

EXECUTIVE SUMMARY
Status Report of Current Regulatory and Legal Proceedings
as of May 1, 2019

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

I. Complaints/Section 206 Proceedings

1	EE M&V Declaratory Order Petition (EL19-43)	Apr 11 Apr 16	ISO-NE answers Petitioners' Mar 22 Answer FERC dismisses Petition
2	Winter Fuel Security (Chapter 3) (EL18-182)	Apr 22	ISO-NE, NESCOE and NEPOOL jointly request joint, public, staff-led meeting during the week of Jul 22 to create a forum for pre-filing discussions without violating the <i>ex parte</i> limitations

II. Rate, ICR, FCA, Cost Recovery Filings

6	Trans. Rate Incentive Request: UI's Pequonnock Substation Project (ER19-1359)	Apr 12 Apr 16 Apr 19 Apr 29	National Grid intervenes Public Citizen answers UI's challenge to its intervenor status UI answers State Parties' joint protest A private citizen protests requested rate incentive
7	FCA13 Results Filing (ER19-1166)	Apr 12 Apr 19	Capacity Suppliers, MA AG, Vineyard Wind, Public Citizen file protests; NEGPA and Calpine file comments ISO-NE and the ISO-NE IMM answer the protests and comments filed
8	Mystic 8/9 Cost of Service Agreement (ER18-1639)	Apr 19	Mystic, Connecticut Parties, ENECOS, MA AG, FERC Trial Staff file initial briefs on ROE to be used in setting charges under Agreement
9	MPD OATT 2018 Annual Informational Filing (ER15-1429)	Apr 30	FERC issues order granting formal challenge in part and setting issues for hearing and settlement judge procedures

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

10	ISO-NE's Interim Winter Energy Security (Chapter 2B) Proposal (ER19-1428)	Apr 12 Apr 15 Apr 16 Apr 30	FERC denies NRG/Cogentrix request for extension of time to comment; Comments and protests submitted by: MA AG, MPUC, VT DPS Comments and protests submitted by NEPOOL, Algonquin Gas Transmission, Brookfield, Calpine/Vistra, Exelon, NECOS/ENE/Direct, NEPGA, NRG, Verso, API/NGSA/IPAA, Clean Energy Advocates, NH PUC/NH OCA, VT DPU, Public Citizen Repsol files comments NEPOOL, ISO-NE, IMM file answers
11	Significant Decrease Calculations (ER19-1271)	Apr 17	FERC accepts changes, eff. Mar 14, 2019
13	Order 841 Compliance Filing (ER19-470)	May 1	ISO-NE files responses to FERC Apr 1 letter requesting additional information; related Tariff changes to be considered at May 3 NPC meeting

IV. OATT Amendments / TOAs / Coordination Agreements

No Activity to Report

V. Financial Assurance/Billing Policy Amendments

No Activity to Report

VI. Schedule 20/21/22/23 Changes

* 19	Schedule 21-NEP: National Grid/Calpine Fore River RFA (ER19-1681)	Apr 26	National Grid files Agreement; comment date May 17
19	Schedule 21-EM: BHD Excess ADIT Changes (ER19-1470)	Apr 19	MPUC files comments recommending that this matter be accepted for filing, subject to refund, and set for hearing and settlement procedures
19	Schedule 21-EM: MPD Excess ADIT Changes (ER19-1400)	Apr 11 Apr 26	MPUC, Maine Customer Group protest changes Emera Maine answers MPUC, MCG protests
* 20	Schedule 21-VEC and 20-VEC: Annual Informational Filing (ER10-1181)	Apr 30	VEC submits its annual update to its Schedule 21-VEC and 20-VEC formula rates covering the Jul 1, 2019 – Jun 30, 2020 period

VII. NEPOOL Agreement/Participants Agreement Amendments

No Activity to Report

VIII. Regional Reports

* 21	LFTR Implementation: 42 nd Quarterly Status Report (ER07-476)	Apr 15	ISO-NE files its 42nd quarterly report
* 21	ISO-NE FERC Form 1 (not docketed)	Apr 16 Apr 23	ISO-NE files 2018 FERC Form 1 ISO-NE files CPA Certification Statement for 2018 FERC Form 1
* 21	ISO-NE FERC Reporting Req. 582 (not docketed)	Apr 24	ISO-NE submits 2017 annual report of total MWh of transmission service (approx. 1.31 million MWhs)

IX. Membership Filings

* 22	Michael Kuser Membership Filing (ER19-1737)	Apr 30	NEPOOL files for acceptance Kuser Governance Only End User membership, eff. May 1, 2019; comment date May 21
* 22	May 2019 Membership Filing (ER19-1720)	Apr 30	<i>New Members:</i> AES Distributed Energy and Precept Power; <i>Termination:</i> Tomorrow Energy Corp.; <i>Name Changes:</i> Central Rivers Power NH, LLC and NGV US Transmission Inc.; comment date May 21
22	April 2019 Membership Filing (ER19-1469)	Apr 29	FERC accepts Revere Power and Valcour Wind Energy memberships; GenOn Canal, Messer Energy Services, and Enerwise Global Technologies name changes

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

* 23	NOPR - New Reliability Standard: CIP-012-1 (RM18-20)	Apr 18	FERC issues NOPR proposing to approve CIP-012-1 Changes and direct further refinements; comment date Jun 24, 2019
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XI. Misc. - of Regional Interest

* 23	203 Application: Emera Maine/ENMAX (EC19-80)	Apr 24	Emera Maine requests authorization for a transaction pursuant to which it will become a wholly-owned, indirect subsidiary of ENMAX Corporation; comment date May 15
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24	PJM MOPR-Related Proceedings (EL18-178; ER18-1314; EL16-49)	Apr 10 Apr 25-29	PJM submits motion noting its intention to run the Aug 2019 BRA under its existing capacity market rules and seeking confirmation that any replacement rate later established by the FERC would be applied prospectively and would not require PJM to re-run the Aug 2019 BRA PJM Entities, IL AG, EPSA, Clean Energy Entities, Direct Energy file answers and comments
26	Deepwater Wind PURPA Complaint (EL18-171)	Apr 24	FERC denies Complaint

XII. Misc. - Administrative & Rulemaking Proceedings



30	NOPR: Refinements to Horizontal Market Power Analysis Requirements (RM19-2)	Apr 29	EI submits supplemental comments
30	<i>Order 849-A</i> : Pipeline Rates (RM18-11)	Apr 18	FERC issues <i>Order 849-A</i> denying requests for rehearing of, and reaffirming its determinations made in, <i>Order 849</i>
31	DER Participation in RTO/ISOs (RM18-9)	Apr 17	APPA/NRECA submit supplemental comments
31	<i>Orders 845/845-A</i> : LGIA/LGIP Reforms (RM17-8)	Apr 23	FERC issues tolling order affording it additional time to consider AEP Service Corp. request for rehearing of <i>Order 845-A</i>
33	NOI: FERC's ROE Policy (PL19-4)	Apr 29	Institute for Energy Economics and Financial Analysis submits initial comments

XIII. Natural Gas Proceedings



No Activity to Report

XIV. State Proceedings & Federal Legislative Proceedings



No Activity to Report

XV. Federal Courts



No Activity to Report

M E M O R A N D U M

TO: NEPOOL Participants Committee Member and Alternates

FROM: Patrick M. Gerity, NEPOOL Counsel

DATE: May 1, 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”),¹ state regulatory commissions, and the Federal Courts and legislatures through May 1, 2019. If you have questions, please contact us.

I. Complaints/Section 206 Proceedings
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- **EE M&V Declaratory Order Petition (EL19-43)**

On April 16, the FERC dismissed the February 13, 2019 request for a declaratory order filed by Advanced Energy Economy (“AEE”) and Sustainable FERC Project (together, “Petitioners”).² As previously reported, the Petition requested a declaratory order that ISO-NE’s (i) new Measurement and Verification (“M&V”) standards cannot be retroactively applied to approved FCA 13 Qualification Packages and (ii) ISO-NE’s implementation of a new practice for determining the capacity value of Energy Efficiency (“EE”) Resources (i.e., valuation on net rather than adjusted gross savings) cannot be implemented prior to filing with and acceptance by the FERC. In the *EE M&V Order*, the FERC dismissed the Petition as premature. The FERC found that the harm alleged was “speculative in light of ISO-NE’s clarification that it has not made any proposal, nor does it currently have any plans, to change its M&V standards.”³ The FERC went on to state that, “because ISO-NE has not proposed a change to its M&V standards, there is no concrete proposal for the Commission to evaluate to determine whether a Tariff filing is required.”⁴ The FERC suggested that “[i]f parties believe that ISO-NE’s future actions violate the Tariff or the FPA, they may file a complaint pursuant to FPA section 206 at that time.”⁵ Unless the *EE M&V Order* is challenged, with any challenges due on or before May 16, 2019, this proceeding will be concluded. If you have any questions concerning this proceeding, please contact Sebastian Lombardi (860-275-0663; slombardi@daypitney.com).

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

² *Advanced Energy Economy and Sustainable FERC Project*, 167 FERC ¶ 61,032 (Apr. 16, 2019) (“*EE M&V Order*”).

³ *Id.* at P 18.

⁴ *Id.* Any provision that significantly affects rates, terms, and conditions of service must be included in the Tariff. The decision as to whether or not a provision must be included is a case-by-case analysis guided by the FERC’s rule of reason policy “under which provisions that “significantly affect rates, terms, and conditions” of service, are readily susceptible of specification, and are not generally understood in a contractual agreement must be included in the tariff, while items better classified as implementation details may be included only in the business practice manual.”

⁵ *Id.* at P 20.

- **RTO Insider Press Policy Complaint (EL18-196)**

As reported in the April 10 Report, the FERC dismissed, on April 10, 2019, *RTO Insider's* August 31 Complaint.⁶ The Complaint had requested that the FERC either (i) find that NEPOOL's press policy "unlawful, unjust and unreasonable, unduly discriminatory and contrary to the public interest, and direct NEPOOL to cease and desist" from implementing its policy; or (ii) "if the [FERC] finds that NEPOOL can sustain such a ban as a "private" entity, [] direct that NEPOOL's special powers, privileges and subsidies be terminated and that an open stakeholder process be used by [ISO-NE]" ("RTO Insider Complaint"). In dismissing the RTO Insider Complaint, the FERC agreed with NEPOOL that the claims asserted by RTO Insider did not relate to matters over which the FERC has jurisdiction, finding that the "rules governing attendance at NEPOOL meetings do not directly affect the filings brought before the Commission in the way that membership rules that allow members to vote do ... the challenged NEPOOL policies here concern passive attendance at NEPOOL meetings by non-voting entities and dissemination of written accounts of NEPOOL deliberations. The contested attendance and reporting policies are too attenuated from NEPOOL's voting process to directly affect jurisdictional rates." Unless the *RTO Insider Complaint Order* is challenged, with any challenges due on or before May 10, this proceeding will be concluded. If you have any questions concerning this matter, please contact Pat Gerity (860-275-0533; pmgerity@daypitney.com) or Sebastian Lombardi (860-275-0663; slombardi@daypitney.com).

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

As previously reported, the July 2, 2018 *Mystic Waiver Order*⁷ (reported on in more detail in ER18-1509 in Section III below) in part instituted this Section 206 proceeding in light of the FERC's preliminary finding that the ISO-NE Tariff may be unjust and unreasonable in that it fails to address specific regional fuel security concerns identified in the record in ER18-1509 that could result in reliability violations as soon as 2022. Accordingly, the *Mystic Waiver Order* directed ISO-NE, in part, to submit permanent Tariff revisions reflecting improvements to its market design to better address regional fuel security concerns (the "Chapter 3 Proposal"). Following an ISO-NE request for an extension of time to file its Chapter 3 Proposal, the FERC issued a notice granting an extension of time, to and including **October 15, 2019**, a month earlier than requested, for the filing of that Proposal. The schedule for development and consideration of the Chapter 3 mechanism has been adjusted accordingly.

Request for Technical Conference. On April 22, ISO-NE, NECPUC and NEPOOL jointly requested that the FERC notice and hold a joint, public, staff-led meeting during the week of Jul 22 to create a forum for pre-filing discussions without violating the *ex parte* limitations. That request is pending before the FERC.

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

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

As previously reported, the Settling Parties⁸ filed on August 17, 2018, 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, 2015.⁹ The Settlement proposes changes to Section II.25, Schedules 8 and 9, Attachment F

⁶ *RTO Insider LLC v. New England Power Pool Participants Comm.*, 167 FERC ¶ 61,021 (Apr. 10, 2019) ("*RTO Insider Complaint Order*").

⁷ *ISO New England Inc.*, 164 FERC ¶ 61,003 (July 2, 2018), *reh'g requested* ("*Mystic Waiver Order*").

⁸ "Settling Parties" are identified as: CMP; CMEEC/CTMEEC; CT OCC; CT PURA; Emera Maine; Eversource (CL&P, PSNH, NSTAR); Fitchburg and Unitil; 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*").

⁹ *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"

(including the addition of Interim Formula Rate Protocols (“Interim Protocols”)), and the Schedule 21s to the ISO-NE OATT. If approved, 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, 2018 meeting.

NESCOE filed comments supporting the Settlement. Comments opposing the Settlement were filed by Municipal PTF Owners¹⁰ 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,¹¹ 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”,¹² 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.”¹³ **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.¹⁴

Settlement Judge Report. Settlement Judge Dring submitted the contested settlement to the Commission on November 5, 2018. 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, 2018, the Munis moved that the

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.

¹⁰ “Municipal PTF Owners” are: Braintree, Chicopee, Middleborough, Norwood, Reading, Taunton, and Wallingford.

¹¹ 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).

¹² 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.

¹³ Reply Comments of NESCOE, Docket Nos. ER18-2235 and EL16-19, at p. 2 (filed Sep. 28, 2018).

¹⁴ Reply Comments of the Mass. Att’y General in Support of Settlement, Docket Nos. EL16-19 and ER18-2235 (filed Sep. 28, 2018).

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. On November 29, FERC Trial Staff supported the Munis' motion, providing additional arguments as to how the settlement report exceeded 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, 2018, 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) or Jamie Blackburn (202-218-3905; 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,¹⁵ 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*).¹⁶ However, the FERC's orders were challenged, and in *Emera Maine*,¹⁷ 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)¹⁸ and third (EL14-86)¹⁹ 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.²⁰ The *Initial Decision* also lowered the ROE ceilings. Parties to these

¹⁵ 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*").

¹⁶ *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*").

¹⁷ *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).

¹⁸ 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%.

¹⁹ 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.

²⁰ *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*").

proceedings filed briefs on exception to the FERC, which has not yet issued an opinion on the ALJ's *Initial Decision*.

- **Base ROE Complaint IV (EL16-64).** The fourth and final ROE proceeding²¹ also went to hearing before an ALJ, Judge Glazer, who issued his initial decision on March 27, 2017.²² 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.²³ 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.²⁴ 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.²⁵

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

²¹ 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.

²² *Belmont Mun. Light Dept. v. Central Me. Power Co.*, 162 FERC ¶ 63,026 (Mar. 27, 2018) ("*Base ROE Complaint IV Initial Decision*").

²³ *Id.* at P 2.; Finding of Fact (B).

²⁴ *Coakley v. Bangor Hydro-Elec. Co.*, 165 FERC ¶ 61,030 (Oct. 18, 2018) ("*Order Directing Briefs*" or "*Coakley*").

²⁵ *Id.* at 19.

unreasonable. The FERC suggested that it would adopt a 10.41% Base ROE and cap any preexisting incentive-based total ROE at 13.08%.²⁶ The new ROE would be effective as of the date of *Opinion 531-A*, or October 16, 2014. Accordingly, the issue to be addressed in the Base ROE Complaint II proceeding is whether the ROE established on remand in the first complaint proceeding remained just and reasonable based on financial data for the six-month period September 2013 through February 2014 addressed by the evidence presented by the participants in the second proceeding. Similarly, briefing in the third and fourth complaints will have to address whether whatever ROE is in effect as a result of the immediately preceding complaint proceeding continues to be just and reasonable.

The FERC directed participants in the four proceedings to submit briefs regarding the proposed approaches to the FPA section 206 inquiry and how to apply them to the complaints (separate briefs for each proceeding). Additional financial data or evidence concerning economic conditions in any proceeding must relate to periods before the conclusion of the hearings in the relevant complaint proceeding. Following a FERC notice granting a request by the TOs and Customers²⁷ for an extension of time to submit briefs, the latest date for filing initial and reply briefs was extended to January 11 and March 8, 2019, respectively. On January 11, initial briefs were filed by EMCOS, Complainant-Aligned Parties, TOs, EEI, Louisiana PSC, Southern California Edison, and AEP. As part of their initial briefs, each of the Louisiana PSC, SEC and AEP also moved to intervene out-of-time. Those interventions were opposed by the TOs on January 24. The Louisiana PSC answered the TO's January 24 motion on February 12. Reply briefs were due March 8, 2019. Reply briefs were submitted by the TOs, Complainant-Aligned Parties, EMCOS, FERC Trial Staff.

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

II. Rate, ICR, FCA, Cost Recovery Filings

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

On March 15, 2019, UI requested approval of the following rate incentives for its investment in the Pequonnock Substation Project:²⁸ (1) 100% recovery of prudently incurred costs in the event the Pequonnock Substation Project is abandoned, in whole or in part, for reasons outside of UI's reasonable control ("Abandoned Plant Incentive"); (2) inclusion of 100% of Construction Work in Progress in rate base ("CWIP Incentive"); and (3) a 50 basis point return on common equity incentive adder ("ROE Incentive Adder") for increased risks and challenges prompted by UI's deployment of smart grid communications-enabled technology and construction and operation of a substation that includes a resilient design.

Comments on the UI request were due on or before April 5. State Parties²⁹ and Public Citizen challenged the incentive requests. Eversource and National Grid submitted doc-less interventions. On April 10, UI challenged the Public Citizen motion to intervene, suggesting that Public Citizen has not demonstrated

²⁶ *Id.* at P 59.

²⁷ For purposes of the motion seeking clarification, "Customers" are CT PURA, MA AG and EMCOS.

²⁸ UI's Pequonnock Substation Project will replace the existing Pequonnock substation and will include (1) a new 115-kV/13.8-kV gas insulated substation; (2) the relocation and installation of five existing 115-kV overhead transmission lines including seventeen new galvanized steel monopole structures (ten single circuit, two double circuit, and five "walk down" 11 structures); and (3) the relocation and installation of two 115-kV underground high-pressure gas filled cables and one underground XLPE cable, each ranging in length from about 500 to 730 feet. The Pequonnock Substation Project is approximately a \$101.6 million electric transmission investment and is expected to be placed in service on or before Dec. 1, 2022.

²⁹ "State Parties" are: the MA AG, CT AG, CT DEEP, CT PURA, and the CT OCC.

that it meets the Commission's standard for intervention.³⁰ Public Citizen asked the FERC to dismiss UI's opposition to its motion to intervene, noting that "has 33,439 members and supporters in the six New England states" and "no other interest can adequately represent [its] interests" in the proceeding. On April 19, UI answered State Parties' joint protest. This matter is pending before the FERC. If you have any questions concerning this proceeding, please contact Pat Gerity (860-275-0533; pmgerity@daypitney.com).

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

On March 1, ISO-NE filed the results of the thirteenth FCA ("FCA13") held February 4, 2019. ISO-NE reported the following highlights:

- ◆ FCA13 Capacity Zones were the Southeastern New England ("SENE") Capacity Zone (the Northeastern Massachusetts ("NEMA")/Boston, Southeastern Massachusetts, and Rhode Island Load Zones), the Northern New England ("NNE") Capacity Zone (the Maine, New Hampshire and Vermont Load Zones) and the Rest-of-Pool Capacity Zone (the Connecticut and Western/Central Massachusetts Load Zones).
- ◆ FCA13 commenced with a starting price of \$13.050/kW-mo. and concluded for the SENE, NNE and Rest-of-Pool after four rounds.
- ◆ Resources will be paid as follows:
 - ▶ \$3.800/kW-mo. – all Capacity Zones
 - ▶ \$3.800/kW-mo. – NY AC Ties imports (522 MW) and Highgate (57 MW)
 - ▶ \$3.800/kW-mo. – Phase I/II HQ Excess external interface (431 MW)
 - ▶ \$2.681/kW-mo. – New Brunswick imports (184 MW).
- ◆ The substitution auction resulted in a single clearing price of \$0.000 for all Capacity Zones. No demand bids cleared that were priced below the substitution auction clearing price.
- ◆ No resources cleared as Conditional Qualified New Generating Capacity Resources.
- ◆ No Long Lead Time Generating Facilities secured a Queue Position to participate as a New Generating Capacity Resource.
- ◆ No de-list bids were rejected for reliability reasons.

ISO-NE asked the FERC to accept the FCA13 rates and results, effective June 28, 2019. Comments on this filing were due on or before April 12, 2019.

Protests to the FCA13 Results filing were filed by **Capacity Suppliers** (concerned that the IMM failed to properly apply the procedures and standards for setting below-ORTP offer floors, particularly for the Killingly Energy Center),³¹ **MA AG** (suggesting the justness and reasonableness of the rates were open to question due to Vineyard Wind's inability to participate in FCA13 under the RTR exemption because the FERC failed to act on Vineyard Wind's Petition for Waiver in ER19-570), **Vineyard Wind** (similarly asserting that its preclusion from participation as an RTR caused the results to be not just and reasonable, unduly discriminatory and preferential), and **Public Citizen** (suggesting the FCA13 results are unjust and unreasonable because of the FERC's failure to act on the Vineyard Wind waiver request, the FERC's failure to take action in response to the EE M&V Declaratory Order Petition, and the failure of CASPR to deliver lower-priced capacity for New England ratepayers). **NEPGA** and **Calpine** submitted comments (neither specifically challenging the FCA13 results, but NEPGA asking the FERC find the FCA13 Results Filing deficient in that it did not include testimony from the

³⁰ Pursuant to Rule 2010 of the FERC's Rules of Practice and Procedure, "A motion to intervene must also state the movant's interest in sufficient factual detail that demonstrates that: (i) [t]he movant has a right to participate which is expressly conferred by statute or by Commission rule, order, or other action; (ii) [t]he movant has or represents an interest which may be directly affected by the outcome of the proceeding...; and (iii) the movant's participation is in the public interest."

³¹ "Capacity Suppliers" for purposes of this proceeding are: Great River Hydro, NRG Power Marketing, Cogentrix Energy Power Management, and Vistra Energy Corp.

IMM explaining the impact, if any, ISO-NE's administrative actions had on the competitiveness of the FCA13 results, and Calpine identifying a concern that the results suggest there is a systemic problem with the FCM rules, including the financial assurance requirements applicable to new resources). Doc-less interventions NEPOOL, Avangrid Renewables, Calpine, Dominion, Dynegy/Vistra, Eversource, Exelon, FirstLight, National Grid, NESCOE, NextEra, PSEG, CT AG, CT OCC, CT DEEP, EPSA, Helix Maine Wind Development, Sierra Club, and Public Citizen have filed. On April 29, ISO-NE and the ISO-NE IMM filed answers to the protests and comments submitted. This matter is pending before the FERC.

If you have any questions concerning this matter, please contact Sebastian Lombardi (860-275-0663; slombardi@daypitney.com) or Pat Gerity (860-275-0533; pmgerity@daypitney.com).

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

As previously reported, on December 20, 2018, in a 2-1 decision (Commissioner Glick dissenting; Commissioner McIntyre not voting; Commissioner McNamee not participating), which followed an evidentiary proceeding and two rounds of briefing, the FERC conditionally accepted the Cost-of-Service Agreement ("COS Agreement")³² among Constellation Mystic Power ("Mystic"), Exelon Generation Company ("ExGen") and ISO-NE.³³ 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, 2019.³⁴ Requests for clarification and/or rehearing of the *Mystic Order* were filed by Constellation Mystic Power, CT Parties, EDF, ENECOS, MA AG, NESCOE, NextEra, and Repsol. On February 6, Constellation answered the other parties' requests for rehearing. CT Parties answered Constellation's request for rehearing on February 8. On February 14, NESCOE answered Constellation's February 6 answer. On February 15, the FERC issued a tolling order affording it additional time to consider the requests for clarification and/or rehearing, which remain pending.

Mystic's Compliance Filing. On March 1, following a 10-day extension of time granted on February 14, 2019, Mystic submitted its required compliance filing. The compliance filing included the following modifications:

- ◆ Modification to Section 2.2 (Termination) which provides ISO-NE will be required to seek FERC authorization to extend the term of the COS Agreement beyond May 31, 2024; deletion of Section 2.2.1 in its entirety;
- ◆ Inclusion of a clawback provision;
- ◆ Modification to Section 4.4 related to settlement of over- and underperformance credits;
- ◆ A clarification that fuel opportunity costs will not be included as part of the Stipulated Variable Costs used to calculate the revenue credits;
- ◆ Modifications to information access provisions (§ 6.2) both to allow ISO-NE full access to information and to support verification of third-party sales;

³² 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.

³³ *Constellation Mystic Power, LLC*, 165 FERC ¶ 61,267 (Dec. 20, 2018) ("*Mystic Order*").

³⁴ *Id.* at PP 31-34.

- ◆ Modifications to Schedule 3 supporting multiple compensation-related directives (e.g. cost of capital/cost of service, fuel supply charge, settlement of over- and under-performance credits);
- ◆ Schedule 3A modifications related to Mystic's true-up process; and
- ◆ Non-substantive conforming changes.

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

ROE Paper Hearing. The *Mystic Order* established a paper hearing to determine the just and reasonable ROE to be used in setting charges under Mystic's COS Agreement. On April 19, Mystic, Connecticut Parties, ENECOS, MA AG, and FERC Trial Staff filed initial briefs.

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.³⁵ The *Mystic COS Agreement Order* was approved by a 3-2 vote, with dissents by Commissioners Powelson and Glick. Challenges to the *July Mystic COS Agreement Order* were filed by NESCOE, ENECOS, MA AG, and the NH PUC. Constellation answered the NESCOE request for reconsideration on August 21. On September 10, 2018, the FERC issued a tolling order affording it additional time to consider the requests for rehearing, which remain pending.

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

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

On April 30, 2019, the FERC granted, in part, the formal challenge filed on December 31, 2018 by the Maine Customer Group³⁶ (the "2018 Challenge") to Emera Maine's May 15, 2018 annual informational filing³⁷ and set the remaining issues for hearing and settlement judge procedures.³⁸ As previously reported, the 2018 Challenge sought certain cost reductions/ exclusions³⁹ to be effective June 1, 2018 following unsuccessful efforts to obtain the relief sought directly from Emera Maine MPD through informal resolution procedures in accordance with the Protocols. In granting in part the 2018 Challenge, the FERC found that Emera Maine's formula rate should be corrected for the current rate year and Emera Maine must submit a

³⁵ *Constellation Mystic Power*, 164 FERC ¶ 61,022 (July 13, 2018) ("*July Mystic COS Agreement Order*"), *reh'g requested*.

³⁶ For purposes of this proceeding, "Maine Customer Group" of "MCG" is the MPUC, MOPA, Houlton water Co., and Van Buren Light & Power District, and Eastern Maine Electric Cooperative.

³⁷ 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.

³⁸ *Emera Maine*, 167 FERC ¶ 61,090 (Apr. 30, 2019).

³⁹ The formal challenge sought (i) exclusion of certain regulatory expenses allocated or directly assigned to the MPD transmission customers; (ii) exclusion of costs that would otherwise constitute a double-recovery for amortization of losses incurred as a result of a merger; (iii) correction of MPD-acknowledged errors in its Annual Update Filing; (iv) exclusion of certain costs for land associated with a project not in service; (v) exclusion from transmission rates certain costs for distribution equipment; (vi) exclude of costs improperly attributed to line 6901; and (vii) a flowback of excess ADIT resulting from the corporate tax reduction, and a requirement for Emera MPD to include a worksheet in its tariff to track excess/deficient ADIT.

compliance filing on or before May 30 that revises its 2018-2019 formula rate charges to correct certain acknowledged errors, exclusion of certain costs for land associated with a project not in service, the exclusion of certain costs for distribution equipment from transmission rates, and the flowback of excess ADIT. As to the remaining issues, addressing Administrative and General (“A&G”) expenses, merger-related prior losses, exclusion of costs attributed to Line 6901, and exclusion of land rights cost, the FERC found that the 2018 Annual Update raises issues of material fact that cannot be resolved based on the record and set those issues for hearing and settlement judge procedures. Hearings will be held in abeyance to provide time for settlement judge procedures. A settlement judge will be designated by mid-May. If there are questions on this matter, please contact Pat Gerity (860-275-0533; pmgerity@daypitney.com).

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

Rehearing remains pending of the FERC’s October 6, 2017 order rejecting the TOs’ June 5, 2017 filing in this proceeding.⁴⁰ 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*⁴¹ 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.⁴² The FERC explained that it will “order such refunds or surcharges as necessary to replace the rates set in the now-vacated order with the rates that the Commission ultimately determines to be just and reasonable in its order on remand” so as to “put the parties in the position that they would have been in but for [its] error.” For the time being, so as not to “significantly complicate the process of putting into effect whatever ROEs the Commission establishes on remand” or create “unnecessary and detrimental variability in rates,” the FERC has temporarily left in place the ROEs set in *Opinion 531-A*, pending an order on remand.⁴³ On November 6, the TOs requested rehearing of the *Order Rejecting Filing*. On December 4, 2017, the FERC issued a tolling order providing it additional time to consider the TOs’ request for rehearing of the *Order Rejecting Filing*, which remains pending. If you have any questions concerning this matter, please contact Joe Fagan (202-218-3901; jfagan@daypitney.com) or Eric Runge (617-345-4735; ekrunge@daypitney.com).

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

- **ISO-NE’s Interim Winter Energy Security (Chapter 2B) Proposal (ER19-1428)**

On March 25, ISO-NE filed its “Inventoried Energy Program” (a/k/a its “Chapter 2B Proposal”) for the Winters of 2023-2024 and 2024-2025 (FCA14 and FCA15 Capacity Commitment Periods). ISO-NE stated that the “program will provide incremental compensation to resources that maintain inventoried energy during cold periods when winter energy security is most stressed” and “fulfills a commitment ... to identify an interim solution that could complement efforts currently underway to develop a long-term, market-based solution to the region’s energy security challenges.” A May 28, 2019 effective date was requested. The changes were not supported by the Participants Committee when considered at its March 13 meeting. The ISO-NE Chapter 2B Proposal received a NEPOOL Vote of 32.67% in favor. Comments on this filing are due on or before April 15, 2019. Thus far, doc-less interventions have been filed by NEPOOL, Avangrid, Calpine, ConEd, CT DEEP, CT OCC, Dominion, Energy New England (“ENE”), Eversource, Exelon, HQ US, LS Power (through Ocean State Power and Wallingford Energy), MA AG, MA DPU, NESCOE, NRG, Shell, Verso, American Petroleum Institute (“API”), EPSA, NH PUC, RENEW, Public Citizen, and Sierra Club.

On April 8, the IMM submitted comments which it stated were “focused on aspects related to administering the Tariff’s mitigation rules in both the energy and capacity markets in light of the expected net

⁴⁰ *ISO New England Inc.*, 161 FERC ¶ 61,031 (Oct. 6, 2017) (“*Order Rejecting Filing*”), *reh’g requested*.

⁴¹ *Emera Maine v. FERC*, 854 F.3d 9 (D.C. Cir. 2017) (“*Emera Maine*”).

⁴² *Order Rejecting Filing* at P 1.

⁴³ *Id.* at P 36.

revenue streams available to resources that elect to participate in the interim program, and on the timing for calculating the administratively-determined forward and spot prices. The IMM comments included the following suggestions:

- ◆ Energy market bids of resources that forego revenues from the interim program by converting inventoried energy into electric power should be subject to adjustment/mitigation to reflect such opportunity costs in their Supply Offers at the spot rate for inventoried energy
- ◆ Inclusion of opportunity costs of the interim program into energy market bids of participating energy-secure resources likely will impact the wholesale energy markets and result in (a) preserving energy-secure resources for when they are most valuable; (b) a reduced (or eliminated) need for manual intervention in dispatch to preserve fuel-secure resources until needed (so-called resource posturing which can result in price distortions); and (c) an increase in Day-Ahead and Real-Time energy market prices (i.e., LMPs) that directly reflect the value of the scarce fuel-secure energy.
- ◆ To the extent that a Participant expects to accrue positive net revenue from the interim program, a competitive De-List bid and New Supply Offer in the FCA would account for this positive revenue stream in the calculation of the resource's net Going Forward Costs, just like any ancillary service revenue, and result in a lower priced bid or offer to better reflect a competitive price to obtain a CSO.
- ◆ Failure to account for interim revenue in FCM mitigation potentially could result in the non-economic retirements of energy-secure resources as a result of higher, non-competitively priced bids.
- ◆ ISO-NE should factor into its interim proposal a mechanism for recalculating the forward and/or spot rates for inventoried energy closer to the time of procurement of fuel and delivery of inventoried capacity beginning in December 2023, in order to better ensure consistency with the cost of providing winter energy security.

Also on April 8, NRG Power Marketing LLC ("NRG") and Cogentrix Energy Power Management, LLC requested a 15-day extension of time, to April 30, 2019, to submit comments in response to the Chapter 2B Proposal Filing. The FERC denied that request on April 12.

Comments and protests on the Chapter 2B Proposal Filing were filed by: NEPOOL, Algonquin Gas Transmission, Brookfield, Calpine/Vistra, Exelon, MA AG, MPUC, NECOS/ENE/Direct, NEPGA, NRG, Repsol, Verso, API/NGSA/IPAA, Clean Energy Advocates, NH PUC/NH OCA, V DPS, VT DPU, and Public Citizen. Answers were filed by NEPOOL, ISO-NE and the IMM. This matter is pending before the FERC.

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

- **ISO-NE eTariff Versioning Corrections (ER19-1387)**

On March 20, ISO-NE filed updates to its eTariff to ensure that the eTariff properly reflects the effective ISO-NE Tariff versioning. ISO-NE stated that no changes are being made to accepted language nor to previously effective dates. Rather, the Tariff sheets were submitted simply to conform the eTariff versioning, correcting inaccuracies due to administrative oversight and assorted mismatches of filing and effective dates. Comments on this filing, if any, were due on or before April 10; none were filed. NEPOOL and NRG submitted doc-less interventions. This matter is pending before the FERC. If you have any questions concerning this matter, please contact Pat Gerity (860-275-0533; pmgerity@daypitney.com).

- **Significant Decrease Calculation Changes (ER19-1271)**

On April 17, the FERC accepted changes jointly filed by ISO-NE and NEPOOL to correct a technical error concerning the calculation of a "significant decrease" in a resource's capability for purposes of participation in

the Forward Capacity Market.⁴⁴ As revised, the Market Rules will ensure that significant decrease calculations are performed as intended using Qualified Capacity for FCA purposes and Capacity Supply Obligation (“CSO”) for purposes of the third Annual Reconfiguration Auction (“ARA”). The changes were accepted effective as of March 14, 2019, as requested. Unless the April 17 order is challenged, this proceeding will be concluded. If you have any questions concerning this proceeding, please contact Sebastian Lombardi (860-275-0663; slombardi@daypitney.com) or Jamie Blackburn (202-218-3905; jblackburn@daypitney.com).

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

As previously reported, Vineyard Wind petitioned the FERC on December 14, 2018 for a waiver of the ISO-NE Tariff provisions necessary to allow Vineyard Wind 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, Vineyard Wind would not have been precluded from utilizing the RTR exemption. Consistent with the discussion in the CASPR Conforming Changes filing, Vineyard Wind asked that the proration requirement that would be triggered by Vineyard Wind’s participation in FCA13 as an RTR be limited for FCA13 to it and any other similarly situated entities (i.e. new offshore wind resources located in federal waters seeking RTR treatment); there would be no impact on resources currently qualified to use the RTR exemption in FCA13. Comments on Vineyard Wind’s request were due on or before January 4, 2019. ISO-NE filed comments not opposing the Waiver Request, but requesting FERC action by January 29, 2019 if the waiver 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, and NextEra.

On January 31, Vineyard Wind requested the immediate issuance of order on its request. Massachusetts Governor Baker submitted a request on February 1 that the FERC grant Vineyard Wind’s waiver request that day. Also on February 1, ISO-NE reported at the Participants Committee meeting, and confirmed later that evening that, in the absence of a FERC order issued early that afternoon, it would proceed to run the auction without granting Vineyard Wind’s MWs treatment under the RTR exemption. Early on February 4, Vineyard Wind submitted an emergency motion for immediate stay of FCA13 or, in the alternative, a requirement that FCA13 be re-run following FERC action. The FERC took no action ahead of FCA13 and FCA13 was run without Vineyard Wind receiving RTR treatment. Following FCA13, answers opposing Vineyard Wind’s emergency motion were submitted by ISO-NE and NEPGA. A joint statement addressing the FERC’s failure to act was issued by Commissioners LaFleur and Glick (to which Chairman Chatterjee responded via Twitter). The Massachusetts Attorney General filed a statement addressing the FERC’s failure to act on February 13. On February 15, ISO-NE submitted a letter that addressed two concerns raised in Commissioner Glick’s dissent from the *CASPR Conforming Changes Order*. On February 19, Vineyard Wind answered the NEPGA and ISO-NE protests to its motion to vacate and rerun FCA13 upon Commission approval of the waiver sought.

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

⁴⁴ *ISO New England Inc. and New England Power Pool Participants Comm.*, Docket No. ER19-1387 (Apr. 17, 2019) (unpublished letter order).

- **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*.⁴⁵ For the majority of the revisions, ISO-NE requested a December 3, 2019 effective date; for a limited number of revisions, ISO-NE requested a January 1, 2024 effective date. The *Order 841* compliance changes were supported by the Participants Committee at its November 2, 2018 meeting. Following a request for a 45-day extension of time,⁴⁶ comments on this filing were due February 7, 2019. Doc-less interventions were filed by Exelon, LS Power, NESCOE, APPA, EPSA, NRECA, GlidePath Development, Lincoln Clean Energy, and Voith Hydro. Protests and comments were filed by Calpine, EDF Renewables, RENEW Northeast (“RENEW”), Advanced Energy Economy (“AEE”), Energy Storage Association (“ESA”), and Tesla. On February 22, NEPOOL, ISO-NE and NRECA filed answers to the comments and protests. On March 1, Voith Hydro submitted comments regarding advanced pumped storage hydro technology. On March 21, ESA filed an answer to ISO-NE’s February 22 answer (requesting that the FERC require the issues with the redeclaration process to be resolved prior to December 3, 2019 implementation deadline).

FERC Request for Additional Information. As previously reported, on April 1, 2019, the FERC issued a letter advising that additional information was necessary to process the compliance filing and directing that responses to the questions posed in the letter order be submitted on or before May 1, 2019. ISO-NE filed additional information and Tariff changes in response to that letter order on May 1, 2019. The Tariff changes included in the ISO-NE March 1 response are to be considered at the May 3 Participants Committee meeting (Agenda Item #7).

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

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

Requests for rehearing and/or clarification of the *Fuel Security Retention Proposal Order*⁴⁷ remain pending before the FERC. As previously reported, the *Fuel Security Retention Proposal Order* accepted ISO-NE’s Proposal⁴⁸

⁴⁵ 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*”).

⁴⁶ 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”).

⁴⁷ *ISO New England Inc.*, 165 FERC ¶ 61,202 (Dec. 3, 2018), *reh’g requested* (“*Fuel Security Retention Proposal Order*”). In accepting the ISO-NE Proposal, the FERC, among other things: (i) found ISO-NE’s trigger and assumptions for the fuel security reliability review for retention of resources be reasonable, but required ISO-NE at the end of each winter to “to submit an informational filing comparing the study assumptions and triggers from the modeling analysis to actual conditions experienced in the winter of 2018/19; (ii) found cost allocation on a regional basis to Real-Time Load Obligation just and reasonable and consistent with precedent regarding the past Winter Reliability Programs; (iii) found that entering retained resources into the FCAs as price takers would be just and reasonable to ensure that they clear and are counted towards resource adequacy so that customers do not pay twice for the resource; and (iv) found that it was appropriate to include FCAs 13, 14 and 15 in the term. The FERC agreed that it is necessary to implement a longer-term market solution as soon as possible, and required ISO-NE to file its longer-term market solution no later than June 1, 2019. The FERC declined to provide guidance on what the long-term solution(s) should be.

⁴⁸ As previously reported, ISO-NE filed, in response to the *Mystic Waiver Order*, “interim Tariff revisions that provide for the filing of a short-term, cost-of-service agreement to address demonstrated fuel security concerns”. ISO-NE proposed three sets of provisions to expand its authority on a short-term basis to enter into out-of-market arrangements in order to provide greater assurance of fuel security during winter months in New England (collectively, the “Fuel Security Retention Proposal”). ISO-NE stated that the interim provisions would sunset after FCA15, with a longer-term market solution to be filed by July 1, 2019, as directed in the *Mystic Waiver Order*. In addition, the ISO-NE transmittal letter described (i) the generally-applicable fuel security reliability review standard that will be used to determine whether a retiring generating resource is needed for fuel security reliability reasons; (ii) the proposed cost allocation methodology (Real-Time Load Obligation, though ISO-NE indicated an ability to implement NEPOOL’s alternative allocation methodology if determined appropriate by the FERC); and (iii) the proposed treatment in the FCA of a retiring generator needed for fuel security reasons that elects to

in all respects, despite the various protests and alternative proposals filed. There was a concurring decision from Commissioner Glick, and a partial dissent from Chairman Chatterjee on the FCA price treatment issue. Challenges to the *Fuel Security Retention Proposal Order* were filed by NEPGA, NRG, Verso, Vistra/Dynegy Marketing & Trade, MPUC, and PIOs.⁴⁹ On February 1, 2019, the FERC issued a tolling order affording it additional time to consider the requests for rehearing, which remain pending. If you have further questions concerning this proceeding, please contact Sebastian Lombardi (860-275-0663; slombardi@daypitney.com).

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

Rehearing of the FERC's November 9 order,⁵⁰ accepting the revised Tariff language that changed the determination of economic life under Section III.13.1.2.3.2.1.2.C of the Tariff, remains pending before the FERC. As previously reported, the Economic Life Revisions provide that the economic life of an Existing Capacity Resource is calculated as the evaluation period in which the net present value of the resource's expected future profit is maximized. The Economic Life Revisions were accepted effective as of August 10, 2018, as requested. In accepting the revisions, the FERC found that "it is just and reasonable to consider as part of the Economic Life calculation that a rational resource, in exercising competitive bidding behavior, would seek to exit the market, or retire, before it starts incurring consecutive losses."⁵¹ 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."⁵² 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."⁵³ On December 10, 2018, NEPGA requested rehearing of the *Economic Life Determination Revisions Order*. On January 8, 2019, the FERC issued a tolling order affording it additional time to consider NEPGA's request for rehearing, which remains pending. If you have any questions concerning this proceeding, please contact Sebastian Lombardi (860-275-0663; slombardi@daypitney.com).

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

On July 2, 2018, the FERC issued an order⁵⁴ 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.

remain in service. The ISO-NE Fuel Security Changes were considered but not supported by the Participants Committee at its August 24, 2018 meeting. There was, however, super-majority support for (1) the Appendix L Proposal with some important adjustments to make that proposal more responsive to the FERC's guidance in the Mystic Waiver Order and other FERC precedent, and (2) the PP-10 Revisions, also with important adjustments (together, the "NEPOOL Alternative").

⁴⁹ "PIOs" for purposes of this proceeding are Sierra Club, NRDC, Sustainable FERC Project, and Acadia Center.

⁵⁰ *ISO New England Inc. and New England Power Pool Participants Comm.*, 165 FERC ¶ 61,088 (Nov. 9, 2018) ("*Economic Life Determination Revisions Order*").

⁵¹ *Economic Life Determination Revisions Order* at P 23.

⁵² *Id.* at P 24.

⁵³ *Id.* at P 27.

⁵⁴ *ISO New England Inc.*, 164 FERC ¶ 61,003 (July 2, 2018), *reh'g requested* ("*Mystic Waiver Order*").

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).”⁵⁵ 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.”⁵⁶

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).⁵⁷ 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.⁵⁸ 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 FCM⁵⁹ and an *ex ante* cost allocation proposal that appropriately identifies beneficiaries and adheres to FERC cost causation precedent.⁶⁰

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

- ◆ **NEPGA** (requesting that the FERC grant clarification that it directed, or on rehearing direct, ISO-NE to adopt a mechanism that prohibits the re-pricing of Fuel Security Resources in the FCA at \$0/kW-mo. or at any other uncompetitive offer price);
- ◆ **Connecticut Parties**⁶¹ (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

⁵⁵ *Id.* at P 47.

⁵⁶ *Id.* at P 48.

⁵⁷ *Id.* at P 55.

⁵⁸ *Id.* at PP 56-57.

⁵⁹ *Id.* at P 57.

⁶⁰ *Id.* at P 58.

⁶¹ “Connecticut Parties” are the Conn. Pub. Utils. Regulatory Authority (“CT PURA”) and the Conn. Dept. of Energy and Environ. Protection (“CT DEEP”).

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**⁶² (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**⁶³ (asserting that (i) the FERC failed to respond to or provide a reasoned explanation for rejecting the arguments submitted by numerous parties that key assumptions underlying and the results of the ISO-NE analyses were flawed; and (ii) the FERC’s determination that ISO-NE’s analyses were reasonable is not supported by substantial evidence in the record); and
- ◆ **AWEA/NGSA** (asserting that the FERC erred (i) in finding that ISO-NE’s OFSA and subsequent impact analysis of fuel security was reasonable without further examination and (ii) in its preliminary finding that a short-term out-of-market solution to keep Mystic 8 & 9 in operation is needed to address fuel security issues).

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

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

⁶² 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).

⁶³ “PIOs” are the Sierra Club, Natural Resources Defense Council (“NRDC”), and Sustainable FERC Project.

- **CASPR (ER18-619)**

Rehearing of the FERC's order accepting and ISO-NE's Competitive Auctions with Sponsored Policy Resources ("CASPR") revisions,⁶⁴ 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*⁶⁵ (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*⁶⁶ (which challenged the CASPR construct in its entirety, asserting that state-sponsored resources should not be subject to the MOPR); and (iv) *Public Citizen* (which also challenged the CASPR construct in its entirety and the *CASPR Order's* failure to define "investor confidence"). On April 24, ISO-NE answered Clean Energy Advocates' answer. On May 7, 2018, the FERC issued a tolling order affording it additional time to consider the requests for rehearing, which remain pending. If you have any questions concerning this proceeding, please contact Dave Doot (860-275-0102; dt_doot@daypitney.com) or Sebastian Lombardi (860-275-0663; 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.⁶⁷ 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).

- **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,⁶⁸ directed the FERC to clarify "what [the FERC] really means" in the context of its orders on the FCM Resource Retirement Reforms.⁶⁹ 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

⁶⁴ *ISO New England Inc.*, 162 FERC ¶ 61,205 (Mar. 9, 2018) ("*CASPR Order*").

⁶⁵ 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.

⁶⁶ "Clean Energy Advocates" are, collectively the NRDC, Sierra Club, Sustainable FERC Project, CLF, and RENEW Northeast, Inc.

⁶⁷ *ISO New England Inc.*, 161 FERC ¶ 61, 035 (Oct. 6, 2017) ("*CONE/ORTP Updates Order*"), *reh'g requested*.

⁶⁸ *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*").

⁶⁹ *Exelon Corporation v. FERC*, 911 F.3d 1236 (D.C. Cir., Dec. 28, 2018) (Case No. 17-1275).

usurp generators' § 205 rights. On January 18, NEPOOL and Exelon submitted limited responses to ISO-NE's January 14 filing.⁷⁰ **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.⁷¹ 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.⁷² In light of the *FCM Resource Retirement Reforms Remand Order*, Exelon informed the DC Circuit that it is no longer aggrieved by the FERC's earlier orders and the DC Circuit dismissed Exelon's petition as moot. Reporting on this proceeding has concluded.

- **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.⁷³ 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.⁷⁴ 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

⁷⁰ 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.

⁷¹ *ISO New England Inc.*, 166 FERC ¶ 61,060 (Jan. 29, 2019) ("*FCM Resource Retirement Reforms Remand Order*").

⁷² *Id.* at P 8.

⁷³ *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).

⁷⁴ *2013/14 Winter Reliability Program Remand Order* at P 17.

recommendation that modification of the program was unwarranted. TransCanada requested that FERC establish a settlement proceeding where Market Participants could “exchange confidential information to determine what the rates should be” and refunds and “such other relief as may be warranted” provided. On February 28, ISO-NE answered the TransCanada and MA AG protests. On March 10, 2017, TransCanada answered ISO-NE’s February 28 answer. This matter remains pending before the FERC. If you have any questions concerning these matters, please contact Sebastian Lombardi (860-275-0663; slombardi@daypitney.com).

IV. OATT Amendments / TOAs / Coordination Agreements

No Activity to Report

V. Financial Assurance/Billing Policy Amendments

No Activity to Report

VI. Schedule 20/21/22/23 Changes

- **Schedule 21-NEP: National Grid/Calpine Fore River RFA (ER19-1681)**

On April 26, 2019, New England Power filed a Related Facilities Agreement (“RFA”) with Calpine Fore River Energy Center, LLC (“Calpine Fore River”) to address costs associated with NEP’s installation of high-speed relaying to accommodate stability issues, and protection upgrades at the Auburn St. Substation, in connection with Calpine Fore River’s 726 MW generating facility. A March 28, 2019 effective date was requested. Comments on this filing are due on or before May 17. If you have any questions concerning this matter, please contact Pat Gerity (pmgerity@daypitney.com; 860-275-0533).

- **Schedule 21-EM: BHD Excess ADIT Changes (ER19-1470)**

On March 29, 2019, Emera Maine filed additional changes to the Emera Maine, Bangor-Hydro District (“BHD”) Formula Rate to ensure that excess ADITs are properly reflected in the calculations of charges under Schedule 21-EM (and thus inure to the benefit of customers). Comments on this filing were due on or before April 19, 2019. On April 19, the MPUC filed comments asserting the proposed changes lack transparency and recommending that this matter be accepted for filing, subject to refund, and set for hearing and settlement procedures. This matter is pending before the FERC. If you have any questions concerning this matter, please contact Pat Gerity (pmgerity@daypitney.com; 860-275-0533).

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

Also on March 29, 2019, Emera Maine filed additional changes to the Emera Maine, Maine Public District (“MPD”) Formula Rate to ensure that excess ADITs are properly reflected in the calculations of charges under Schedule 21-EM (and thus inure to the benefit of customers). Comments on this filing were due on or before April 11, 2019. MPUC and Maine Customer Group filed protests on April 11, 2019. Emera Maine answered those protests on April 26. This matter is pending before the FERC. If you have any questions concerning this matter, please contact Pat Gerity (pmgerity@daypitney.com; 860-275-0533).

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

The MPS Merger Cost Recovery Settlement, filed by Emera Maine on May 8, 2018 to resolve all issues pending before the FERC in the consolidated proceedings set for hearing in the *MPS Merger-Related Costs Order*,⁷⁵ and certified by Settlement Judge Dring⁷⁶ to the Commission,⁷⁷ remains pending before the FERC. As

⁷⁵ *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

previously reported, under the Settlement, permitted cost recovery over a period from June 1, 2018 to May 31, 2021 will be \$390,000 under Attachment P-EM of the BHD OATT and \$260,000 under the MPD OATT. If you have any questions concerning these matters, please contact Pat Gerity (860-275-0533; pmgerity@daypitney.com).

- **Schedule 21-VEC and 20-VEC Annual Informational Filing (ER10-1181)**

On April 30, 2019, VEC submitted its 16th annual update to the formula rates contained in Schedules 21-VEC and 20-VEC covering the July 1, 201 – June 30, 2020 period. VEC indicated that it was not proposing any changes to the underlying formulas. The FERC will not notice this filing for public comment, and absent further activity, no further FERC action is expected. If there are questions on this matter, please contact Pat Gerity (860-275-0533; pmgerity@daypitney.com).

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.⁷⁸ 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.”⁷⁹ The FERC further indicated that the *Press Membership Provisions Order* only addressed NEPOOL’s proposed changes to the NEPOOL Agreement, and not the pending RTO Insider Complaint (see EL18-196 above) that it addressed (and dismissed) in a separate order.

On February 28, 2019, NEPOOL requested clarification, or in the alternative rehearing, of the *Press Membership Provisions Order* (the “Request”). In the Request, NEPOOL asked the FERC, particularly in light of issues that remained pending in EL18-196, to clarify the extent to which the FERC sought to assert jurisdiction over the NEPOOL Agreement, or in the alternative, grant rehearing of the *Press Membership Provisions Order* on the grounds that it reflects an impermissible exercise of the FERC’s jurisdiction. On March 4, Public Citizen submitted comments requesting that the FERC require NEPOOL to describe the notice and approval of its members sought in connection with the Request, insinuating that the request was unauthorized. There are no

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

⁷⁶ ALJ John Dring was the settlement judge for these proceedings. There were five settlement conferences -- three in 2016 and two in 2017. With the Settlement pending before the FERC, settlement judge procedures, for now, have not been terminated.

⁷⁷ *Emera Maine and BHE Holdings*, 163 FERC ¶ 63,018 (June 11, 2018).

⁷⁸ *New England Power Pool Participants Comm.*, 166 FERC ¶61,062 (Jan. 29, 2019) (“*Press Membership Provisions Order*”), *reh’g requested*. The rejected changes were identified in the One Hundred Thirty-Second Agreement Amending New England Power Pool Agreement (“132nd Agreement”), which was approved in balloting following the 2018 Summer Meeting.

⁷⁹ *Id.* at P 50.

plans to respond to Public Citizen's unsubstantiated and uninformed comments. On March 14 and 15, PIOs and RTO Insider responded to NEPOOL's Request. On March 28, the FERC issued a tolling order affording it additional time to consider NEPOOL's Request, which remains pending.

On May 1, 2019, NEPOOL submitted Michael Kuser's membership for FERC acceptance (see ER19-1737 below). If you have any questions concerning this proceeding, please contact Pat Gerity (860-275-0533; pmgerity@daypitney.com), Dave Doot (860-275-0102; dtdoot@daypitney.com), or Sebastian Lombardi (860-275-0663; 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).

- **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-A⁸⁰ and 531-B⁸¹* also remains pending. If there are questions on this matter, please contact Pat Gerity (860-275-0533; pmgerity@daypitney.com).

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

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

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

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

- **LFTR Implementation: 42nd Quarterly Status Report (ER07-476; RM06-08)**

ISO-NE filed the 42nd of its Quarterly Status Reports regarding LFTR implementation on April 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.

- **ISO-NE FERC Form 1 (not docketed)**

On April 16, ISO-NE submitted its 2018 FERC Form 1 (Annual Report of Major Electric Utilities, Licensees and Others). On April 23, ISO-NE filed the CPA Certification Statement for that Form. FERC Form 1 filings are not noticed for comment.

- **ISO-NE FERC Reporting Requirement 582 (not docketed)**

On April 26, ISO-NE submitted a report of its total MWh of transmission service during 2018. ISO-NE reported that 131,249,024.495 MWh of transmission service in interstate commerce was provided during 2017 (roughly 347,538 MWh more than 2017, but still 1.5 million MWh less than 2016). These filings are not noticed for comment.

⁸⁰ *Martha Coakley, Mass. Att'y Gen.*, 149 FERC ¶ 61,032 (Oct. 16, 2014) ("*Opinion 531-A*").

⁸¹ *Martha Coakley, Mass. Att'y Gen.*, *Opinion No. 531-B*, 150 FERC ¶ 61,165 (Mar. 3, 2015) ("*Opinion 531-B*").

IX. Membership Filings

- **Michael Kuser Membership Filing (ER19-1737)**

On April 30, NEPOOL requested that the FERC accept the Governance Only End User membership of Michael Kuser (also an *RTO Insider* reporter) to be effective May 1, 2019. Comments on this filing are due on or before May 21.

- **May 2019 Membership Filing (ER19-1720)**

Also on April 30, NEPOOL requested that the FERC accept (i) the May 1, 2019 memberships of AES Distributed Energy, Inc. (AR Sector, Renewable Generation Sub-Sector) and Precept Power LLC (Supplier Sector); (ii) the April 1, 2019 termination of the Participant status of Tomorrow Energy Corp.; and (iii) the name changes of Central Rivers Power NH, LLC (f/k/a HSE Hydro NH AC, LLC) and NGV US Transmission Inc. (f/k/a GridAmerica Holdings Inc.). Comments on the May Membership filing are due on or before May 21.

- **Involuntary Termination: Lotus Danbury LMS100 One, LLC (ER19-1550)**

On April 10, 2019, NEPOOL and ISO-NE jointly requested that the FERC accept the involuntary termination of the NEPOOL membership and Market Participant status of Lotus Danbury LMS100 One, LLC (Provisional Member) on the basis of on-going Payment and Financial Assurance Defaults. NEPOOL and ISO-NE requested that the terminations be accepted effective as of June 10, 2019. Comments on this filing were due on or before May 1; none were filed. This matter is pending before the FERC.

- **April 2019 Membership Filing (ER19-1469)**

On April 29, 2019, the FERC accepted (i) the memberships of Revere Power, LLC and Valcour Wind Energy, LLC [each, Related Persons to Nautilus Hydro, et al. (Generation Sector)]; and (ii) the name changes of the following Participants: GenOn Canal LLC (f/k/a NRG Canal LLC); Messer Energy Services, Inc. (f/k/a Linde Energy Services, Inc.); and Enerwise Global Technologies, LLC (f/k/a Enerwise Global Technologies, Inc.) both d/b/a CPower.⁸² Unless the April 29 order is challenged, this proceeding will be concluded.

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

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

- **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.

⁸² *New England Power Pool Participants Comm.*, Docket No. ER19-1469 (Apr. 29, 2019).

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

On April 18, 2019, the FERC issued a NOPR proposing to approve a new Reliability Standard -- CIP-012-1 (Cyber Security – Communications between Control Centers), and associated Glossary definitions, implementation plan, VRFs and VSLs (together, the “Control Center Cyber Security Communication Changes”).⁸³ The *CIP-012-1 NOPR* also proposes to direct NERC develop certain modifications to CIP-012-1 to require protections regarding the availability of communication links and data communicated between bulk electric system control centers and, further, to clarify the types of data that must be protected. When it filed CIP-012-1, NERC stated that the changes modify the Critical Infrastructure Protection (“CIP”) Reliability Standards to require Responsible Entities to implement controls to protect communication links and sensitive Bulk Electric System (“BES”) data communicated between BES Control Centers. CIP-012-1 requires Responsible Entities to develop a plan to mitigate the risks posed by unauthorized modification (integrity) and unauthorized disclosure (confidentiality) of Real-time Assessment and Real-time monitoring data. The plan must include the following three components: (1) identification of security protection used to meet the security objective; (2) identification of where the Responsible Entity applied the security protection; and (3) identification of the responsibilities of each Responsible Entity for applying the security protection. Comments on the *CIP-012-1 NOPR* are due on or before June 24, 2019.⁸⁴

XI. Misc. - of Regional Interest

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

On April 24, 2019, Emera Maine requested FERC authorization for a transaction pursuant to which Emera Maine (though not the Emera Energy Service Companies) will become a wholly-owned, indirect subsidiary of ENMAX Corporation, an Alberta corporation wholly-owned by the City of Calgary, Alberta, Canada (“ENMAX”), rather than Emera Inc. Comments on the application are due on or before May 15. Thus far a doc-less intervention has been filed by Northern Maine Independent System Administrator, Inc. (“NMISA”).

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

On March 12, 2019, the FERC authorized the disposition of jurisdictional facilities that will result from a proposed corporate restructuring involving the transfer of 100% of the electric generating facilities and related assets (“Facilities”) of FirstLight Hydro Generating Company (FirstLight Hydro) to the FirstLight Project Companies⁸⁵ (“FirstLight Restructuring”), who will then directly own the Facilities.⁸⁶ Among other conditions, the March 12 order required notice within 10 days, which has not yet been filed, of the consummation of the FirstLight Restructuring.

- **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.⁸⁷ Among other conditions, the December 20 order required notice within 10 days of the acquisition’s consummation, which has not yet been filed.

⁸³ *Critical Infrastructure Protection Rel. Standard CIP-012-1 – Cyber Security – Communications between Control Centers*, 167 FERC ¶ 61,055 (Apr. 18, 2019) (“*CIP-012-1 NOPR*”).

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

⁸⁵ The “FirstLight Project Companies” are FirstLight CT Housatonic, FirstLight CT Hydro, FirstLight MA Hydro, and Northfield Mountain.

⁸⁶ *FirstLight Hydro Generating Co. et al.*, 166 FERC ¶ 62,112 (Mar. 12, 2019).

⁸⁷ *Dominion Bridgeport Fuel Cell, LLC*, Docket No. EC19-22 (Dec. 20, 2018).

- **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”),⁸⁸ 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 regulations⁸⁹ 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,⁹⁰ EPSA, and a group of NH customers; a Protest was filed by the State of New Hampshire.⁹¹ 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.

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 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, 2019, 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; 860-275-0533).

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

On June 29, 2018, the FERC issued an order (“*PJM Order*”)⁹² regarding out-of-market support affecting the PJM capacity market.⁹³ Opening with the statement that “the integrity and effectiveness of the capacity

⁸⁸ 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.

⁸⁹ 18 C.F.R. §§ 292.304(a); 292.101(b)(6) (2018).

⁹⁰ 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.

⁹¹ 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.

⁹² *Calpine Corp. et al.*, 163 FERC ¶ 61,236 (June 29, 2018) (“*June 29, 2018 Order*”), *clarif. and/or reh’g requested*.

⁹³ 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 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*,⁹⁴ which would modify two existing aspects of the PJM Tariff, “or any other proposal that may be presented.”

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

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

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

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”).

⁹⁴ The proposed alternative approach would (i) modify PJM’s MOPR such that it would apply to new and existing resources that receive out-of-market payments, regardless of resource type, but would include few to no exemptions; and (ii) in order to accommodate state policy decisions and allow resources that receive out-of-market support to remain online, establish an option in PJM’s Tariff that would allow, on a resource-specific basis, resources receiving out-of-market support to choose to be removed from the PJM capacity market, along with a commensurate amount of load, for some period of time. That option, which is similar in concept to the Fixed Resource Requirement (“FRR”) that currently exists in PJM’s Tariff, is referred to as the “FRR Alternative.” Unlike the existing FRR construct, the FRR Alternative would apply only to resources receiving out-of-market support. Both aspects of the proposed replacement rate, along with a series of questions that need to be addressed, are more fully explained and raised in the *PJM Order*.

American belief that markets drive better outcomes than government.”⁹⁵ Answers to and comments on PJM’s answer were filed by “Clean Energy Entities”⁹⁶ 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.

On March 11, 2019, PJM submitted an informational filing notifying the FERC that, given the lack of a final FERC order in this proceeding, it has instructed Capacity Market Sellers to follow all relevant pre-auction deadlines under **both** the existing capacity market rules as well as PJM’s proposed Capacity Reform rules (with revised MOPR rules and the Extended RCO alternative), in connection with the upcoming 2022/2023 Delivery Year Base Residual Auction (“BRA”) scheduled to begin on August 14, 2019. PJM urged the FERC to issue an order expeditiously. On April 3, 2019, Joint Consumer Advocates⁹⁷ also urged the FERC rule in this matter.

PJM Motion for Supplemental Clarification. On April 10, PJM submitted a Motion for Supplemental Clarification of the *June 29, 2018 Order* setting forth its intention to run the August 2019 BRA under its existing capacity market rules and seeking confirmation that, to the extent the FERC has not established a replacement rate prior to the August 2019 BRA, any replacement rate later established by the FERC would be applied prospectively and would not require PJM to re-run the August 2019 BRA. Answers to the Motion were filed by PJM Entities⁹⁸ (requesting the FERC establish a revised commencement date and schedule) and the IL AG (requesting that the FERC require PJM to replace the clearing price setting algorithm ahead of running the BRA and to release generator bidding data 30 days after the BRA). EPSA, Clean Energy Entities and Direct Energy each filed comments supporting the PJM Motion.

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

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

On April 24, the FERC denied the June 7, 2018 complaint filed by Kathryn Leonard, an individual ratepayer and councilwoman for the City of Newport, Rhode Island (“Complainant”), against the RI PUC, National Grid, and Deepwater Wind Block Island (“Deepwater Wind”).⁹⁹ As previously reported, the Complaint sought, 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”. Unless the *Deepwater Wind PURPA Complaint Order* is challenged, with any challenges due on or before May 24, this proceeding will be concluded. If you have any questions concerning this matter, please contact Pat Gerity (pmgerity@daypitney.com; 860-275-0533).

⁹⁵ 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.

⁹⁶ “Clean Energy Entities” 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”).

⁹⁷ “Joint Consumer Advocates” were the NJ Division of Rate Counsel, DE Division of the Public Advocate, the DC Office of the People’s Counsel, the PA Office of Consumer Advocate, MD Office of People’s Counsel and the IL Citizens Utility Board.

⁹⁸ “PJM Entities are AMP, Dominion, Exelon, EDP Renewables, FirstEnergy and the Talen PJM Companies.

⁹⁹ *Kathryn E. Leonard v. Rhode Island Pub. Util. Comm., Narragansett Elec. Co., Inc., and Deepwater Wind Block Island, LLC*, 167 FERC ¶ 61,072 (Apr. 24, 2019) (“*Deepwater Wind PURPA Complaint Order*”).

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

This proceeding, which could impact potentially impact New England’s markets, remains pending. As previously reported, CPV Power Holdings, L.P. (“CPV”), Calpine Corporation (“Calpine”), and Eastern Generation, LLC (“Eastern Generation”) (collectively, “PJM MOPR Complainants”) filed a complaint on May 31, 2018 requesting that the FERC protect PJM’s Reliability Pricing Model (“RPM”) market from below-cost offers for resources receiving out-of-market subsidies by requiring PJM to adopt a “Clean MOPR” (i.e. a MOPR applicable to all subsidized resources and without categorical exemptions like those in PJM’s MOPR-Ex proposal). PJM MOPR Complainants state that the Complaint offers the FERC a procedural vehicle to require adoption of the “Clean MOPR” that Complainants opine is not otherwise available in pending FERC proceedings (EL16-49 (PJM MOPR Complaint)¹⁰⁰ 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).

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

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

- **D&E Agreement Cancellation: NSTAR/National Grid (Wynn Casino) (ER19-1395)**

On March 21, 2019, NSTAR filed a notice of cancellation of the Design and Engineering Agreement (“D&E Agreement”) between NSTAR and National Grid (designated as service agreement IA-NSTAR-36). The D&E Agreement set forth the terms and conditions under which National Grid would reimburse NSTAR undertook for costs associated with the interconnection of Wynn Casino. With the completion of NSTAR’s services, the D&E Agreement terminated by its own terms. A March 21, 2019 effective date for the cancellation notice was requested. Comments, if any, on this filing were due on or before April 11; none were filed. National Grid submitted a doc-less intervention. This matter is pending before the FERC. If you have any questions concerning this matter, please contact Pat Gerity (pmgerity@daypitney.com; 860-275-0533).

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

On March 1, 2019, Constellation Mystic Power, LLC (“Mystic”) filed (separately from its contemporaneously-submitted compliance filing) and amendment to its COS Agreement to provide “reciprocal early termination rights for ISO-NE and Mystic based on the results of ISO-NE’s updated fuel security analysis, to be completed in September of 2019”. Comments on this filing were due on or before March 22, 2019. Protests were filed by CT Parties, ENECOS, MMWEC/NHEC, and Verso. Doc-less interventions were filed by Avangrid, Environmental Defense Fund, Eversource, MA DPU, National Grid, NESCOE, Repsol, and the New England Local Distribution Companies. On April 8, Mystic answered the March 22 protests. This matter is

¹⁰⁰ 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.

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

- **CMP & UI/Brookfield Phase I/II HVDC-TF Service Agreements (ER19-1105 et al.)**

The three new Phase I/II HVDC-TF Service Agreements with Brookfield Energy Marketing LP (“Brookfield”) filed February 22, 2019 by CMP and UI (which allow the continuation without interruption of service provided pursuant to existing agreements that conform to the pro forma Phase I/II HVDC-TF Service Agreement set forth in Attachment A of Schedule 20A—Common to the ISO-NE OATT), remain pending before the FERC. The Service Agreements were separately filed and docketed – “CMP-Brookfield 85 MW” (ER19-1105); “UI-Brookfield 1 MW” (ER19-1106); and “UI-Brookfield 32 MW” (ER19-1107). The Service Agreements allow Brookfield to retain its rollover rights and right of first refusal in a manner that takes into account the fact that the current contractual rights of UI and CMP to capacity over the Phase I/II HVDC-TF under the Support Agreements only extend until October 31, 2020. Effective dates of January 1, 2020 for CMP-Brookfield 85 MW, January 1, 2020 for UI-Brookfield 1 MW and September 1, 2020 for UI-Brookfield 32 MW were requested. Comments on these filings were due on or before March 15. Brookfield submitted comments on March 15 requesting that the FERC accept the Service Agreements. The Agreements are pending before the FERC. If you have any questions concerning this matter, please contact Pat Gerity (pmgerity@daypitney.com; 860-275-0533).

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

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

XII. Misc. - Administrative & Rulemaking Proceedings

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

On January 8, 2018, the FERC initiated a Grid Resilience in RTO/ISOs proceeding (AD18-7)¹⁰¹ and terminated the DOE NOPR rulemaking proceeding (RM18-1).¹⁰² 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

¹⁰¹ *Grid Rel. and Resilience Pricing*, 162 FERC ¶ 61,012 (Jan. 8, 2018), *reh’g requested*.

¹⁰² 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.

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 security¹⁰³ as the most significant resilience challenge facing the New England region. ISO-NE reported that it has established a process to discuss market-based solutions to address this risk, and indicated that it believed it will need through the second quarter of 2019 to develop a solution and test its robustness through the stakeholder process. In the meantime, ISO-NE indicated that it would continue to independently assess the level of fuel-security risk to reliable system operation and, if circumstances dictate, would take, with FERC approval when required, actions it determines to be necessary to address near-term reliability risks. ISO-NE's response was broken into three parts: (i) an introduction to fuel-security risk; (ii) background on how ISO-NE's work in transmission planning, markets, and operations support the New England bulk power system's resilience; and (iii) answers to the specific questions posed in the January 8 order.

Industry Comments. Following a 30-day extension issued on March 20, 2018, reply comments were due on or before May 9, 2018. NEPOOL's comments, which were approved at the May 4 meeting, were filed May 7, and were among over 100 sets of initial comments filed. A summary of the comments that seemed most relevant to New England and NEPOOL was circulated to the Participants Committee on May 15 and is posted on the [NEPOOL website](#). On May 23, NEPOOL submitted a limited response to four sets of comments, opposing the suggestions made in those pleadings to the extent that the suggestions would not permit full use of the Participant Processes. Supplemental comments and answers were also filed by FirstEnergy, MISO South Regulators, NEI, and EDF. Exelon and American Petroleum Institute filed reply comments. FirstEnergy included in this proceeding its motion for emergency action also filed in ER18-1509 (ISO-NE Waiver Filing: Mystic 8 & 9), which Eversource answered (in both proceedings). Reply comments were filed by APPA and American Municipal Power ("AMP") and the Nuclear Energy Institute ("NEI") moved to lodge presentations by the National Infrastructure Advisory Council. On December 6, the Harvard Electricity Law Initiative filed a comment suggesting that, as a matter of law, "Commission McNamee cannot be an impartial adjudicator in these proceedings" and "any proceeding about rates for 'fuel-secure' generators" and should recuse himself. Similarly, on December 18, "Clean Energy Advocates"¹⁰⁴ requested Commissioner McNamee recuse himself from these proceedings. These matters remain pending before the FERC.

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

- **NOPR: 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").¹⁰⁵ 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

¹⁰³ 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."

¹⁰⁴ For purposes of these proceedings, "Clean Energy Advocates" are NRDC, Sierra Club and UCS.

¹⁰⁵ *Public Util. Trans. Rate Changes to Address Accumulated Deferred Income Taxes*, 165 FERC ¶ 61,117 (Nov. 15, 2018).

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.

- **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*").¹⁰⁶ 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* were due March 18, 2019.¹⁰⁷ Comments were filed by over 20 parties, including Calpine, EDF Renewables, APPA/NRECA/American Antitrust Institute, EEI, ELCON, EPSA, the Organization of PJM States, and the PJM IMM. Reply comments were submitted by PG&E and the CAISO IMM. Since the last Report, EEI submitted supplemental comments. The *Horizontal Market Power Analysis Refinements NOPR* is pending before the FERC.

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

On April 18, 2019, the FERC issued Order 849-A,¹⁰⁸ denying rehearing of, and reaffirming its determinations made in, *Order 849*.¹⁰⁹ 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. The procedures adopted 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.¹¹⁰ *Order 849* became effective September 13, 2018.¹¹¹ Requests for rehearing of *Order 849*

¹⁰⁶ *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)

¹⁰⁷ The *Horizontal Market Power Analysis Refinements NOPR* was published *Fed. Reg.* on Feb. 1, 2019 (Vol. 84, No. 22) pp. 993-1,106.

¹⁰⁸ *Interstate and Intrastate Natural Gas Pipelines; Rate Changes Relating to Fed. Income Tax Rate*, Order No. 849-A, 167 FERC ¶ 61,051 (Apr. 18, 2019) ("*Order 849-A*").

¹⁰⁹ *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*").

¹¹⁰ 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.

¹¹¹ *Order 849* was published in the *Fed. Reg.* on July 30, 2018 (Vol. 83, No. 146) pp. 36,672-36,717.

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, but as noted above, were denied. Challenges to *Orders 849* and *849-A*, if any, must be made in Federal Court on or before June 17, 2019.

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

In *Order 841*¹¹² (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*.¹¹³ 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 AD18-10,¹¹⁴ were also to be filed in RM18-9. On June 26, 2018, over 50 parties submitted post-technical conference comments in this proceeding, including comments from ISO-NE, Calpine, Direct, Eversource, Ictec, NRG, Utility Services, EEI, EPRI, EPSA, NARUC, NRECA, and SEI. On February 11, 2019, a group of 18 US Senators submitted a letter urging the FERC to adopt a final rule that enable all DERs the opportunity to participate in the RTO/ISO markets and requesting an update no later than March 1, 2019. Reply comments and answers were submitted by the Arkansas PUC, Advanced Energy Economy, AEMA, and the Missouri PUC. Since the last Report, APPA/NRECA submitted supplemental comments. This matter remains pending before the FERC.

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

Order 845. As previously reported, the FERC issued on April 19, 2018, its final rule,¹¹⁵ *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,¹¹⁶ promote more informed interconnection decisions,¹¹⁷ and enhance the interconnection process.¹¹⁸ Based on the comments received

¹¹² *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*”).

¹¹³ *Elec. Storage Participation in Mkts. Operated by Regional Trans. Orgs. and Indep. Sys. Operators*, 157 FERC ¶ 61,121 (Nov. 17, 2016) (“*Storage NOPR*”).

¹¹⁴ 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.

¹¹⁵ *Reform of Generator Interconnection Procedures and Agreements*, Order No. 845, 163 FERC ¶ 61,043 (Apr. 19, 2018) (“*Order 845*”).

¹¹⁶ 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.

¹¹⁷ 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.

¹¹⁸ 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.

on its December 15, 2016 NOPR¹¹⁹ 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.

Order 845-A. On February 21, 2019, the FERC issued its order on rehearing and clarification of *Order 845* ("*Order 845-A*").¹²⁰ The FERC granted rehearing in full or in part of four requests and clarification with respect to seven requests. The FERC **granted rehearing** with regard to (a) the option to build reform (requiring that transmission providers explain why they do not consider a specific network upgrade to be a standalone network upgrade; and allowing transmission providers to recover oversight costs related to the interconnection customer's option to build), (b) surplus interconnection service reform (explaining that RTOs/ISOs will not be limited in their arguments for an independent entity variation from the requirements), and (c) when an interconnection customer can propose control technologies in connection with interconnection service below generating facility capacity (control technologies may be proposed at any time in the interconnection process that it is permitted to request interconnection service below generating facility capacity). The FERC granted clarification with regard to (w) the option to build provisions (finding *Order 845* applies to all public utility transmission providers, including those that reimburse the interconnection customer for network upgrades, and does not apply to stand alone network upgrades on affected systems), (x) study model and assumption transparency (finding that transmission providers may use the FERC's CEII regulations as a model for evaluating entities that request network model information and assumptions and the phrase "current system conditions" does not require transmission providers to maintain network models that reflect current real-time operating conditions of the transmission provider's system), (y) interconnection study deadlines (transmission providers are not required to post 2017 interconnection study metrics) and (z) transmission providers must provide a detailed explanation of its determination to perform additional studies at the full generating facility capacity for an interconnection customer that has requested service below its full generating facility capacity. All other requests for rehearing and clarification were denied. On March 25, AEP requested rehearing of *Order 845-A*. On April 23, the FERC issued a tolling order affording it additional time to consider the AEP request, which remains pending.

Effective Date and Compliance Filing Deadline. *Order 845-A* will become effective May 20, 2019.¹²¹ The *Order 845* compliance filing deadline is now **May 22, 2019**. Additionally, for each RTO/ISO, "the effective date of the proposed revisions shall be the date established in the Commission's order accepting that RTO's/ISO's compliance filing, which will be no earlier than the issuance date of such an order." New England's *Order 845* compliance filing will be considered by the Participants Committee at its May 3, 2019 meeting.

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

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

Requests for clarification and/or rehearing of *Order 841* remain pending. On February 15, 2018, 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."¹²² Additionally, each RTO/ISO must specify

¹¹⁹ *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.

¹²⁰ *Reform of Generator Interconnection Procedures and Agreements*, Order No. 845-A, 166 FERC ¶ 61,137 (Feb. 219, 2019).

¹²¹ *Order 845-A* was published in the *Fed. Reg.* on Mar. 6, 2019 (Vol. 84, No. 44) pp. 8,156-8,185.

¹²² 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

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. As previously reported, *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. Supplemental comments were submitted by the Arkansas and Missouri PUCs in March, 2019. Advanced Energy Economy answered the supplemental comments of the Arkansas PUC on March 29, 2019.

- **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.¹²³ 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, 2016¹²⁴ and were filed by over 30 parties, including: APPA, Avangrid, Brookfield, EPSA, Macquarie/DC Energy/Emera Energy Services, NextEra, and NRG.

- **NOI: FERC's ROE Policy (PL19-4)**

On March 21, 2019, the FERC issued a notice of inquiry seeking information and views to help the Commission explore whether, and if so how, it should modify its policies concerning the determination of the return on equity ("ROE") to be used in designing jurisdictional rates charged by public utilities.¹²⁵ The Commission also seeks comment on whether any changes to its policies concerning public utility ROEs should be applied to interstate natural gas and oil pipelines. This NOI follows *Emera Maine*, which reversed *Opinion 531*, and seeks to engage interests beyond those represented in the *Emera Maine* proceeding (see EL11-66 *et al.* in Section I above). Initial comments are due June 26, 2019; reply comments, July 26, 2019.¹²⁶ Thus far, initial comments have been submitted by the Institute for Energy Economics and Financial Analysis.

consistent with existing market rules that govern when a resource can set the wholesale price; (3) account for the physical and operational 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.

¹²³ *Data Collection for Analytics and Surveillance and Market-Based Rate Purposes*, 156 FERC ¶ 61,045 (July 21, 2016) ("*Data Collection NOPR*").

¹²⁴ The *Data Collection NOPR* was published in the *Fed. Reg.* on Aug. 4, 2016 (Vol. 81, No. 150) pp. 51,726-51,772.

¹²⁵ *Inquiry Regarding the Commission's Policy for Determining Return on Equity*, 166 FERC ¶ 61,207 (Mar. 21, 2019) ("*ROE Policy NOI*").

¹²⁶ The *ROE Policy NOI* was published in the *Fed. Reg.* on Mar. 28, 2019 (Vol. 84, No. 61) pp. 11,769-11,777.

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

Also on March 21, 2019, the FERC issued a notice of inquiry seeking comment on the scope and implementation of its electric transmission incentives regulations and policy pursuant to section 1241 of the Energy Policy Act of 2005 (“EPA Act 2005”), codified in FPA Section 219, which directed the FERC to use transmission incentives to help ensure reliability and reduce the cost of delivered power by reducing transmission congestion.¹²⁷ Given the passage of time since Order 679 and the FERC’s 2012 Incentives Policy Statement and the “significant developments in how transmission is planned, developed, operated, and maintained,” the FERC stated that “it is appropriate to seek comment ... on the scope and implementation of the Commission’s transmission incentives policy and on how the Commission should evaluate future requests for transmission incentives in a manner consistent with Congress’s direction in section 219” and solicited comment on a variety of transmission incentives-related issues. Initial comments are due June 25, 2019; reply comments, July 25, 2019.¹²⁸

- **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 NOI¹²⁹ 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,¹³⁰ 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.

- **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.¹³¹ 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 NOI¹³² 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*¹³³ 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,

¹²⁷ *Inquiry Regarding the Commission’s Elec. Trans. Incentives Policy*, 166 FERC ¶ 61,208 (Mar. 21, 2019) (“*Electric Transmission Incentives Policy NOI*”).

¹²⁸ The *Electric Transmission Incentives Policy NOI* was published in the *Fed. Reg.* on Mar. 28, 2019 (Vol. 84, No. 60) pp. 11,759-11,768.

¹²⁹ The NOI was published in the *Fed. Reg.* on Apr. 26, 2018 (Vol. 83, No. 80) pp. 18,020-18,032.

¹³⁰ *Certification of New Interstate Natural Gas Facilities*, 163 FERC ¶ 61,138 (May 23, 2018).

¹³¹ *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).

¹³² *Inquiry Regarding the FERC’s Policy for Recovery of Income Tax Costs*, 157 FERC ¶ 61,210 (Dec. 15, 2016).

¹³³ *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.

LP, Oil Pipe Lines, Plains Pipeline, Tallgrass Pipelines, and TransCanada. On July 18, the FERC issued its order on rehearing,¹³⁴ 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) or Jamie Blackburn (202-218-3905; jblackburn@daypitney.com).

- **Natural Gas-Related Enforcement Actions**

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

BP (IN13-15). On July 11, 2016, the FERC issued *Opinion 549*¹³⁵ 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.¹³⁶ 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.”¹³⁷ 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.¹³⁸ 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

¹³⁴ *Inquiry Regarding the FERC’s Policy for Recovery of Income Tax Costs*, 164 FERC ¶ 61,030 (July 18, 2018) (“*Order on Rehearing*”).

¹³⁵ *BP America Inc.*, Opinion No. 549, 156 FERC ¶ 61,031 (July 11, 2016) (“*BP Penalties Order*”).

¹³⁶ *BP America Inc.*, 152 FERC ¶ 63,016 (Aug. 13, 2015) (“*BP Initial Decision*”).

¹³⁷ *BP Penalties Order* at P 3.

¹³⁸ *BP America Inc.*, 147 FERC ¶ 61,130 (May 15, 2014) (“*BP Hearing Order*”), *reh’g denied*, 156 FERC ¶ 61,031 (July 11, 2016).

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.¹³⁹

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

Total Gas & Power North America, Inc. et al. (IN12-17). On April 28, 2016, the FERC issued a show cause order¹⁴⁰ 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 2012.¹⁴¹

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

¹³⁹ *BP America Inc.*, 156 FERC ¶ 61,174 (Sep. 12, 2016) ("*Order Staying BP Disgorgement*")

¹⁴⁰ *Total Gas & Power North America, Inc.*, 155 FERC ¶ 61,105 (Apr. 28, 2016) ("*TGPNA Show Cause Order*").

¹⁴¹ 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.

Staff's conclusions regarding the subject's conduct.¹⁴² 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.
- ▶ 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, 2017.¹⁴³
- ▶ Certain facilities,¹⁴⁴ 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, 2017.¹⁴⁵ 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.¹⁴⁶ 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.

¹⁴² 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).

¹⁴³ *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*").

¹⁴⁴ 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).

¹⁴⁵ *Algonquin Gas Trans., LLC*, 158 FERC ¶ 61,061 (Oct. 27, 2017).

¹⁴⁶ *Algonquin Gas Trans. v. Mass. Dept. of Env'tl. Protection*, Case No. 18-1045, DC Cir. (May 31, 2018).

- ▶ Status reports have thus far been filed on August 24 and November 21, 2018, and February 20, 2019, each indicating that the case should continue to be held in abeyance. The next status report will be due in late May, 2019.
- ▶ On December 26, 2018, the FERC granted Algonquin a two-year extension of time, to January 25, 2021, to complete the Project.¹⁴⁷ In requesting the extension, Algonquin attributed the need for additional time to permitting delays for the Weymouth Compressor Station and ongoing construction of the Horizontal Directional Drill of the Taconic Parkway in New York. Requests for rehearing of the December 26 order were filed by two parties. On February 25, 2019, the FERC issued a tolling order affording it additional time to consider the requests for rehearing, which remain pending.
- **Constitution Pipeline (CP13-499) and Wright Interconnection Project (CP13-502)**
 - ▶ Constitution Pipeline Company and Iroquois Gas Transmission (Wright Interconnection) concurrently filed for Section 7(c) certificates on June 13, 2013.
 - ▶ 650,000 Dth/d of firm capacity from Susquehanna County, PA (Marcellus Shale) through NY to Iroquois/Tennessee interconnection (Wright Interconnection).
 - ▶ New 122-mile interstate pipeline.
 - ▶ Two firm shippers: Cabot Oil & Gas and Southwestern Energy Services.
 - ▶ Final EIS completed on Oct 24, 2014.
 - ▶ Certificates of public convenience and necessity granted Dec 2, 2014.
 - By letter order issued July 26, 2016, the Director of the Division of Pipeline Certificates (Director) granted Constitution's requested two-year extension of time to construct the project.
 - Construction was expected to begin Spring 2016 (after final Federal Authorizations), but has been plagued by delays (see below).
 - ▶ On April 22, 2016, New York State Department of Environmental Conservation (NY DEC) denied Constitution's application for a Section 401 permit under the Clean Water Act.
 - On August 18, 2017, the 2nd Circuit denied Constitution's petition for review of the NY DEC decision, concluding that (1) the court lacked jurisdiction over the Constitution's claims to the extent that they challenged the timeliness of the decision; and (2) the NY DEC acted within its statutory authority in denying the certification, and its denial was not arbitrary or capricious.
 - Constitution filed a petition for a writ of certiorari of the 2nd Circuit's decision at the United States Supreme Court in January 2018 alleging, among other things, that the State's denial of the Clean Water Act permit exceeded the state's authority, and interfered with FERC's exclusive jurisdiction. On April 30, 2018, the Supreme Court denied Constitution's petition, thereby letting stand the 2nd Circuit's ruling.
 - ▶ On October 11, 2017, Constitution filed with the FERC a petition for declaratory order ("Petition") requesting that the FERC find that NY DEC waived its authority under section 401 of the Clean Water Act by failing to act within a "reasonable period of time." (CP18-5)
 - On January 11, 2018, the FERC denied Constitution's Petition.¹⁴⁸ 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

¹⁴⁷ *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.

¹⁴⁸ *Constitution Pipeline Co.*, 162 FERC ¶ 61,014 (Jan. 11, 2018), *reh'g requested*.

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.¹⁴⁹

- 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.¹⁵⁰ On September 14, 2018, Constitution filed a petition for review in the U.S. Court of Appeals for the D.C. Circuit.¹⁵¹
 - ▶ 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, 2018.¹⁵²
 - ▶ 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.
 - ▶ Nine sets of individual comments on the project were submitted since the last Report

- **Non-New England Pipeline Proceedings**

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

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

- ▶ The New York State Department of Environmental Conservation ("NY DEC") and the Sierra Club requested rehearing of the *Northern Access Certificate Rehearing Order* on August 14 and September 5, 2018, respectively. On August 29, National Fuel Gas Supply Corporation and Empire Pipeline ("Applicants") answered the NY DEC's August 14 rehearing request

¹⁴⁹ *Id.* at P 23.

¹⁵⁰ *Constitution Pipeline Co., LLC*, 164 FERC ¶ 61,029 (2018) (September 2018 Waiver Rehearing Order).

¹⁵¹ Constitution, Petition for Review in U.S. Court of Appeals for the D.C. Circuit, Docket No. CP18-5-000 (filed Sept. 14, 2018).

¹⁵² *Constitution Pipeline Co.*, 165 FERC ¶ 61,081 (Nov. 5, 2018), *reh'g requested*.

and request for stay. On April 2, 2019, the FERC denied the NY DEC and Sierra Club requests for rehearing.¹⁵³

- ▶ As previously reported, the August 6, 2018 *Northern Access Certificate Rehearing Order* dismissed or denied the requests for rehearing of the *Northern Access Certificate Order*.¹⁵⁴ 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,¹⁵⁵ and proceeded to find that the NY DEC was obligated to act on the application within one year, failed to do so, and so waived its authority under section 401 of the CWA.
- ▶ The FERC authorized the Companies to construct and operate pipeline, compression, and ancillary facilities in McKean County, Pennsylvania, and Allegany, Cattaraugus, Erie, and Niagara Counties, New York (“Northern Access Project”) in an order issued February 3, 2017.¹⁵⁶ 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.¹⁵⁷ On February 2, 2019, the 2nd Circuit vacated the decision of the NY DEC and remanded the case with instructions for the NY DEC to more clearly articulate its basis for the denial and how that basis is connected to information in the existing administrative record. The matter is again before the NY DEC.
- ▶ On November 26, 2018, the Applicants filed a request at FERC for a 3- year extension of time, until February 3, 2022, to complete construction and to place the certificated facilities into service. The Applicants cited the fact that they “do not anticipate commencement of Project construction until early 2021 due to New York’s continued legal actions and to time lines required for procurement of necessary pipe and compressor facility materials.” The extension request remains pending.

XIV. State Proceedings & Federal Legislative Proceedings

No Activity to Report

¹⁵³ *Nat’l Fuel Gas Supply Corp. and Empire Pipeline, Inc.*, 167 FERC ¶ 61,007 (Apr. 2, 2019).

¹⁵⁴ *Nat’l Fuel Gas Supply Corp. and Empire Pipeline, Inc.*, 164 FERC ¶ 61,084 (Aug. 6, 2018) (“*Northern Access Rehearing & Waiver Determination Order*”), *reh’g denied*, 167 FERC ¶ 61,007 (Apr. 2, 2019).

¹⁵⁵ 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).

¹⁵⁶ *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*”).

¹⁵⁷ *Nat’l Fuel Gas Supply Corp. v. NYSDEC et al.* (2d Cir., Case No. 17-1164).

XV. Federal Courts

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

- **FCM Pricing Rules Complaints (15-1071**, 16-1042) (consol.)**
Underlying FERC Proceeding: EL14-7,¹⁵⁸ EL15-23¹⁵⁹
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).¹⁶⁰ Finding that “the FERC failed to adequately explain why its rationale [for rejecting price lock-in and capacity carry forward rules] in PJM – which seems to foreclose signing off on a Tariff scheme like ISO-NE’s – does not apply even more forcefully to the scheme it accepted in the Orders [appealed from],” the DC Circuit granted the Petitions and remanded the case to the FERC for further proceedings in which the FERC, in order to accept the changes filed, must provide some analysis and explanation why it changed course. The remand is now pending before the FERC.

Other Federal Court Activity of Interest

- **PennEast Project (18-1128)**
Underlying FERC Proceeding: CP15-558¹⁶¹
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”)¹⁶² for the construction and operation of a new 116-mile natural gas pipeline from Luzerne County, Pennsylvania, to Mercer County, New Jersey, along with three laterals extending off the mainline, a compression station, and appurtenant above ground facilities (“PennEast Project”). The FERC, as appellee, submitted its brief on March 21. Briefs supporting the FERC were filed by joint intervenors (ConEd and PennEast) and amicus curiae by INGAA. 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. These matters remain pending.

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

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

¹⁶⁰ *New England Power Generators Assoc. v FERC*, 881 F.3d 202 (DC Cir. 2018).

¹⁶¹ *PennEast Pipeline Co., LLC*, 162 FERC ¶ 61,053 (Jan. 19, 2018), *reh’g denied*, 163 FERC ¶ 61,159 (May 30, 2018).

¹⁶² 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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