s waiver determination in the *Northern Access Rehearing & Waiver Determination Order*.
- ▶ 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 remains pending.

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

- **Connecticut Zero-Carbon Resource Selections**

On December 28, 2018, Connecticut announced that, pursuant to Public Act 17-3,<sup>200</sup> it had selected two nuclear power bids,<sup>201</sup> along with nine solar project bids (two of which were paired with energy storage)<sup>202</sup> and one offshore wind project (200 MW from Revolution Wind). Connecticut stated that over 100 renewable energy projects bid into this RFP, including numerous solar projects, land-based and offshore wind, and existing hydropower. Nearly all of Public Act 17-3’s procurement authority was utilized. Assuming all of the selected projects successfully enter into contracts and are approved by CT PURA, Connecticut “will retain approximately 17% percent of total load for additional renewable procurement authority in future RFPs”.

#### 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

<sup>198</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>199</sup> *Nat’l Fuel Gas Supply Corp. v. NYSDEC et al.* (2d Cir., Case No. 17-1164).

<sup>200</sup> Public Act 17-3 required Connecticut to conduct an appraisal of nuclear power-generating facilities and solicit bids for zero-carbon electricity-generating resources.

<sup>201</sup> One bid was a 10-year bid from Millstone for roughly 50% of its output; the other, from Seabrook, for 1.9 million MWh beginning in 2022.

<sup>202</sup> The selected solar projects include three in Connecticut (Montville Energy Center, Black Hill Point Energy Center (paired with energy storage) and Gravel Pit Solar), two in New Hampshire (Tilton Heights Energy Center and Steel Mill Solar) and four in Maine (Old Mill Solar, Keay Brook Energy Center, and GRE-3-ME-SACO (also paired with energy storage), and Kennebec PV Partners.



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)).

- **FCM Resource Retirement Reforms (17-1275)**

**Underlying FERC Proceedings: ER16-551<sup>203</sup>**

**Petitioner: Exelon**

On December 28, 2018, five weeks after oral argument (held November 19, 2018), the DC Circuit Court of Appeals issued an opinion remanding the record in this case to the FERC for a clarification of “what [the FERC] really means” in the context of its orders on the FCM Resource Retirement Reforms.<sup>204</sup> Specifically, the FERC was directed to issue an order, not later than February 1, 2019, clarifying its position on the proper reading, process and legal standards associated with the Tariff changes that have ISO-NE file mitigated retirement bids for FERC review under § 205 of the FPA. In its appeal, Exelon continued its objection to the replacement of its De-List Bid for an IMM-mitigated De-List Bid in that FERC review under FPA § 205, which Exelon asserted “trample[s] on its § 205 rights”. Writing for the Court, Senior Justice Williams observed that FERC counsel “seemed to contend [at oral argument] that the correct meaning of the challenged order was in conformity with the meaning that [Exelon] ascribed to the controlling statute. Because the parties’ dispute may be illusory, we remand the record to the [FERC] to sort out what it really means.” The Court emphasized that the decision *did not* resolve arguments briefed as to “whether a supplier’s retirement bids are “rates” under [Section § 205 of the FPA], and therefore entitled to assessment by FERC under the “just and reasonable” criterion ... nor ... whether Exelon can rightly be said to have consented to the new rules by virtue of having participated in the 2006 Forward Capacity Market Settlement.” The FERC submitted its *FCM Resource Retirement Reforms Remand Order* to the Court on January 29, 2019.

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

**Underlying FERC Proceeding: EL14-7,<sup>205</sup> EL15-23<sup>206</sup>**

**Petitioners: NEPGA, Exelon**

On February 2, 2018, DC Circuit granted NEPGA’s and Exelon’s petitions for review of orders accepting the FCM’s 7-year price lock-in (EL14-7) and capacity-carry-forward rules (EL15-23).<sup>207</sup> Finding that “the FERC failed to adequately explain why its rationale [for rejecting price lock-in and capacity carry forward rules] in PJM – which seems to foreclose signing off on a Tariff scheme like ISO-NE’s – does not apply even more forcefully to the scheme it accepted in the Orders [appealed from],” the DC Circuit granted the Petitions and remanded the case to the FERC for further proceedings in which the FERC, in order to accept the changes filed, must provide some analysis and explanation why it changed course.

### Other Federal Court Activity of Interest

<sup>203</sup> *ISO New England Inc.*, 155 FERC ¶ 61,029 (Apr. 12, 2016) (“*Resource Retirement Reforms Order*”), *reh’g and clarif. denied*, 161 FERC ¶ 61,115 (Oct. 30, 2017) (“*FCM Resource Retirement Reforms Orders*”).

<sup>204</sup> *Exelon Corporation v. FERC*, Case No. 17-1275 (D.C. Cir., Dec. 28, 2018).

<sup>205</sup> 150 FERC ¶ 61,064 (Jan. 30, 2015); 146 FERC ¶ 61,039 (Jan. 24, 2014).

<sup>206</sup> 154 FERC ¶ 61,005 (Jan. 7, 2016); 150 FERC ¶ 61,067 (Jan. 30, 2015).

<sup>207</sup> *New England Power Generators Assoc. v FERC*, 881 F.3d 202 (DC Cir. 2018).

- **PennEast Project (18-1128)**  
**Underlying FERC Proceeding: CP15-558<sup>208</sup>**  
**Petitioners: NEPGA, Exelon**

Pending before the DC Circuit is an appeal of the FERC's orders granting certificates of public convenience and necessity to PennEast Pipeline Company, LLC ("PennEast")<sup>209</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"). In separate but related proceedings, the New Jersey Attorney General and several conservation groups have filed actions in federal district court in New Jersey seeking to limit PennEast's use of its NGA eminent domain authority.

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<sup>208</sup> *PennEast Pipeline Co., LLC*, 162 FERC ¶ 61,053 (Jan. 19, 2018), *reh'g denied*, 163 FERC ¶ 61,159 (May 30, 2018).

<sup>209</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.

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