

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

The following activity, as more fully described in the attached litigation report, has occurred since the report dated January 7, 2020 was circulated. New matters/proceedings since the last Report are preceded by an asterisk '*'. Page numbers precede the matter description.

I. Complaints/Section 206 Proceedings

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| 1 | 206 Investigation: ISO-NE Implementation of <i>Order 1000</i> Exemptions for Immediate Need Rel. Projects (EL19-90) | Jan 13 Jan 24-27 | NEPOOL comments on ISO-NE Dec 27 responses to <i>October 17 Order</i> Avangrid, Eversource, LSPower, MMEWC, National Grid, NESCOE, CT PURA, State Agencies, Developers Advocating Transmission Advancements, EEI submit comments on ISO-NE responses |
| 2 | RTO Insider Press Policy Complaint (EL18-196) | Jan 23 | FERC denies rehearing of <i>RTO Insider Complaint Order</i> |
| 3 | RNS/LNS Rates and Rate Protocols Settlement Proceeding (EL16-19-002) | Jan 22 Jan 24 | TOs request procedural schedule be suspended for an add'l 90 days Chief Judge Cintron issues an order holding the proceeding in abeyance until Apr 22, 2020; TOs next status report due on or before Mar 9, 2020 |
| 4 | Base ROE Complaints I-IV: (EL11-66, EL13-33; EL14-86; EL16-64) | Jan 21 | CAPs, EMCOS oppose TOs Dec 23 request to re-open the record and their Supplemental Brief |

II. Rate, ICR, FCA, Cost Recovery Filings

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| 7 | Att. F Modification: Inclusion of UI's Pequonnock Substation Project CWIP (ER20-499) | Jan 28 | FERC accepts modifications, eff. Jan 31, 2020 |
| 10 | MPD OATT 2018 Annual Info Filing (ER15-1429-010) | Jan 23 | Settlement Judge Dring issues status report advising that an offer of settlement is being finalized and recommending settlement judge procedures be continued |

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

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| * 11 | ISO-NE eTariff Versioning True-Up (ER20-763) | Jan 9 Jan 24 | ISO-NE files corrections to remove from the version of § III.13.2 accepted with the PRD Clean-Up Changes (ER20-140) changes submitted with still-pending Fuel Security Retention Limit Revisions (ER20-89) NEPOOL intervenes |
| * 11 | ISO-NE Waiver Request: FCA15 De-List Bids Submission Deadline (ER20-759) | Jan 8 Jan 9-Feb 3 | ISO-NE requests limited waiver of Tariff § III.13.1.10(b) to allow Market Participants to adjust or withdraw their FCA15 De-List Bids under certain conditions NEPOOL, Calpine, Dominion, Eversource, Exelon, National Grid, NESCOE, NRG intervene doc-lessly |
| 12 | Fuel Security Retention Sunset (ER20-645) | Jan 9 Jan 24 | Exelon protests filing; MMWEC, NHEC intervene NEPOOL, ISO-NE answer Exelon protest |
| 12 | Waiver Request: FCA14 Qualification (Genbright II) (ER20-366) | Feb 3 | FERC denies waiver request |
| 13 | Fuel Security Retention Limit Revision (ER20-89) | Jan 27 | Exelon protests ISO-NE's Jan 6 responses to deficiency letter |

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| 14 | <i>Order 841</i> Compliance Filing (ER19-470) | Jan 21 | FERC issues tolling order affording it add'l time to consider ISO-NE's request for rehearing of the <i>Order 841 Initial Compliance Filing Order</i> |
| 20 | CONE & ORTP Updates (ER17-795) | Jan 24 | FERC denies reh'g of its Oct 6, 2017 <i>CONE/ORTP Updates Order</i> |

IV. OATT Amendments / TOAs / Coordination Agreements

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| 20 | CIP IROL Cost Recovery Rules (ER20-739) | Jan 22 Jan 27 Jan 13-27 | NEPOOL submits comments Calpine, Cross-Sound Cable, IROL-Critical Facility Owners support, and NESCOE conditionally supports, Rules Brookfield, Dominion, Eversource, Exelon, MA AG, National Grid, NextEra, PSEG, UI, MA DPU, MPUC, Public Citizen, RESA intervene doc-lessly |
| 21 | Interconnection Service Capability Changes (ER20-450) | Jan 14 | FERC accepts changes, eff. Jan 22, 2020 |

V. Financial Assurance/Billing Policy Amendments

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| 22 | NCFA Rate (ER20-395) | Jan 14 | FERC accepts NCFA Rate changes, eff. Jan 15, 2020 |
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VI. Schedule 20/21/22/23 Changes

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|----|--|--------|--|
| 23 | Schedule 22: Notice of Cancellation of First Revised Clear River LGIA (ER20-586) | Jan 16 | FERC accepts notice of cancellation, eff. Nov 25, 2019 |
| 23 | Schedule 20A-EM: Expiration of Talen IRH Rights Assignment (ER20-375) | Jan 15 | FERC accepts changes, eff. Nov. 1, 2020 |
| 23 | Schedule 21-EM: 2018 Annual Update Settlement Agreement (ER15-1434-003) | Jan 8 | FERC accepts Settlement Agreement |

VII. NEPOOL Agreement/Participants Agreement Amendments

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| * 24 | 132nd Agreement (Press Membership) (ER18-2208) | Jan 23 | FERC dismisses request for rehearing of <i>Press Membership Provisions Order</i> |
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VIII. Regional Reports

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| * 25 | Transmission Projects Annual Info Filing (ER13-193) | Jan 31 | ISO-NE files annual informational filing of projects on the RSP project list that had a year of need 3 years or less from the completion of the Needs Assessment as required under OATT § 4.1(j)(iii) |
| * 25 | LFTR Implementation: 45 th Quarterly Status Report (ER07-476) | Jan 15 | ISO-NE files its 45th quarterly report |

IX. Membership Filings

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|------|--|--------|--|
| * 26 | February 2020 Membership Filing (ER20-923) | Jan 31 | Memberships: Avangrid Networks; TrueLight Commodities; and Weaver Wind; Terminations: Great Eastern Energy, Precept Power, and the TransCanada Companies; Name Change Mercuria Energy America, LLC (f/k/a Mercuria Energy America, Inc.); comment date Feb 21 |
| 26 | December 2019 Membership Filing (ER20-493) | Jan 27 | FERC accepts Dichotomy Collins Hydro LLC's membership, eff. Dec 1, 2019 |

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

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| 27 | <i>Retirements NOPR</i> (Standards Efficiency Review) (RM19-17; RM19-16) | Jan 23 | FERC issues <i>Retirements NOPR</i> proposing to retire 74/77 of the requirements proposed by NERC, seeking add'l information before deciding on 2; and remanding 1; comment date [60 days after publication in the <i>Federal Register</i>] |
| 27 | <i>Order 867</i> - Revised Reliability Standard: TPL-001-5 (RM19-10) | Jan 23 | FERC approves revised TPL-001-5, eff. [60 days after publication in the <i>Federal Register</i>] |
| 28 | <i>Order 866</i> - New Reliability Standard: CIP-012-1 (RM18-20) | Jan 23 | FERC approves new CIP-012-1, eff. [60 days after publication in the <i>Federal Register</i>] |
| 28 | 5-Year ERO Performance Assessment Report (RR19-7) | Jan 23 | FERC conditionally accepts Report, subject to 90-day and 180-day compliance filings |

XI. Misc. - of Regional Interest

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|------|--|--------------------|--|
| 28 | 203 Application: CMP/NECEC (EC20-24) | Jan 8 | CMP supplements application with corrections to accounting entries attached to original application |
| 29 | 203 Application: Verso/Pixelle (EC20-20) | Jan 17 | FERC authorizes sale |
| 32 | EMM Contract (ER20-619) | Feb 4 | FERC accepts EMM contract |
| 29 | PJM MOPR-Related Proceedings (EL18-178; EL16-49) | Jan 17-24 Feb 3 | Over 50 Parties request rehearing and/or clarification of the FERC's <i>Dec 2019 PJM MOPR Order</i> Talen PJM Companies reply to PJM IMM request for rehearing |
| 33 | D&E Agreement: CL&P/CPV Towantic (ER20-521) | Jan 22 | FERC accepts D&E Agreement, eff. Dec 5, 2019 |
| 33 | Mystic COS Agreement Amendment No. 1 (ER19-1164) | Jan 9 | FERC rejects Amendment No. 1 |
| * 33 | FERC Enforcement Action: Exelon Generation Co. (IN20-3) | Jan 10 | FERC approves Stipulation and Consent Agreement with ExGen, requiring ExGen to pay a \$32,500 civil penalty and to disgorge \$101,156 , plus interest, to resolve the FERC's investigation into misrepresentations to ISO-NE, between 2014 and 2016, of the type and quantity of Mystic 7's start-up fuel |
| * 34 | FERC Enforcement Action: Emera ISO-NE Tariff Violations (IN20-2) | Jan 10 | FERC approves Stipulation and Consent Agreement with Emera, requiring Emera to pay a \$5,000 civil penalty and to disgorge \$14,120, plus \$2,002.19 in interest , to resolve the FERC's investigation into Emera violations of the ISO-NE Tariff (submission of Rumford FPA Requests using affiliate rather than arm's length transaction data) |

XII. Misc. - Administrative & Rulemaking Proceedings

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| 35 | Credit Reforms in Organized Wholesale Markets (AD20-6) | Jan 24 | IRC submits comments, proposing an alternative approach to the one proposed by Energy Trading Institute |
| 35 | <i>Order 865</i> : Civil Monetary Penalty Inflation Adjustments (RM19-9) | Jan 14 | <i>Order 865</i> , which increased the maximum civil monetary penalties that FERC may assess, became effective |
| 38 | <i>Order 864</i> : Public Util. Trans. ADIT Rate Changes (RM19-5) | Jan 21 Feb 3 | FERC issues tolling order affording it additional time to consider requests for rehearing of <i>Order 864</i> ; VTransco requests extension of time, to Jul 31, 2020, to submit its compliance filings FERC grants VTransco extension of time, as requested |

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| 40 | <i>Order 860</i> : Data Collection for Analytics & Surveillance and MBR Purposes (RM16-17) | Jan 10 Jan 22 | FERC issues notice that updated Data Dictionary versions and the test environment for the MBR Database are available FERC issues notice of Feb 27, 2020 workshop |
| 41 | NOI: FERC's ROE Policy (PL19-4) | Jan 31 | SPP transmission owners submit comments in light of <i>Opinion 569</i> |

XIII. Natural Gas Proceedings



No Activity to Report

XIV. State Proceedings & Federal Legislative Proceedings



No Activity to Report

XV. Federal Courts



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| 48 | ISO-NE's Inventoried Energy Program (Chapter 2B) Proposal (19-1224)*** | Jan 13 Jan 17 Jan 21 | FERC submits motion asking for 60 days between filing of Petitioners' opening brief and the FERC's brief in response FERC files Certified Index to the Record Court grants NEPOOL, ISO-NE, NEPGA, Calpine, MPUC interventions |
| 48 | <i>Order 841</i> (19-1142, 19-1147) (consol.) | Jan 23 Jan 31 | Engie Storage Services, Vivant Solar, Tesla and Sunrun file notice of intention to participate as <i>Amicus Curiae</i> FERC files Appellee Brief |
| 49 | PG&E Bankruptcy (19-71615) (9th Cir.) | Jan 17 | PG&E submits Reply Brief |
| 49 | First Energy Solutions Bankruptcy (18-3787) (6th Cir.) | Jan 27 | FERC petitions 6 th Circuit for <i>en banc</i> rehearing of the Dec 12 decision |

M E M O R A N D U M

TO: NEPOOL Participants Committee Members and Alternates

FROM: Patrick M. Gerity, NEPOOL Counsel

DATE: February 4, 2020

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

We have summarized below the status of key ongoing proceedings relating to NEPOOL matters before the Federal Energy Regulatory Commission (“FERC”),¹ state regulatory commissions, and the Federal Courts and legislatures through February 4, 2020. If you have questions, please contact us.

I. Complaints/Section 206 Proceedings

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

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

Those interested in participating in this proceeding were required to intervene on or before November 27, 2019.⁵ Interventions were filed by: NEPOOL, ISO-NE, Anbaric, Avangrid, Calpine, CT AG, CT, OCC, CT PURA, ENE, Eversource, IECG, LSPower, MA AG, MA DPU, MMWEC, MS PSC, NESCOE, NHEC, NextEra, NRDC, NRG, PSEG, AK PSC, ATC, Developers Advocating Transmission Advancements, East TX Cooperative, EEI, IECA, LA

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

³ *Id.* at P 7.

⁴ *Id.* at P 23.

⁵ The *October 17 Order* was published in the *Fed. Reg.* on Oct. 29, 2019 (Vol. 84, No. 208) pp. 57,726-57,727.

PSC, MD PSC, Mid-Kansas Electric Co., NJ PBU, NY TOs, NY Transco, Northeast TX Electric Cooperative, PA PUC, Public Citizen, Sunflower Electric Cooperative, and Xcel Energy Services. As noted above, ISO-NE submitted its responses on December 27, 2019.

Comments on ISO-NE's response are due on or before January 27, 2020 and were filed by: [NEPOOL](#), [Avangrid](#), [Eversource](#), [LSPower](#), [MMEWC](#), [National Grid](#), [NESCOE](#), [CT PURA](#), [State Agencies](#),⁶ [Developers Advocating Transmission Advancements](#), and [EEI](#).

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

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

On January 23, 2020, the FERC denied rehearing⁷ of its April 10, 2019 order dismissing *RTO Insider's* August 31 Complaint.⁸ The Complaint had requested that the FERC either (i) find that NEPOOL's press policy "unlawful, unjust and unreasonable, unduly discriminatory and contrary to the public interest, and direct NEPOOL to cease and desist" from implementing its policy; or (ii) "if the [FERC] finds that NEPOOL can sustain such a ban as a "private" entity, [] direct that NEPOOL's special powers, privileges and subsidies be terminated and that an open stakeholder process be used by [ISO-NE]" ("RTO Insider Complaint"). In dismissing the RTO Insider Complaint, the FERC agreed with NEPOOL that the claims asserted by RTO Insider did not relate to matters over which the FERC has jurisdiction, finding that the "rules governing attendance at NEPOOL meetings do not directly affect the filings brought before the Commission in the way that membership rules that allow members to vote do ... the challenged NEPOOL policies here concern passive attendance at NEPOOL meetings by non-voting entities and dissemination of written accounts of NEPOOL deliberations. The contested attendance and reporting policies are too attenuated from NEPOOL's voting process to directly affect jurisdictional rates." On May 10, 2019, Public Citizen requested rehearing of the *RTO Insider Complaint Order*. As explained more fully in the *RTO Insider Complaint Rehearing Order*, the FERC was not persuaded by Public Citizen's assertions of "errors of fact" and denied rehearing. Absent a challenge in Federal Court, 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).

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

As previously reported, the July 2, 2018 *Mystic Waiver Order*⁹ (reported on in more detail in ER18-1509 in Section III below) in part instituted this Section 206 proceeding in light of the FERC's preliminary finding that the ISO-NE Tariff may be unjust and unreasonable in that it fails to address specific regional fuel security concerns identified in the record in ER18-1509 that could result in reliability violations as soon as 2022. Accordingly, the *Mystic Waiver Order* directed ISO-NE, in part, to submit permanent Tariff revisions reflecting improvements to its market design to better address regional fuel security concerns (the "Chapter 3 Proposal"). Following an ISO-NE request for an extension of time to file its Chapter 3 Proposal, the FERC issued a notice granting an extension of time, to and including October 15, 2019, a month earlier than requested, for the filing of that Proposal. The deadline has since been further extended – to **April 15, 2020**.¹⁰ Markets Committee consideration of ISO-NE's Energy Security Improvements ("ESI") project is on-going. If you have any questions concerning this proceeding,

⁶ "State Agencies" are: the CT and MA Attorneys General, CT DEEP, CT OCC, and MOPA.

⁷ *RTO Insider LLC v. New England Power Pool Participants Comm.*, 170 FERC ¶ 61,035 (Jan. 23, 2020) ("*RTO Insider Complaint Rehearing Order*").

⁸ *RTO Insider LLC v. New England Power Pool Participants Comm.*, 167 FERC ¶ 61,021 (Apr. 10, 2019) ("*RTO Insider Complaint Order*"), *reh'g denied*, 170 FERC ¶ 61,035 (Jan. 23, 2020).

⁹ *ISO New England Inc.*, 164 FERC ¶ 61,003 (July 2, 2018), *reh'g requested* ("*Mystic Waiver Order*").

¹⁰ Notice of Extension of Time, *ISO New England Inc.*, Docket No. EL18-182 (Aug. 30, 2019).

please contact Dave Doot (860-275-0102; dtdoot@daypitney.com) or Sebastian Lombardi (860-275-0663; slombardi@daypitney.com).

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

As described below, the procedural schedule in this proceeding is now suspended until April 22, 2020 to “allow the active participants to continue to work together to finalize the details of a formal offer of settlement and promote the efficient use of resources by avoiding litigation.” In the absence of a settlement filing, the TOs will next file a status report with the Presiding Judge and Settlement Judge on March 9, 2020.

2018 Settlement (Rejected). Concluding that the contested 2018 Joint Offer of Settlement (the “Settlement”),¹¹ filed to resolve all issues in the Section 206 proceeding instituted by the FERC on December 28, 2015,¹² lacked sufficient detailed information to enable it to apply any of the approaches available to it to approve a contested settlement,¹³ the FERC rejected the Settlement and remanded this proceeding (EL16-19) to Chief Judge Cintron to resume hearing procedures.¹⁴

As previously reported, the Settlement was supported by **NESCOE** but opposed by Municipal PTF Owners¹⁵ and FERC Trial Staff. The **Municipal PTF Owners** (“Munis”) asserted that the Settlement would worsen, rather than improve, the issues of “lack of transparency, clarity and specificity that led the Commission [to] find the existing Attachment F formula unjust and unreasonable”, discriminate against load directly connected to PTF and exempted by Section II.12(c) of the ISO-NE Tariff from paying costs associated with service across non-PTF facilities, contravened numerous settled rate principles without explanation or justification,¹⁶ and would have imposed an unacceptable moratorium and burden on parties inclined to challenge Attachment F. **FERC Trial Staff** asserted that the Settlement, as filed, was not fair and reasonable nor in the public interest “because it would

¹¹ As previously reported, the Settling Parties filed the Settlement on Aug. 17, 2018, in ER18-2235. The Settlement proposed changes to Section II.25, Schedules 8 and 9, Attachment F (including the addition of Interim Formula Rate Protocols (“Interim Protocols”)), and the Schedule 21s to the ISO-NE OATT. Had they been approved, the changes to Attachment F would have become effective mid-June, 2019, with the remaining changes to be effective January 1, 2020. The Interim Protocols, as well as the changes to Section II.25 and Schedules 8 and 9, were supported by the Participants Committee at its July 24, 2018 meeting.

¹² *ISO New England Inc. Participating Transmission Owners Admin. Comm.*, 153 FERC ¶ 61,343 (Dec. 28, 2015), *reh’g denied*, 154 FERC ¶ 61,230 (Mar. 22, 2016) (“*RNS/LNS Rates and Rate Protocols Order*”). The *RNS/LNS Rates and Rate Protocols Order* found the ISO-NE Tariff unjust, unreasonable, and unduly discriminatory or preferential because the Tariff “lacks adequate transparency and challenge procedures with regard to the formula rates” for Regional Network Service (“RNS”) and Local Network Service (“LNS”). The FERC also found that the RNS and LNS rates themselves “appear to be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful” because (i) “the formula rates appear to lack sufficient detail in order to determine how certain costs are derived and recovered in the formula rates” and “could result in an over-recovery of costs” due to the “the timing and synchronization of the RNS and LNS rates”. The FERC encouraged the parties to make every effort to settle this matter before hearing procedures are commenced. The FERC-established refund date is January 4, 2016.

¹³ The FERC outlined in a seminal case the following four alternative approaches for approving contested settlements: (1) where the FERC can render a binding merits decision on each contested issue, (2) where the FERC can approve the settlement based on a finding that the overall settlement *as a package* is just and reasonable, (3) where the FERC can determine that the benefits of the settlement outweigh the nature of the objections and the interests of the contesting party are too attenuated, and (4) where the FERC can approve the settlement as uncontested for the consenting parties, and can sever the contesting parties to allow them to litigate the issues raised. See *Trailblazer Pipeline Co.*, 85 FERC ¶ 61,345, at 62,342-44 (1998).

¹⁴ *ISO New England Inc. Participating Transmission Owners Admin. Comm., et al.*, 167 FERC ¶ 61,164 (May 22, 2019) (“*RNS Rate/Rate Protocol Settlement Order*”).

¹⁵ “Municipal PTF Owners” are: Braintree, Chicopee, Middleborough, Norwood, Reading, Taunton, and Wallingford.

¹⁶ 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).

result in unreasonable rates and contains fundamental defects”,¹⁷ and opposed the Settlement terms which would bind non-settling parties to the terms of the Settlement and establish a standard of review for changes to the Settlement. FERC Trial Staff suggested that these defects could be corrected in a comprehensive compliance filing. **Reply comments** were submitted by NEPOOL, NESCOE and the MA AG. In its limited comments, **NEPOOL** noted that it supported the Interim Protocols and that it had no objection to the Settlement. **NESCOE** reiterated its support for the Settlement in its reply comments, urging the FERC to reject any arguments that consumer-interested parties “were not familiar with the issues relating to the Settlement or that they reached a settlement for any reason other than their view that it is in the best interests of consumers.”¹⁸ **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.¹⁹

Hearings. On May 23, 2019, Chief Judge Cintron designated Judge David H. Coffman as the Presiding Judge for the purpose of hearings and issuance of an initial decision within Track III procedural time standards.²⁰ A prehearing conference was held on June 6, 2019. Following that conference, orders establishing a procedural schedule and adopting rules of conduct for the hearing were issued. That schedule has since been extended three times by a total of 85 days and is currently suspended (*see immediately below*).

Procedural Schedule Suspended Until April 22, 2020. On January 22, 2020, the TOs requested the suspension of the procedural schedule for an additional 90 days. Chief Judge Cintron issued an order on January 24, 2020 holding the proceedings in abeyance until April 22, 2020. The TOs must file a status report with the Chief Judge and Presiding Judge by March 9, 2020. As previously noted, if the current suspension period concludes without a settlement filed, the Chief Judge and Presiding Judge will take action to re-establish a procedural schedule absent good cause provided for a further suspension.

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

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

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

- **Base ROE Complaint I (EL11-66).** In the first Base ROE Complaint proceeding, the FERC concluded that the TOs’ ROE had become unjust and unreasonable,²¹ 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*

¹⁷ 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.

¹⁸ Reply Comments of NESCOE, Docket Nos. ER18-2235 and EL16-19, at p. 2 (filed Sep. 28, 2018).

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

²⁰ Track III time standards require a hearing be convened within 42 weeks and an initial decision issued within 63 weeks.

²¹ 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*”).

531-A).²² However, the FERC's orders were challenged, and in *Emera Maine*,²³ 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)²⁴ and third (EL14-86)²⁵ 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.²⁶ The *Initial Decision* also lowered the ROE ceilings. Parties to these proceedings filed briefs on exception to the FERC, which has not yet issued an opinion on the ALJ's *Initial Decision*.
- **Base ROE Complaint IV (EL16-64).** The fourth and final ROE proceeding²⁷ also went to hearing before an ALJ, Judge Glazer, who issued his initial decision on March 27, 2017.²⁸ 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.²⁹ 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*.

²² *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*").

²³ *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).

²⁴ The 2012 Base ROE Complaint, filed by Environment Northeast (now known as Acadia Center), Greater Boston Real Estate Board, National Consumer Law Center, and the NEPOOL Industrial Customer Coalition ("NICC", and together, the "2012 Complainants"), challenged the TOs' 11.14% ROE, and seeks a reduction of the Base ROE to 8.7%.

²⁵ 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.

²⁶ *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*").

²⁷ 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.

²⁸ *Belmont Mun. Light Dept. v. Central Me. Power Co.*, 162 FERC ¶ 63,026 (Mar. 27, 2018) ("*Base ROE Complaint IV Initial Decision*").

²⁹ *Id.* at P 2.; Finding of Fact (B).

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.³⁰ 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.³¹

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

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

The FERC provided preliminary analysis of how it would apply the proposed methodology in the Base ROE I Complaint, suggesting that it would affirm its holding that an 11.14% Base ROE is unjust and unreasonable. The FERC suggested that it would adopt a 10.41% Base ROE and cap any preexisting incentive-based total ROE at 13.08%.³² 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 Customers³³ 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

³⁰ *Coakley v. Bangor Hydro-Elec. Co.*, 165 FERC ¶ 61,030 (Oct. 18, 2018) ("*Order Directing Briefs*" or "*Coakley*").

³¹ *Id.* at 19.

³² *Id.* at P 59.

³³ For purposes of the motion seeking clarification, "Customers" are CT PURA, MA AG and EMCOS.

TOs' January 24 motion on February 12. Reply briefs were due March 8, 2019 and were submitted by the TOs, Complainant-Aligned Parties, EMCOS, FERC Trial Staff.

TOs Request to Re-Open Record and file Supplemental Paper Hearing Brief. On December 26, 2019, the TOs filed a Supplemental Brief that addresses the consequences of the November 21 *MISO ROE Order*³⁴ and requested that the FERC re-open the record to permit that additional testimony on the impacts of the *MISO ROE Order's* changes. On January 21, EMCOS and CAPs opposed the TOs' request and brief.

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

II. Rate, ICR, FCA, Cost Recovery Filings

- **Attachment F Modification: Inclusion of UI's Pequonnock Substation Project CWIP (ER20-499)**

On January 28, 2020, the FERC accepted UI's changes to the Attachment F revenue requirement calculation in the ISO-NE OATT.³⁵ UI's changes include 100% of the construction work in progress ("CWIP") associated with the Pequonnock Substation Project³⁶ as a line item in the revenue requirement recovered through the Attachment F Implementation Rule.³⁷ The changes do not modify the formula rate itself.³⁸ The CWIP changes were accepted effective January 31, 2020, as requested. Unless the January 28 order is challenged, this proceeding will be concluded. If you have any questions concerning this proceeding, please contact Pat Gerity (860-275-0533; pmgerity@daypitney.com).

- **FCA14 Qualification Informational Filing (ER20-308)**

ISO-NE submitted its informational filing (the "FCA14 Informational Filing") for qualification in FCA14 on November 5, 2019, as required under Market Rule Section 13.8.1. The Informational Filing contained ISO-NE's determinations that four Capacity Zones will be modeled for FCA14 -- Southeastern New England ("SENE"), Northern New England ("NNE"), the Maine Capacity Zone ("Maine"), and Rest of Pool. SENE will again be modeled as import-constrained; NNE will be modeled as export-constrained. The Maine Load Zone will be modeled as a separate nested export-constrained Capacity Zone within NNE. The Informational Filing reported that, with Mystic 8 & 9 operating, there will be 34,905 MW of existing capacity in FCA14 competing with 7,314 MW of new capacity under a Net ICR of 32,490 MW (ICR minus HQICCs). ISO-NE reported also that there were a total of 913 MW of Static De-List Bids. A summary of the De-List Bids accepted and those rejected for reliability purposes was included in a privileged Attachment E. ISO-NE qualified 14 demand bids, totaling 446 MW, and 344 supply offers, totaling 749 MW, to participate in the substitution auction.

Comments on the FCA14 Informational Filing were due November 20, 2019. Comments and protests were filed by the ISO-NE External Market Monitor ("EMM"), RENEW Northeast, Inc. ("RENEW") and Able Grid

³⁴ *Ass'n of Buss. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, Opinion No. 569, 169 FERC ¶ 61,129 (2019) ("*MISO ROE Order*").

³⁵ *The United Illuminating Co.*, Docket No. ER20-499 (Jan. 28, 2020) (unpublished letter order).

³⁶ 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.

³⁷ The FERC granted on May 14, 2019, two of the three transmission rate incentives requested by UI in connection with its Pequonnock Substation Project, including the CWIP Incentive. *United Illuminating Co.*, 167 FERC ¶ 61,126 (May 14, 2019).

³⁸ UI provided notice of these changes by e-mail to the Participants and Transmission Committee on Nov. 1, 2019.

Infrastructure Holding, LLC (“Able Grid”). In its comments, the **EMM** discussed the quality and appropriateness of key elements of the IMM’s review and mitigation of New Resource Offer Floor Prices (“OFPs”) for certain resources in FCA14. The EMM identified methodological concerns with certain elements of the IMM’s determinations for large-scale energy storage resources (“ESRs”), suggesting that, while it was appropriate for the IMM to adjust net revenues for Energy and Ancillary Services (“EAS”) and mitigate the OFPs of such ESRs, its analyses indicated that the EAS revenue levels assumed by the IMM in mitigating the OFPs were unreasonably low. The EMM asked the FERC to require the IMM to revise its determinations for ESR OFPs for FCA14. **RENEW** supported the EMM’s comments, and requested that the FERC direct the IMM to re-calculate OFPs for ESRs using the EMM’s assumptions and re-issue Qualification Determination Notifications (“QDNs”) to all affected ESR developers, with revised OFPs for use in FCA14. **Able Grid** requested that the FERC (i) find that, with respect to the four battery storage projects it proposed for qualification, the IMM-determined OFP was calculated in an arbitrary and capricious manner, would result in unjust and unreasonable rates, and (ii) allow Able Grid to participate in FCA14 with its Requested OFP. Doc-less interventions were filed by NEPOOL, Avangrid, Calpine, Dominion (out-of-time), Enerwise Global Technologies (“CPower”), Exelon, Eversource, National Grid, NESCOE, NRG, and Vistra³⁹ (out-of-time).

On December 5, **the IMM** answered the comments and protests of the EMM, RENEW, and Able Grid, asserting that its determinations were “a just and reasonable exercise of buyer-side mitigation in the face of unreasonable, unsupported and/or overly optimistic assumptions underlying requested OCPs by Project Sponsors for ESRs, which otherwise could artificially suppress capacity prices if unchecked”. The IMM agreed with RENEW “that there is no perfect revenue model” and “favors more open discussion with market participants in anticipation of future auctions” but asserted that its “estimates are reasonable based on a revenue model that was developed with the benefit of reviewing many submitted models, review for quality assurance, and applied in the mitigation process within the qualification period provided.” **Able Grid** on December 20 answered the IMM Answer suggesting that the IMM Answer (1) failed to fully address the issues raised in its November 20 Protest; (2) mischaracterized information submitted by Able Grid, resulting in factually incorrect statements; and (3) diverts the FERC’s attention from the relevant and relatively limited Tariff provisions that establish the standard for and defines the data categories subject to the IMM’s authority under the Tariff to substitute its data for a Project Sponsor.

While this matter is still pending before the FERC, FCA14 has now been run, and was run without an order on this filing. Pursuant to Section III.13.8.1(d) of the Tariff, when the FERC did not issue an order within 75 days after the date of the filing (January 19, 2020) directing otherwise, ISO-NE was authorized to use the determinations contained in the Informational Filing in conducting FCA14. If you have any questions concerning this matter, please contact Sebastian Lombardi (860-275-0663; slombardi@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”)⁴⁰ among Constellation Mystic Power (“Mystic”), Exelon Generation Company (“ExGen”) and ISO-

³⁹ For purposes of this Report, “Vistra” includes each of Vistra’s Related Persons that are NEPOOL Participants: Dynegy Marketing and Trade, LLC; Ambit Northeast LLC; Connecticut Gas & Electric, Inc.; Energy Rewards, LLC; Everyday Energy, LLC; Massachusetts Gas and Electric, Inc.; Public Power, LLC; and Viridian Energy, LLC.

⁴⁰ 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.

NE.⁴¹ 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, 2019.⁴² Requests for clarification and/or rehearing of the *Mystic Order* were filed by Constellation Mystic Power, CT Parties, EDF, ENECOS, MA AG, NESCOE, NextEra, and Repsol. On February 6, Constellation answered the other parties' requests for rehearing. CT Parties answered Constellation's request for rehearing on February 8. On February 14, NESCOE answered Constellation's February 6 answer. On February 15, 2019, the FERC issued a tolling order affording it additional time to consider the requests for clarification and/or rehearing, which remain pending.

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

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

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

ROE Paper Hearing. The *Mystic Order* established a paper hearing to determine the just and reasonable ROE to be used in setting charges under Mystic's COS Agreement. On April 19, Mystic, Connecticut Parties, ENECOS, MA AG, and FERC Trial Staff filed initial briefs. On July 18, 2019, Constellation Mystic Power, CT Parties, ENECOS, MA AG, National Grid, FERC Trial Staff filed reply briefs. The ROE Paper Hearing is now pending before the FERC.

July Mystic COS Agreement Order. Rehearing remains pending of the FERC's July order. As previously reported, the FERC issued an initial order regarding the COS Agreement, accepting the COS Agreement but suspending its effectiveness and setting it for accelerated hearings and settlement discussions.⁴³ The *Mystic*

⁴¹ *Constellation Mystic Power, LLC*, 165 FERC ¶ 61,267 (Dec. 20, 2018) ("*Mystic Order*").

⁴² *Id.* at PP 31-34.

⁴³ *Constellation Mystic Power*, 164 FERC ¶ 61,022 (July 13, 2018) ("*July Mystic COS Agreement Order*"), *reh'g requested*.

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

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

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

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

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

As previously reported, the FERC granted, in part, on April 30, 2019, the formal challenge filed on December 31, 2018 by the Maine Customer Group⁴⁴ (the “2018 Challenge”) to Emera Maine’s May 15, 2018 annual informational filing⁴⁵ and set the remaining issues for hearing and settlement judge procedures.⁴⁶ As previously reported, the 2018 Challenge sought certain cost reductions/ exclusions⁴⁷ to be effective June 1, 2018 following unsuccessful efforts to obtain the relief sought directly from Emera Maine MPD through informal resolution procedures in accordance with the Protocols. In granting in part the 2018 Challenge, the FERC found that Emera Maine’s formula rate should be corrected for the current rate year and Emera Maine must submit a compliance filing on or before May 30 that revises its 2018-2019 formula rate charges to correct certain acknowledged errors, exclusion of certain costs for land associated with a project not in service, the exclusion of certain costs for distribution equipment from transmission rates, and the flowback of excess accumulated deferred income tax (“ADIT”). As to the remaining issues, addressing Administrative and General (“A&G”) expenses, merger-related prior losses, exclusion of costs attributed to Line 6901, and

⁴⁴ For purposes of this proceeding, “Maine Customer Group” or “MCG” is the MPUC, MOPA, Houlton Water Co., and Van Buren Light & Power District, and Eastern Maine Electric Cooperative.

⁴⁵ 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.

⁴⁶ *Emera Maine*, 167 FERC ¶ 61,090 (Apr. 30, 2019) (“2018 Challenge Order”).

⁴⁷ 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.

exclusion of land rights cost, the FERC found that the 2018 Annual Update raises issues of material fact that cannot be resolved based on the record and set those issues for hearing and settlement judge procedures. Hearings will be held in abeyance to provide time for settlement judge procedures.

Settlement Judge Procedures. Chief Judge Cintron designated John P. Dring as the Settlement Judge for these proceedings. Judge Dring has held two settlement conferences, one on July 18, 2019 and the second on September 11, 2019. A third settlement conference occurred on October 7 and the parties reached an agreement in principle at that time. Since the last Report, on January 23, 2020, Judge Dring issued a report advising that the “participants currently are in the process of finalizing an offer of settlement” and recommending the continuation of settlement judge procedures.

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.⁴⁸ 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*⁴⁹ 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.⁵⁰ 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.⁵¹ 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 eTariff Versioning True-Up (ER20-763)**

On January 9, 2020, ISO-NE filed corrections to remove from the version of § III.13.2 accepted with the PRD Clean-Up Changes (ER20-140) changes submitted with still-pending Fuel Security Retention Limit Revisions (see ER20-89 below). Comments on this filing were due on or before January 30; none were filed. NEPOOL submitted a doc-less intervention. 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).

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

On January 8, 2020, ISO-NE requested waiver of § III.13.1.10(b) of the Tariff to allow Market Participants to adjust or withdraw their FCA15 Retirement De-List Bids or Permanent De-List Bids should ISO-NE make a subsequent non-clerical change to certain ISO Tariff revisions after the current March 13, 2020 deadline for De-List Bids (which will not change) or in the lead-up to (or as part of) the Participants Committee vote on the Energy

⁴⁸ *ISO New England Inc.*, 161 FERC ¶ 61,031 (Oct. 6, 2017) (“*Order Rejecting Filing*”), *reh’g requested*.

⁴⁹ *Emera Maine v. FERC*, 854 F.3d 9 (D.C. Cir. 2017) (“*Emera Maine*”).

⁵⁰ *Order Rejecting Filing* at P 1.

⁵¹ *Id.* at P 36.

Security Improvements (“ESI”)-related Market Rules (scheduled for April 2, 2020). Under such circumstances, Participants that have submitted an FCA15 Retirement De-List Bid or Permanent De-List Bid would have the option to either (i) update its De-List Bid to reflect the impact of the changes to the ESI design or (ii) withdraw the De-List Bid altogether, and to exercise that option within a week (seven calendar days) following the Participants Committee vote. Comments on ISO-NE’s waiver request were due on or before January 29; none were filed. Doc-less interventions were filed by NEPOOL, Dominion, Eversource, Exelon, National Grid, NESCOE, NRG, and Calpine (out-of-time). This matter is pending before the FERC. If you have any questions concerning this proceeding, please contact Sebastian Lombardi (860-275-0663; slombardi@daypitney.com) or Rosendo Garza (860-275-0660; rgarza@daypitney.com).

- **Fuel Security Retention Sunset (ER20-645)**

On December 19, 2019, ISO-NE and NEPOOL jointly filed changes to sunset one year early the mechanism in the Forward Capacity Market (“FCM”) to retain a resource for fuel security reasons (“Fuel Security Retention Sunset”). The fuel security retention mechanism is being sunsetted for the third and final year for which it is to be in place in light of the market solution to be filed in April 2020 and implemented by June 2024. The Sunset was filed so that it can be in effect for the start of the March 2020 FCA15 qualification period, when the fuel security retention review is scheduled to be performed. The Fuel Security Retention Sunset was supported by the Participants Committee at its December 6 meeting (Consent Agenda Item #2). Comments on this filing were due on or before January 9, 2020. On January 9, Exelon protested the filing, stating that “there is simply no reason to shorten the life of the Fuel Security Provisions now when doing so would unnecessarily limit ISO-NE’s options for addressing fuel security needs when it is not clear that market reforms will be in place in time for FCA15”. Both ISO-NE and NEPOOL answered Exelon’s protest, urging the FERC to accept the Fuel Security Retention Sunset as filed. Calpine, Dominion, Eversource, FirstLight, MMWEC, National Grid, NESCOE, NHEC, and NRG filed doc-less interventions only. This matter is pending before the FERC. If you have any questions concerning this proceeding, please contact Sebastian Lombardi (860-275-0663; slombardi@daypitney.com) or Rosendo Garza (860-275-0660; rgarza@daypitney.com).

- **Waiver Request: FCA14 Qualification (CPower) (ER20-458)**

Still pending, notwithstanding the fact that FCA14 has been run, is the request by Enerwise Global Technologies, Inc. d/b/a/ CPower (“CPower”) for a waiver of the FCM qualification rules to allow seven residential and commercial, summer-only solar Distributed Generation On-Peak Demand Resources (the “Resources”), unable to use composite offers for FCA14 participation due to the interplay between RTR proration and substitution auction rules, to participate in FCA14 and the substitution auction. Alternatively, CPower requested, should its primary waiver request not be granted, the waivers necessary to allow the Resources to form a composite offer (if winter capacity remains available); offer into FCA14 at their IMM-mitigated Offer Floor Prices (“OFPs”), and participate in the substitution auction. Comments on CPower’s waiver request were due on or before December 9, 2019.

ISO-NE opposed the primary relief requested by CPower (to allow its Solar Demand Resources to participate in FCA14 with only summer Qualified Capacity) but not CPower’s request for alternative relief (to allow CPower to undo the RTR election for its Solar Demand Resources and enter into composite offers). On December 12, CPower answered ISO-NE’s opposition. Doc-less interventions were filed by NEPOOL, Calpine (out-of-time), National Grid, NRG (out-of-time), and RENEW. Although FCA14 has now been completed, this matter remains pending before the FERC. If you have any questions concerning this matter, please contact Pat Gerity (860-275-0533; pmgerity@daypitney.com).

- **Waiver Request: FCA14 Qualification (Genbright II) (ER20-366)**

On February 3, 2020, the FERC denied Genbright’s request for a waiver of the FCM qualification rules for 14 distributed energy resource projects (the “DER Projects”) disqualified from FCA14 based on an ISO-NE finding that the DER Projects’ interconnection requests should have been filed with ISO-NE in accordance with Schedule

23 of the OATT prior to the close of the FCA14 Show-of-Interest (“SOI”) submission window.⁵² As previously reported, Genbright challenged that finding and the equity of the outcome even if the finding were correct (given Eversource’s failure to timely and accurately inform each Project of the correct jurisdictional status of the distribution feeder into which the Project would interconnect, as Eversource was required to do). In denying the request, the FERC found that Genbright failed to demonstrate that the waiver request was limited in scope.⁵³ Unless the February 3 order is challenged, with any challenges due on or before March 4, 2020, this proceeding will be concluded. If you have any questions concerning this matter, please contact Pat Gerity (860-275-0533; pmgerity@daypitney.com).

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

On October 11, ISO-NE and NEPOOL jointly filed a revision to Market Rule 1 Section III.13.2.5.2.5A(j) to make clear that a resource retained for fuel security reasons will not be retained for a longer period for some other reason beyond the two-year fuel-security retention period (“Fuel Security Retention Limit Revision”). The Fuel Security Retention Limit Revision was supported by the Participants Committee at its October 4 meeting (Consent Agenda Item #1). Comments on this filing were due on or before November 1, 2019. **Exelon protested** the Revision, asserting that the Revision (i) unduly discriminates against fuel security resources in general, and Mystic specifically; (ii) is premature and unreasonably ignores the likelihood that neither the transmission upgrades nor the comprehensive fuel security market mechanism will be completed or implemented prior to the proposed sunset; and (iii) has not been shown to be just and reasonable. **NEPGA supported** the Revision, asking that it be accepted without modification. On November 18, both NEPOOL and ISO-NE answered Exelon’s protest. Exelon answered the NEPOOL and ISO-NE answers on November 27. Doc-less interventions were filed by Brookfield, Calpine, Dominion, Eversource, Exelon, LS Power Companies, MMWEC, National Grid, NESCOE, NRG, Verso, and Vistra.

Deficiency Letter. On December 6, the FERC issued a deficiency letter, directing ISO-NE to provide the following additional information: (i) how the Fuel Security Retention Limit Revisions impacts the planning and consideration of outcomes of the Boston Area Needs Assessment and to describe, absent the Revisions, how resources retained for fuel security reasons currently impact the planning of the Boston Area Needs Assessment; and (ii) to explain the actions that ISO-NE would take to mitigate any violations of local reliability criteria if a competitively developed transmission solution cannot be developed or made available in time to alleviate the reliability need that could otherwise be resolved by a resource previously retained for fuel security. The additional information was due and was filed by ISO-NE on January 6, 2020. The submission of the additional information re-set the deadline for FERC action (which is now required on or before March 6, 2020).

Comments on the deficiency letter responses were due January 27, 2020. **Exelon** filed the lone set of comments, asserting that ISO-NE’s deficiency letter response “does nothing to ameliorate the concerns raised by Exelon and fails to provide additional support to demonstrate that the proposal is just and reasonable and not unduly discriminatory” and renewing its request that the FERC “reject the Fuel Security Retention [Limit] Revision in its entirety.”

This matter is pending before the FERC. If you have any questions concerning this proceeding, please contact Sebastian Lombardi (860-275-0663; slombardi@daypitney.com) or Rosendo Garza (860-275-0660; rgarza@daypitney.com).

⁵² *Genbright LLC*, 170 FERC ¶ 61,079 (Feb. 3, 2020).

⁵³ *Id.* at PP 29-30 (distinguishing the Genbright request from others previously granted because it sought the waiver of several Tariff provisions, including some that might have allowed the DER Projects to avoid system impact study and other aspects of ISO-NE’s “complex interconnection study process”).

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

Still pending is Vineyard Wind's December 14, 2018 petition for a waiver of the ISO-NE Tariff provisions necessary to allow Vineyard Wind to participate in FCA13 as an RTR. As previously reported, Vineyard Wind's request for RTR designation was earlier rejected by ISO-NE on the basis that the resource is to be located in federal waters. Under the CASPR Conforming Changes, Vineyard Wind would not have been precluded from utilizing the RTR exemption. Consistent with the discussion in the CASPR Conforming Changes filing, Vineyard Wind asked that the proration requirement that would be triggered by Vineyard Wind's participation in FCA13 as an RTR be limited for FCA13 to it and any other similarly-situated entities (i.e. new offshore wind resources located in federal waters seeking RTR treatment); there would be no impact on resources currently qualified to use the RTR exemption in FCA13. Comments on Vineyard Wind's request were due on or before January 4, 2019. ISO-NE filed comments not opposing the Waiver Request, but requesting FERC action by January 29, 2019 if the waiver was to be effective for FCA13. NEPGA protested the Waiver Request. Answers to NEPGA's protest were filed by Vineyard Wind and NESCOE. On January 15, the Massachusetts Department of Energy Resources ("MA DOER") intervened out-of-time and submitted comments supporting the Waiver Request. Doc-less interventions were filed by NEPOOL, Avangrid, Dominion, ENE, National Grid, and NextEra. Despite several last minute requests to do so, including a Vineyard Wind emergency motion for immediate stay of FCA13 or, in the alternative, a requirement that FCA13 be re-run following FERC action, the FERC took no action ahead of FCA13 and FCA13 was run without Vineyard Wind receiving RTR treatment. As noted, this matter remains pending before the FERC, with no activity since the last Report. If you have any questions concerning this matter, please contact Pat Gerity (pmgerity@daypitney.com; 860-275-0533).

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

On November 22, 2019, the FERC conditionally accepted, subject to a 60-day compliance filing, New England's *Order 841*⁵⁴ compliance filing.⁵⁵ For the majority of the revisions, the effective date was December 3, 2019; the effective date for the revisions to Section II.21, Schedule 9 (Regional Network Service), and Schedule 21 (Local Service) of the OATT was December 1, 2019; the effective date for the remainder of the changes will be January 1, 2024.

In accepting the compliance filing, the FERC directed a number of changes to be submitted in a compliance filing. That compliance filing, which is now due February 10, 2020, must include, among other things:

- ◆ Modifications to the proposed electric storage resource participation model to account for Maximum Run Time, Maximum Charge Time, State of Charge, Maximum State of Charge, and Minimum State of Charge through bidding parameters or other means in the Day-Ahead Energy Market.
- ◆ Application of transmission charges to an electric storage resource when that resource is charging for later resale in wholesale markets and is not providing a service. The FERC found that New England's *Order 841* compliance filing did not meet *Order 841* requirements because it proposed to exempt all electric storage resources that are charging for later resale from transmission charges that are applicable to other load. "We reiterate that to the extent that ISO-NE seeks to create a new service that constitutes charging pursuant to economic dispatch under certain

⁵⁴ See *Elec. Storage Participation in Mkts. Operated by Regional Transmission Orgs. and Indep. Sys. Operators*, Order No. 841, 162 FERC ¶ 61,127 (Feb. 15, 2018) ("*Order 841*").

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

system conditions, ISO-NE may propose such revisions to its Tariff through a separate FPA section 205 filing.”⁵⁶

- ◆ Metering and accounting practices for electric storage resources. “We find that ISO-NE’s proposal partially complies ... the ISO-NE Tariff should include a basic description of ISO-NE’s proposed metering methodology and accounting practices for electric storage resources as well as references to specific documents containing further details... [helpful explanation of when language must be “filed”] ... The unique physical and operational characteristics of electric storage resources require unique metering and accounting practices to ensure that these resources are charged the LMP for charging energy and are not double charged, as required by Order No. 841. We find that these practices significantly affect rates, terms, and conditions and should be included in the Tariff.”⁵⁷
- ◆ Tariff revisions that explicitly state that ISO-NE will not charge distribution-connected electric storage resources for charging energy if the distribution utility is unwilling or unable to net out any energy purchases associated with an electric storage resource’s wholesale charging activities from the host customer’s retail bill. “We find that ISO-NE’s Compliance Filing and Tariff provide insufficient detail to demonstrate that electric storage resources will not pay both the wholesale and retail price for the same charging energy.”⁵⁸
- ◆ An explanation of how the ISO-NE Tariff “allows for electric storage resources to participate in both wholesale and retail markets, or alternatively, revise its Tariff to allow electric storage resources that provide retail services to also participate in ISO-NE’s markets, as required by Order No. 841.”⁵⁹

The FERC highlighted its expectation that ISO-NE will carry out its commitment to accelerate the development of the capability for Binary Storage Facilities Dispatchable Asset Related Demands (“DARD”) to provide regulation service if a stakeholder or developer requests to participate as a Binary Storage Facility and regulate as a DARD.

Extension of compliance filing deadline (now Feb 10, 2020). On December 19, NEPOOL, supported by ISO-NE, moved for a 20-day extension of time, to February 10, 2020, for ISO-NE’s submission in response to the *Order 841 Initial Compliance Filing Order*. The extension was intended to facilitate meaningful stakeholder consideration of proposed Tariff revisions before their submission. The FERC granted that extension on December 30, 2019. The compliance filing must now be submitted on or before February 10, 2020, and will be considered during the Participants Committee’s February 6 teleconference meeting (Agenda Item #5).

Request for rehearing. On December 23, 2019⁶⁰ ISO-NE requested rehearing of the FERC’s finding that the initial compliance filing did not comply with *Order 841*’s requirement to allow electric storage resources to account for their state of charge and duration in the Day-Ahead Energy Market. ISO-NE asserted that the finding “ignore[d] substantial record evidence and would require ISO-NE to implement a needlessly

⁵⁶ *Id.* at P 20.

⁵⁷ *Id.* at P 220.

⁵⁸ *Id.* at P 221.

⁵⁹ *Id.* at P 224.

⁶⁰ The Request for Rehearing was assigned a Dec. 26 filing date in FERC’s eLibrary as filing was successfully completed shortly after the 5pm deadline for official receipt as of the 23rd in the FERC’s eFiling system. On December 26, ISO-NE filed a motion explaining the technical difficulties experienced and asked that its request for rehearing be deemed timely filed.

problematic solution. On January 21, 2020, the FERC issued a tolling order affording it additional time to consider ISO-NE's request for rehearing, which remains pending before the FERC.

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*⁶¹ remain pending before the FERC. As previously reported, the *Fuel Security Retention Proposal Order* accepted ISO-NE's Proposal⁶² 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.⁶³ 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, 2018 order,⁶⁴ 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."⁶⁵ 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

⁶¹ *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.

⁶² As previously reported, ISO-NE filed, in response to the *Mystic Waiver Order*, "interim Tariff revisions that provide for the filing of a short-term, cost-of-service agreement to address demonstrated fuel security concerns". ISO-NE proposed three sets of provisions to expand its authority on a short-term basis to enter into out-of-market arrangements in order to provide greater assurance of fuel security during winter months in New England (collectively, the "Fuel Security Retention Proposal"). ISO-NE stated that the interim provisions would sunset after FCA15, with a longer-term market solution to be filed by July 1, 2019, as directed in the *Mystic Waiver Order*. In addition, the ISO-NE transmittal letter described (i) the generally-applicable fuel security reliability review standard that will be used to determine whether a retiring generating resource is needed for fuel security reliability reasons; (ii) the proposed cost allocation methodology (Real-Time Load Obligation, though ISO-NE indicated an ability to implement NEPOOL's alternative allocation methodology if determined appropriate by the FERC); and (iii) the proposed treatment in the FCA of a retiring generator needed for fuel security reasons that elects to remain in service. The ISO-NE Fuel Security Changes were considered but not supported by the Participants Committee at its August 24, 2018 meeting. There was, however, super-majority support for (1) the Appendix L Proposal with some important adjustments to make that proposal more responsive to the FERC's guidance in the *Mystic Waiver Order* and other FERC precedent, and (2) the PP-10 Revisions, also with important adjustments (together, the "NEPOOL Alternative").

⁶³ "PIOs" for purposes of this proceeding are Sierra Club, NRDC, Sustainable FERC Project, and Acadia Center.

⁶⁴ *ISO New England Inc. and New England Power Pool Participants Comm.*, 165 FERC ¶ 61,088 (Nov. 9, 2018) ("*Economic Life Determination Revisions Order*").

⁶⁵ *Economic Life Determination Revisions Order* at P 23.

ratemaking.”⁶⁶ 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.”⁶⁷ 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 order⁶⁸ that (i) denied ISO-NE’s request for waiver of certain Tariff provisions that would have permitted ISO-NE to retain Mystic 8 & 9 for fuel security purposes (ER18-1509); and (ii) instituted an FPA Section 206 proceeding (EL18-182) (having preliminarily found that the ISO-NE Tariff may be unjust and unreasonable in that it fails to address specific regional fuel security concerns identified in the record that could result in reliability violations as soon as year 2022). The *Mystic Waiver Order* required ISO-NE, on or before August 31, 2018 to either: (a) submit interim Tariff revisions that provide for the filing of a short-term, cost-of-service agreement (COS Agreement) to address demonstrated fuel security concerns (and to submit by July 1, 2019 permanent Tariff revisions reflecting improvements to its market design to better address regional fuel security concerns “Chapter 3 Proposal”); or (b) show cause as to why the Tariff remains just and reasonable in the short- and long-term such that one or both of Tariff revisions filings is not necessary.

Addressing the waiver element, the FERC found the waiver request “an inappropriate vehicle for allowing Mystic 8 and 9 to submit a [COS Agreement] in response to the identified fuel security need” and further that the request “would not only suspend tariff provisions but also alter the existing conditions upon which a market participant could enter into a [COS Agreement] (for a transmission constraint that impacts reliability) and allow for an entirely new basis (for fuel security concerns that impact reliability) to enter into such an agreement.” The FERC concluded that “[s]uch new processes may not be effectuated by a waiver of the ISO-NE Tariff; they must be filed as proposed tariff provisions under FPA section 205(d).”⁶⁹ 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.”⁷⁰

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).⁷¹ 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.⁷² The FERC also directed ISO-NE include with any proposed Tariff revisions a mechanism that

⁶⁶ *Id.* at P 24.

⁶⁷ *Id.* at P 27.

⁶⁸ *ISO New England Inc.*, 164 FERC ¶ 61,003 (July 2, 2018), *reh’g requested* (“*Mystic Waiver Order*”).

⁶⁹ *Id.* at P 47.

⁷⁰ *Id.* at P 48.

⁷¹ *Id.* at P 55.

⁷² *Id.* at PP 56-57.

addresses how cost-of-service-retained resources would be treated in the FCM⁷³ and an *ex ante* cost allocation proposal that appropriately identifies beneficiaries and adheres to FERC cost causation precedent.⁷⁴

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**⁷⁵ (requesting that the FERC clarify that (i) the discussion in the *Mystic Waiver Order* of pricing treatment in the FCM for fuel security reliability resources is not a final determination nor is it intended to establish FERC policy; (ii) the FERC did not intend to prejudge whether entering those resources in the FCM as price takers would be just and reasonable; and (iii) that ISO-NE may confirm its submitted position that price taking treatment for these resources would, in fact, be a just and reasonable outcome. Failing such clarification, Connecticut Parties request rehearing, asserting that the record fails to support a determination that resources retained for reliability to address fuel security concerns must be entered into the FCM at a price greater than zero);
- ◆ **ENECOS** (asserting that the *Mystic Waiver Order* (i) misplaces reliance on ISO-NE “assertions concerning ‘fuel security,’ which do not in fact establish a basis in evidence or logic for initiating” a Section 206(a) proceeding; (ii) impermissibly relies on extra-record material that the FERC did not actually review and that intervenors were afforded no meaningful opportunity to challenge; and (iii) speculation concerning potential future modifications to the FCM bidding rules as to retiring generation retained for fuel security misunderstands the problem it seeks to address, and prejudices the already truncated opportunities for stakeholder input in this proceeding), ENECOS suggest that the FERC should grant rehearing, vacate its show cause directive, strike its dictum concerning potential treatment of FCM bidding for retiring generation retained for “fuel security,” and direct ISO-NE to proceed either in accordance with its Tariff or under FPA Section 205 to address, with appropriate evidentiary support, whatever concerns it believes to exist concerning “fuel security”);
- ◆ **MA AG** (asserting that the decision to institute a Section 206 proceeding was insufficiently supported by sole reliance on highly contested OFSA and Mystic Retirement Studies; and the FERC should reconsider the timeline for the permanent tariff solution and set the deadline for implementation no later than February 2020);
- ◆ **MPUC** (challenging the Order’s (i) adoption of ISO-NE’s methodology and assumptions in the OFSA and Mystic Retirement Studies without undertaking any independent analysis; (ii) failure to address arguments and analysis challenging assumptions in the OFSA and Mystic Retirement Studies; (iii) failure to address the MPUC argument that the Mystic Retirement Studies adopted a completely new standard for determining a reliability problem three years in advance; (iv) unreasonably discounting of the ability of Pay-for-Performance to provide sufficient incentives to Market Participants to ensure their performance under stressed system conditions; and (v) failure to direct ISO-NE to undertake a Transmission Security Analysis consistent with the provisions in the Tariff);
- ◆ **New England EDCs**⁷⁶ (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

⁷³ *Id.* at P 57.

⁷⁴ *Id.* at P 58.

⁷⁵ “Connecticut Parties” are the Conn. Pub. Utils. Regulatory Authority (“CT PURA”) and the Conn. Dept. of Energy and Environ. Protection (“CT DEEP”).

⁷⁶ 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).

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**⁷⁷ (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] refile their proposal, if appropriate, following its full consideration in the stakeholder process." Answers to the Indicated New England EDCs were also filed by the MA AG, NEPGA, NextEra, and CLF/NRDC/Sierra Club/Sustainable FERC Project. On August 29, the Indicated New England EDCs answered the August 14/16 answers. On August 27, 2018, the FERC issued a tolling order affording it additional time to consider the requests for rehearing, which remain pending.

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

- **CASPR (ER18-619)**

Rehearing of the FERC's order accepting ISO-NE's Competitive Auctions with Sponsored Policy Resources ("CASPR") revisions,⁷⁸ 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**⁷⁹ (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**⁸⁰ (which challenged the CASPR construct in its entirety, asserting that state-sponsored resources should not be subject to the MOPR); and (iv) **Public Citizen** (which also challenged the CASPR construct in its entirety and the *CASPR Order's* failure to define "investor confidence"). On April 24, ISO-NE answered Clean Energy Advocates' answer. On May 7, 2018, the FERC issued a tolling order affording it additional time to consider the requests for rehearing, which remain pending. If you have any questions concerning this proceeding, please contact Dave Doot (860-275-0102; dtodoot@daypitney.com) or Sebastian Lombardi (860-275-0663; slombardi@daypitney.com).

⁷⁷ "PIOs" are the Sierra Club, Natural Resources Defense Council ("NRDC"), and Sustainable FERC Project.

⁷⁸ *ISO New England Inc.*, 162 FERC ¶ 61,205 (Mar. 9, 2018) ("*CASPR Order*"), *reh'g requested*.

⁷⁹ 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.

⁸⁰ For purposes of this proceeding, "Clean Energy Advocates" are, collectively, the NRDC, Sierra Club, Sustainable FERC Project, CLF, and RENEW Northeast, Inc.

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

On January 24, 2020, the FERC denied rehearing of its October 6, 2017 order⁸¹ accepting updated FCM CONE, Net CONE and ORTP values.⁸² In the *CONE/ORTP Updates Order*, 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%), accepting the updated values effective as of March 15, 2017, as requested. On November 6, 2017, NEPGA requested rehearing of the *CONE/ORTP Updates Order*. In denying rehearing, the FERC disagreed with the contentions raised by NEPGA and affirmed its prior determinations. Unless the *CONE/ORTP Updates Rehearing Order* is challenged in Federal Court, the proceeding will be concluded. If you have any questions concerning this proceeding, please contact Sebastian Lombardi (860-275-0663; slombardi@daypitney.com).

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

Still pending before the FERC is ISO-NE's compliance filing in response to the FERC's August 8, 2016 remand order.⁸³ 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.⁸⁴ ISO-NE submitted its compliance filing on January 23, 2017, reporting the IMM's conclusion that "the auction was not structurally competitive and a 'small proportion' of the total cost of the program may be the result of the exercise of market power" but that the "vast majority of supply was offered at prices that appear reasonable and that, for a number of reasons, it is difficult to assess the impact of market power on cost." Based on the IMM and additional analysis, ISO-NE recommended that "there is insufficient demonstration of market power to warrant modification of program." In February 13 comments, both TransCanada and the MA AG protested ISO-NE's conclusion and recommendation that modification of the program was unwarranted. TransCanada requested that FERC establish a settlement proceeding where Market Participants could "exchange confidential information to determine what the rates should be" and refunds and "such other relief as may be warranted" provided. On February 28, ISO-NE answered the TransCanada and MA AG protests. On March 10, 2017, TransCanada answered ISO-NE's February 28 answer. This matter remains pending before the FERC. If you have any questions concerning these matters, please contact Sebastian Lombardi (860-275-0663; slombardi@daypitney.com).

IV.OATT Amendments / TOAs / Coordination Agreements

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

On January 6, 2020, ISO-NE filed revisions to incorporate into the Tariff as a new Schedule 17 a mechanism to facilitate the recovery of critical infrastructure protection ("CIP") costs by facilities that ISO-NE identifies as critical to the derivation of Interconnection Reliability Operating Limits ("IROL") (the "CIP IROL Cost Recovery Rules"). ISO-NE requested a March 6, 2020 effective date for the CIP IROL Cost Recovery Rules. The CIP IROL Cost

⁸¹ *ISO New England Inc.*, 161 FERC ¶ 61, 035 (Oct. 6, 2017) ("*CONE/ORTP Updates Order*"), *reh'g denied* 170 FERC ¶ 61,052 (Jan. 24, 2020).

⁸² *ISO New England Inc.*, 170 FERC ¶ 61,052 (Jan. 24, 2020) ("*CONE/ORTP Updates Rehearing Order*").

⁸³ *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).

⁸⁴ *2013/14 Winter Reliability Program Remand Order* at P 17.

Recovery Rules were considered but not supported by the Participants Committee at its November 1, 2019 meeting (Agenda Item #8). Comments on this filing were due on or before January 27, 2020. On January 22, NEPOOL filed comments to provide the FERC with further information explaining NEPOOL's consideration of the Rules and reasons provided by members for supporting or not supporting the Rules. Calpine, Cross-Sound Cable, and the IROL-Critical Facility Owners⁸⁵ filed comments supporting the Rules. NESCOE conditionally supported the Rules, subject to the FERC providing its requested guidance and clarifications.⁸⁶ Doc-less interventions only were filed by: Brookfield, Dominion, Eversource, Exelon, MA AG, National Grid, NextEra (out-of-time), PSEG, UI, MA DPU, MPUC, Public Citizen, and RESA. This matter is pending before the FERC. If you have any questions concerning this proceeding, please contact Eric Runge (617-345-4735; ekrunge@daypitney.com).

- **Interconnection Service Capability Changes (ER20-450)**

On January 14, 2020, the FERC accepted revisions that consolidate the rules governing the determination of interconnection service capabilities into a single new section of the OATT and to add to those rules an exception to the formulaic determination of winter interconnection service capabilities in certain instances (the "Changes").⁸⁷ The Changes were accepted effective as of January 22, 2020, as requested. Unless the January 14 order is challenged, this proceeding will be concluded. If you have any questions concerning this proceeding, please contact Eric Runge (617-345-4735; ekrunge@daypitney.com).

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

Still pending before the FERC are changes to Schedule 22 of the OATT, filed May 22, 2019 by ISO-NE, NEPOOL and the PTO AC, to: (i) reduce the scope of the Interconnection Feasibility Study ("Feasibility Study") and increase the Reasonable Efforts timeframe for completing that study; and (ii) increase the Reasonable Efforts timeframe for completing the Interconnection System Impact Study ("SIS"). The Filing Parties asked that these changes become effective on the same date that the *Order 845* Changes (see ER19-1951 below) become effective. The *Order 845* compliance changes were supported by the Participants Committee at its May 3, 2019 meeting (Consent Agenda Item #4).

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

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

Similarly, the proposed revisions to the Large Generator Interconnection Procedures ("LGIP") and Agreement ("LGIA") in Schedule 22 of the ISO-NE OATT jointly filed on May 22, 2019 by ISO-NE and the PTO AC ("Filing Parties") in response to the requirements of *Order 845* ("ISO-NE/TO Proposal") remain pending. The Filing Parties asserted that the ISO-NE/TO Proposal "fully compl[ies] with the requirements in Order Nos. 845

⁸⁵ The "IROL-Critical Facility Owners" are: Cogentrix, CSC, FirstLight, NextEra, NRG, and Vistra.

⁸⁶ NESCOE requested that the FERC (i) clarify that any order approving Schedule 17 is limited in scope and does not set broad precedent, (ii) confirm that under no circumstances may IROL-critical facilities recover costs subject to recovery under another provision of the Tariff or under any other mechanism; (iii) clarify that costs eligible for recovery under Schedule 17 must be solely and directly related to ISO-NE's designation; and (iv) clarify that only going-forward costs are eligible for recovery under Schedule 17.

⁸⁷ *ISO New England Inc. et al.*, Docket No. ER20-450 (Jan. 14, 2020) (unpublished letter order).

and 845-A, and request that the Commission accept them as proposed herein, without modifications or conditions, effective upon issuance of its order accepting this filing.” The ISO-NE/TO Proposal did not include the RENEW Amendment’s revisions to the Surplus Interconnection Service provisions supported by the Participants Committee at its May 3 meeting (“NEPOOL Proposal”). The Participants Committee considered but did not support the ISO-NE/TO Proposal (without the RENEW Amendment) at its May 3 meeting.

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

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

On July 11, ISO-NE and the PTO AC answered the comments and protests. This matter is pending before the FERC. If you have any questions concerning this matter, please contact Eric Runge (617-345-4735; ekrunge@daypitney.com).

V. Financial Assurance/Billing Policy Amendments

- **NCFR Rate (ER20-395)**

On January 14, 2020, the FERC accepted without change or condition ISO-NE’s revisions to the Financial Assurance Policy (“FAP”) that will base the financial assurance calculation for non-commercial capacity (“NCFR”), both before and after a Forward Capacity Auction, on Net CONE rather than on the starting price (before the FCA) and the clearing price (after the FCA) (“NCFR Rate Changes”).⁸⁸ As previously reported, ISO-NE identified the following three advantages to the Changes: (i) uniform collateral requirements will provide non-commercial resources an incentive to deliver; (ii) uncertainty regarding the amount of collateral that will be required after an FCA is conducted will be reduced; and (iii) the amount of collateral that must be provided by non-commercial resources *prior to* an FCA will be reduced. ISO-NE explained that whether the changes require increased collateral *after* an FCA will depend on whether Net CONE is higher than the FCA clearing price (in which case the changes represent an increase in post-FCA required collateral) or lower than the FCA clearing price (in which case the changes will represent a decrease in post-FCA required collateral). In accepting the NCFR Rate Changes and the

⁸⁸ *ISO New England Inc.*, 170 FERC ¶ 61,011 (Jan. 14, 2020) (“NCFR Rate Order”).

timing of their application, the FERC did not agree with assertions by NEPGA that new non-commercial capacity clearing in FCA14 and future FCAs are similarly situated to existing non-commercial capacity that first cleared before FCA14 or that the application of the revisions only to non-commercial resources that first clear in FCA14 (and not to resources that first cleared prior to FCA 14 and have yet to reach commercial operation) is unduly discriminatory.⁸⁹ The NCFR Rate Changes were accepted effective January 15, 2020, as requested. Unless the *NCFR Rate Order* is challenged, with any challenges due on or before February 13, 2020, this proceeding will be concluded. If you have any questions concerning this matter, please contact Paul Belval (860-275-0381; pnbelval@daypitney.com).

VI. Schedule 20/21/22/23 Changes

- **Schedule 22: Notice of Cancellation of First Revised Clear River LGIA (ER20-586)**

On January 16, 2020, the FERC accepted the December 12, 2019 notice of cancellation of the First Revised LGIA⁹⁰ by and among ISO-NE, National Grid and Clear River.⁹¹ The LGIA governed the interconnection of Clear River's project in Burrillville, Rhode Island (the "Clear River Project"). The notice of cancellation was accepted effective as of November 25, 2019, as requested. Unless the January 16 order is challenged, this proceeding will be concluded. If you have any questions concerning this matter, please contact Pat Gerity (pmgerity@daypitney.com; 860-275-0533).

- **Schedule 21-ES: Berkshire Phase 2 LSA (ER20-585)**

On December 12, 2019, Eversource filed a Local Service Agreement ("LSA") among NSTAR, Berkshire Wind Power Cooperative Corporation ("Berkshire")⁹² and ISO-NE. The LSA provides for Firm and Non-Firm Local Point-To-Point Transmission Service for Berkshire's use of NSTAR (West)'s local facilities for "wheeling-out" power associated with Phase 2 to the regional transmission system.⁹³ An October 1, 2019 effective date was requested. Comments on this filing were due on or before January 2, 2020; none were filed. This matter is pending before the FERC. If there are questions on this matter, please contact Pat Gerity (860-275-0533; pmgerity@daypitney.com).

- **Schedule 20A-EM: Expiration of Talen IRH Rights Assignment (ER20-375)**

On January 15, 2020, the FERC accepted a revised Schedule 20A-EM filed by Emera Maine as a result of the October 31, 2020 expiration of assignment by BHE to Talen of rights over the Phase I/II HVDC-TF.⁹⁴ Upon the effective date of these changes (November 1, 2020), Emera Maine will offer open access transmission service over the Phase I/II HVDC-TF up to the full extent of its rights under new Support Agreements, as may be agreed to by the owners of the Phase I/II HVDC-TF, Emera Maine, and other IRHs. Unless the January 15 order is challenged, this proceeding will be concluded. If there are questions on this matter, please contact Eric Runge (617-345-4735; ekrunge@daypitney.com).

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

On January 8, 2020, the FERC accepted the joint offer of settlement between Emera Maine and the MPUC submitted May 24, 2019 to resolve certain issues raised by the MPUC in response to Emera Maine's

⁸⁹ *Id.* at PP 14-16.

⁹⁰ The effective, first revised LGIA was accepted in *ISO New England Inc. and New England Power Co.*, Docket No. ER19-2419-000 (Sep. 10, 2019); the original LGIA was accepted in *ISO New England Inc.*, 162 FERC ¶ 61,058 (Jan. 26, 2018).

⁹¹ *ISO New England Inc.*, Docket No. ER20-586 (Jan. 16, 2020) (unpublished letter order).

⁹² Berkshire is a non-profit entity created by 14 Mass. municipal utilities and MMWEC that owns and operates the 15 MW Berkshire Wind Power Project ("Berkshire Wind") located in Lanesboro, MA.

⁹³ A LSA for Phase 1 was filed and accepted in Docket No. ER19-309. See *ISO New England Inc. and NSTAR Elec. Co.*, Docket No. ER19-309 (Jan 2, 2019) (unpublished letter order).

⁹⁴ *ISO New England Inc.*, Docket No. ER20-375 (Jan. 15, 2020) (unpublished letter order).

June 15, 2018 annual charges update (the “Emera 2018 Annual Update Settlement Agreement”).⁹⁵ Unless the *Emera 2018 Annual Update Settlement Agreement Order* is challenged, this proceeding will be concluded. If you have any questions concerning this proceeding, please contact Pat Gerity (860-275-0533; pmgerity@daypitney.com).

- **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*,⁹⁶ and certified by Settlement Judge Dring⁹⁷ to the Commission,⁹⁸ remains pending before the FERC. As previously reported, under the Settlement, permitted cost recovery over a period from June 1, 2018 to May 31, 2021 will be \$390,000 under Attachment P-EM of the BHD OATT and \$260,000 under the MPD OATT. If you have any questions concerning these matters, please contact Pat Gerity (860-275-0533; pmgerity@daypitney.com).

VII. NEPOOL Agreement/Participants Agreement Amendments

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

On January 23, the FERC denied rehearing⁹⁹ of its *Press Membership Provisions Order*.¹⁰⁰ As previously reported, the FERC rejected, on January 30, 2019, the changes to the NEPOOL Agreement that would have precluded press reporters from becoming NEPOOL End User Participants or representatives of NEPOOL Participants. 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.”¹⁰¹

⁹⁵ *ISO New England Inc. and Emera Maine*, 170 FERC ¶ 61,004 (Jan. 8, 2020) (“*Emera 2018 Annual Update Settlement Agreement Order*”).

⁹⁶ *Emera Maine and BHE Holdings*, 155 FERC ¶ 61,230 (June 2, 2016) (“*MPS Merger-Related Costs Order*”). In the *MPS Merger-Related Costs Order*, the FERC accepted, but established hearing and settlement judge procedures for, filings by Emera Maine seeking authorization to recover certain merger-related costs viewed by the FERC’s Office of Enforcement’s Division of Audits and Accounting (“DAA”) to be subject to the conditions of the orders authorizing Emera Maine’s acquisition of, and ultimate merger with, Maine Public Service (“Merger Conditions”). The Merger Conditions imposed a hold harmless requirement, and required a compliance filing demonstrating fulfillment of that requirement, should Emera Maine seek to recover transaction-related costs through any transmission rate. Following an audit of Emera Maine, DAA found that Emera Maine “inappropriately included the costs of four merger-related capital initiatives in its formula rate recovery mechanisms” and “did not properly record certain merger-related expenses incurred to consummate the merger transaction to appropriate non-operating expense accounts as required by [FERC] regulations [and] inappropriately included costs of merger-related activities through its formula rate recovery mechanisms” without first making a compliance filing as required by the merger orders. The *MPS Merger-Related Costs Order* set resolution of the issues of material fact for hearing and settlement judge procedures, consolidating the separate compliance filing dockets.

⁹⁷ 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.

⁹⁸ *Emera Maine and BHE Holdings*, 163 FERC ¶ 63,018 (June 11, 2018).

⁹⁹ *New England Power Pool Participants Comm.*, 170 FERC ¶ 61,034 (Jan. 23, 2020) (“*Press Membership Provisions Rehearing Order*”).

¹⁰⁰ *New England Power Pool Participants Comm.*, 166 FERC ¶ 61,062 (Jan. 29, 2019) (“*Press Membership Provisions Order*”), *reh’g denied*, 170 FERC ¶ 61,034 (Jan. 23, 2020). 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.

¹⁰¹ *Id.* at P 50.

In its request for rehearing and/or clarification, NEPOOL asked the FERC to clarify the extent to which the FERC sought to assert jurisdiction over the NEPOOL Agreement, or in the alternative, grant rehearing on the grounds that the Order reflected an impermissible exercise of the FERC's jurisdiction. The FERC denied rehearing, stating that the *Press Membership Provisions Order* "provided a reasoned explanation of its jurisdiction based directly on the relevant statutory language and its application to the facts presented." The FERC went on to state that "FPA section 205 applies to 'all rules and regulations affecting or pertaining to' jurisdictional rates, and this designation of scope is broad enough to encompass those aspects of NEPOOL operations that the [FERC] found to be jurisdictional in the [*Press Membership Provisions Order*]" and to dismiss the contention that the *Press Membership Provisions Order* could have implications for matters that do not pertain to qualifications for NEPOOL membership. As noted above, the FERC dismissed in a concurrently issued order the RTO Insider Complaint summarized in EL18-196 above. Unless the *Press Membership Provisions Rehearing Order* is challenged in Federal Court, this proceeding will be concluded. 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-A*¹⁰² and *531-B*¹⁰³ 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).

- **Transmission Projects Annual Informational Filing (ER13-193)**

On January 30, 2020, ISO-NE filed, as required under Section 4.1(j)(iii) of the OATT, its annual informational filing of projects on the RSP project list that had a year of need three years or less from the completion of the Needs Assessment. The list of prior year designations is maintained on the ISO-NE website at <https://www.iso-ne.com/static-assets/documents/2020/01/2019-prior-year-projects-section-4-j-iii-final.pdf>. This filing will not be noticed for public comment by the FERC.

- **LFTR Implementation: 45th Quarterly Status Report (ER07-476; RM06-08)**

ISO-NE filed the 45th of its quarterly status reports regarding LFTR implementation on January 15, 2020. ISO-NE reported that it implemented monthly reconfiguration auctions (accepted in ER12-2122)

¹⁰² *Martha Coakley, Mass. Att'y Gen.*, 149 FERC ¶ 61,032 (Oct. 16, 2014) ("*Opinion 531-A*").

¹⁰³ *Martha Coakley, Mass. Att'y Gen.*, Opinion No. 531-B, 150 FERC ¶ 61,165 (Mar. 3, 2015) ("*Opinion 531-B*").

beginning with the month of October 2019. ISO-NE further reported that, while it will continue to evaluate its as-filed LFTR design and financial assurance issues, including an ongoing evaluation of the FTR market and risk associated with FTRs and LFTRs, it is currently focused on higher priority market-design initiatives. These status reports are not noticed for public comment.

IX. Membership Filings

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

On January 31, 2020 NEPOOL requested that the FERC accept (i) the memberships of Avangrid Networks, Inc. [Provisional Member, Related Person to Avangrid Companies (Transmission Sector)]; TrueLight Commodities, LLC (Supplier Sector); and Weaver Wind, LLC (AR Sector, RG Sub-Sector, Large RG Group Member); (ii) the termination of the Participant status of: BBPC LLC d/b/a Great Eastern Energy (Supplier Sector); Precept Power LLC (Supplier Sector); and the TransCanada Companies (TransCanada Power Marketing Ltd, TCPL Power Ltd.; and TransCanada Energy Ltd.) (Supplier Sector); and (iii) the name change of Mercuria Energy America, LLC (f/k/a Mercuria Energy America, Inc.). Comments on this filing are due on or before February 21.

- **January 2020 Membership Filing (ER20-710)**

On December 30, NEPOOL requested that the FERC accept the memberships of Enel Trading North America, LLC ([Related Person to Enel X Companies (AR Sector, LR Sub-Sector)]); MP2 Energy LLC ([Related Person to Shell and MP2 Energy New England (Supplier Sector)]); and Rodan Energy Solutions (USA) Inc. (Provisional Member Group Seat). This matter is pending before the FERC.

- **December 2019 Membership Filing (ER20-493)**

On January 27, the FERC accepted Dichotomy Collins Hydro LLC's membership (AR Sector, RG Sub-Sector, Small Group Member), effective December 1, 2019.¹⁰⁴ Unless the January 27 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 Regional Reliability Standard: PRC-006-NPCC-2 (RD20-1)**

On December 23, 2019, NERC and NPCC filed for approval proposed changes to Regional Reliability Standard PRC-006-NPCC2 (Automatic Underfrequency Load Shedding ("UFLS")), the associated implementation plan, Violation Risk Factors ("VRFs") and Violation Severity Levels ("VSLs"), and the retirement of the current version of the regional reliability standard. The purpose of PRC-006-NPCC-2 is to establish more stringent and specific NPCC UFLS program requirements than the NERC continent-wide PRC-006 standard, such that declining frequency is arrested and recovered in accordance with established NPCC performance requirements. NPCC states that it has revised the currently effective PRC-006-NPCC-1 to remove redundancies with PRC-006-3, clarify obligations for registered entities, improve communication of island boundaries to affected registered entities, and provide entities with the flexibility to calculate net load shed for UFLS in certain situations. NPCC asked that PRC-006-NPCC-2 become effective on the first day of the first calendar quarter following approval, with the exception of R.3, which would become effective one year from the effective date. Comments on the proposed changes were due on or before January 22, 2020; none were filed. This matter is pending before the FERC.

¹⁰⁴ *New England Power Pool Participants Comm.*, Docket No. ER20-493 (Jan. 27, 2020) (unpublished letter order).

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

On January 23, 2020, the FERC issued a NOPR¹⁰⁵ proposing to approve the retirement of 74 of the 77 Reliability Standard requirements requested to be retired by NERC in these two dockets¹⁰⁶ in connection with the first phase of work under NERC's Standards Efficiency Review¹⁰⁷ ("*Retirements NOPR*"). The FERC explained in the *Retirements NOPR* that the requirements to be retired "(1) provide little or no reliability benefit; (2) are administrative in nature or relate expressly to commercial or business practices; or (3) are redundant with other Reliability Standards."¹⁰⁸ The FERC also proposes to approve the associated VRFs, VSLs, implementation plan, and effective dates proposed by NERC. With respect to the remaining three requirements that NERC seeks to retire, the FERC seeks more information on two -- the retirement of FCA-008-3, Requirements R7 and R8 (with the FERC's final determination to be based on the comments received) -- and proposes to remand one -- VAR-001-6 -- in order to retain R2, which it found neither redundant nor unnecessary for reliability. Comments on the *Retirements NOPR* are due [60 days after the date of the NOPR's publication in the *Federal Register*].¹⁰⁹

- **Order 867 - Revised Reliability Standard: TPL-001-5 (RM19-10)**

On January 23, 2020, the FERC approved revised Reliability Standard -- TPL-001-5 (Transmission System Planning Performance Requirements), and its associated implementation plan, VRFs and VSLs (together, the "TPL-001 Changes").¹¹⁰ As previously reported, the TPL-001 Changes are to 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. The FERC determined *not* to direct NERC, as proposed in the *TPL-001-5 NOPR*,¹¹¹ to modify the Reliability Standards to require corrective action plans for protection system single points of failure in combination with a three-phase fault if planning studies indicate potential cascading. *Order 867* will become effective [60 days after the date of publication in the *Federal Register*]. Unless *Order 867* is challenged, this proceeding will be concluded.

¹⁰⁵ *Electric Reliability Organization Proposal to Retire Requirements in Rel. Standards Under the NERC Standards Efficiency Review*, 170 FERC ¶ 61,032 (Jan. 23, 2020).

¹⁰⁶ As previously reported, NERC filed in **RM19-17** for approval (i) the retirement of individual requirements in the following four Reliability Standards: FAC-008-4 (Facility Ratings); INT-006-5 (Evaluation of Interchange Transactions); INT-009-3 (Implementation of Interchange); and PRC-004-6 (Protection System Misoperation Identification and Correction); and (ii) the retirement, in their entirety, of the following 10 Reliability Standards: FAC-013-2 (Assessment of Transfer Capability for the Near-term Transmission Planning Horizon); INT-004-3.1 (Dynamic Transfers); INT-010-2.1 (Interchange Initiation and Modification for Reliability); MOD-001-1a (Available Transmission System Capability); MOD-004-1 (Capacity Benefit Margin); MOD-008-1 (Transmission Readability Margin Calculation Methodology); MOD-020-0 (Providing Interruptible Demands and Direct Control Load Management Data to System Operators and Reliability Coordinators); MOD-028-2 (Area Interchange Methodology); MOD-029-2a (Rated System Path Methodology); and MOD-030-3 (Flowgate Methodology). NERC filed in **RM19-16** for approval of the retirement of individual requirements in the following three Reliability Standards: IRO-002-7 (Reliability Coordination -- Monitoring and Analysis); TOP-001-5 (Transmission Operations); and VAR-001-6 (Voltage and Reactive Control).

¹⁰⁷ The Standards Efficiency Review initiative, which began in 2017, reviewed the body of NERC Reliability Standards to identify those Reliability Standards and requirements that were administrative in nature, duplicative to other standards, or provided no benefit to reliability.

¹⁰⁸ *Id.* at P 1.

¹⁰⁹ The *Retirements NOPR* has not yet been published in the *Fed. Reg.*

¹¹⁰ *Transmission Planning Rel. Standard TPL-001-5*, Order No. 867, 170 FERC ¶ 61,030 (Jan. 23, 2020) ("*Order 867*").

¹¹¹ *Transmission Planning Rel. Standard TPL-001-5*, 167 FERC ¶ 61,249 (June 20, 2019) ("*TPL-001-5 NOPR*").

- **Order 866 - New Reliability Standard: CIP-012-1 (RM18-20)**

On January 23, 2020, the FERC approved new Reliability Standard -- CIP-012-1 (Cyber Security – Communications between Control Centers),¹¹² and associated Glossary definitions, implementation plan, VRFs and VSLs (together, the “Control Center Cyber Security Communication Changes”).¹¹³ *Order 866* also directed NERC to 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. In light of the comments received in response to the *CIP-012-1 NOPR*,¹¹⁴ *Order 866* does not require NERC to clarify the types of data that must be protected.¹¹⁵ *Order 866* will become effective [60 days after the date of its publication in the *Federal Register*]. Unless *Order 866* is challenged, this proceeding will be concluded.

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

On January 23, 2020, the FERC accepted NERC’s Performance Assessment,¹¹⁶ finding (i) that NERC “continues to satisfy the statutory and regulatory criteria for certification as the ERO”; (ii) that the Regional Entities continue to satisfy applicable statutory and regulatory criteria; and (iii) that NERC should take several actions to continue improving its performance as the ERO. Specifically, the FERC directed NERC to submit a 90-day compliance filing providing additional information and a second, 180-day compliance filing revising NERC’s Rules of Procedure to address specific matters as discussed in the *2020 Five Year Order*.¹¹⁷ Challenges, if any, to the *2020 Five Year Order* are due on or before February 24, 2020.

XI. Misc. - of Regional Interest

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

On December 10, 2019, CMP requested authorization to transfer to NECEC Transmission LLC 7 TSAs, executed on June 13, 2018, that provide the rates, terms, and conditions under which transmission service will be provided over the New England Clean Energy Connect (“NECEC”) Transmission Line to the participants that are funding construction of the Line. Comments on the 203 application were due on or before December 31, 2019; none were filed. Doc-less interventions were filed by Eversource, HQUS and National Grid. On January 8, 2020, CMP supplemented the application to correct an error in the accounting entries attached as Exhibit N to the original application. This matter remains pending before the FERC.

¹¹² 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.

¹¹³ *Critical Infrastructure Protection Rel. Standard CIP-012-1 – Cyber Security – Communications between Control Centers*, Order No. 866, 170 FERC ¶ 61,031 (Jan. 23, 2020) (“*Order 866*”).

¹¹⁴ *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*”).

¹¹⁵ *Id.* at P 42.

¹¹⁶ *N. Amer. Elec. Rel. Corp.*, 170 FERC ¶ 61,029 (Jan. 23, 2020) (“*2020 Five Year Order*”). NERC’s performance assessment report, filed July 22, 2019, (i) identified how NERC and its Regional Entities’ activities and achievements during the Assessment Period (2014-2018) build upon the certification criteria of 18 C.F.R. § 39.3(b); (ii) evaluated the effectiveness of each Regional Entity in carrying out its Delegated Authority; and (iii) addressed stakeholder comments on NERC’s performance (specific comments attached as directed by the FERC in *N. Amer. Elec. Rel. Corp.*, 149 FERC ¶ 61,141, at P 70 (2014) (“*2014 Five Year Order*”).

¹¹⁷ *Id.* at P 2.

- **203 Application: Verso/Pixelle (EC20-20)**

On January 17, the FERC authorized the sale of 100% of the indirect membership interests in Verso Energy Services and Verso Androscoggin to Pixelle Specialty Solutions LLC (“Pixelle”).¹¹⁸ Pursuant to the January 17 order, notice must be filed within 10 days of consummation of the sale, which as of the date of this Report has not yet occurred. The change in upstream ownership will not impact Verso’s membership in the Generation Sector.

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

On June 25, the FERC authorized a transaction pursuant to which Emera Maine (though not the Emera Energy Service Companies) will become a wholly-owned, indirect subsidiary of ENMAX Corporation, an Alberta corporation wholly-owned by the City of Calgary, Alberta, Canada (“ENMAX”), rather than Emera Inc.¹¹⁹ Pursuant to the June 25 order, notice must be filed within 10 days of consummation of the transaction, which as of the date of this Report has not yet occurred.

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

On December 19, 2019, in a long-awaited order (approved 2-1),¹²⁰ the FERC *found* that “any resource, new or existing, that receives, or is entitled to receive, a State Subsidy, and does not qualify for [an exemption], should be subject to the [Minimum Offer Price Rule (“MOPR”)]”¹²¹ and *directed* PJM to submit a replacement rate that “extends the MOPR to include both new and existing resources, internal and external, that receive, or are entitled to receive, certain out-of-market payments, with certain exemptions.”¹²² The FERC directed PJM to include five exemptions: (1) a Self-Supply Exemption [PP 12; 202-204]; (2) a Demand Response, Energy Efficiency, and Capacity Storage Resources Exemption [PP 13; 208-209]; (3) a RPS Exemption [PP 14; 173-174]; (4) a Competitive Exemption [PP 15; 161]; and (5) a Unit-Specific Exemption [PP 16; 214-216].¹²³ The FERC established the replacement rate under section 206 of the FPA, but declined to order refunds (which it otherwise had the discretion to do).¹²⁴ The FERC directed PJM to submit a compliance filing consistent with its guidance on or before March 18, 2020 (90 days from the date of the *Dec 2019 PJM MOPR Order*). In the compliance filing, PJM was directed to also provide revised dates and timelines for the 2019 Base Residual Auction (“BRA”) and related incremental auctions, along with revised dates and timelines for the May 2020 BRA and related incremental auctions.¹²⁵

The *Dec 2019 PJM MOPR Order* is the latest milestone in the FERC’s consideration of out-of-market support affecting the PJM capacity market.¹²⁶ As previously reported, the FERC found in a *June 2018 PJM*

¹¹⁸ *Verso Androscoggin LLC and Verso Energy Services LLC*, 170 FERC ¶ 62,037 (Jan. 17, 2020).

¹¹⁹ *Emera Maine*, 167 FERC ¶ 62,194 (June 25, 2019).

¹²⁰ *PJM Interconnection, L.L.C. and Calpine Corp. et al.*, 169 FERC ¶ 61,239 (Dec. 19, 2019) (“*Dec 2019 PJM MOPR Order*”).

¹²¹ *Id.* at P 9 (emphasis added).

¹²² *Id.* at P 2 (“[g]oing forward, the default offer price floor for applicable new resources will be the Net Cost of New Entry (“Net CONE”) for their resource class; the default offer price floor for applicable existing resources will be the Net Avoidable Cost Rate (“Net ACR”) for their resource class”).

¹²³ *Id.* (“The replacement rate will include three categorical exemptions to reflect reliance on prior Commission decisions: (1) existing self-supply resources, (2) existing demand response, energy efficiency, and storage resources, and (3) existing renewable resources participating in RPS programs. The replacement rate will also include a fourth exemption, the Competitive Exemption, for new and existing resources that are not subsidized and thus do not generally require review to protect ‘the integrity and effectiveness of the capacity market.’ To preserve flexibility, PJM will also permit new and existing suppliers that do not qualify for a categorical exemption to justify a competitive offer below the applicable default offer price floor through a Unit-Specific Exemption.”)

¹²⁴ *Id.* at P 3. The FERC had previously established a refund effective date of March 21, 2016, the date of the original Calpine Complaint in EL16-49.

¹²⁵ *Id.* at P 4. As previously reported, the FERC directed PJM not to run the BRA in August 2019 as it had proposed to do (see *Calpine et al. v. PJM*, 168 FERC ¶ 61,051 (July 25, 2019)).

¹²⁶ The *PJM 2019 MOPR Order* addressed a paper hearing that arose from two separate, but related proceedings. The first, EL16-49, was initiated by a complaint originally filed by Calpine, joined by additional generation entities (“*Calpine Complaint*”) on March 21, 2016,

*MOPR Order*¹²⁷ that “the integrity and effectiveness of the capacity market administered by [PJM] have become untenably threatened by out-of-market payments provided or required by certain states for the purpose of supporting the entry or continued operation of preferred generation resources,” determined that the PJM Tariff was unjust and unreasonable, rejected the PJM MOPR Filing, granted in part Calpine’s Complaint, and *sua sponte* initiated a new FPA section 206 proceeding (EL18-178) in which it conducted a paper hearing to resolve proposed alternatives, whether put forth in the *June 2018 PJM MOPR Order* or otherwise,¹²⁸ addressing “price-suppressive” effects of out-of-market support for certain resources.

The *Dec 2019 PJM MOPR Order* affirms the FERC’s prior finding that “[a]n expanded MOPR with few or no exceptions, should protect PJM’s capacity market from the price-suppressive effects of resources receiving out-of-market support by ensuring that such resources are not able to offer below a competitive price.”¹²⁹ The expanded MOPR¹³⁰ only applies to “State-Subsidized Resources” (Resources that receive, or are entitled to receive, State Subsidies).¹³¹ The FERC considers a “State Subsidy” to be:

a direct or indirect payment, concession, rebate, subsidy, non-bypassable consumer charge, or other financial benefit that is (1) a result of any action, mandated process, or sponsored process of a state government, a political subdivision or agency of a state, or an electric cooperative formed pursuant to state law, and that (2) is derived from or connected to the procurement of (a) electricity or electric generation capacity sold at wholesale in interstate commerce, or (b) an attribute of the generation process for electricity or electric generation capacity sold at wholesale in interstate commerce, or (3) will support the construction, development, or operation of a new or existing capacity resource, or (4) could have the effect of allowing a resource to clear in any PJM capacity auction.¹³²

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

¹²⁷ *Calpine Corp. et al.*, 163 FERC ¶ 61,236 (June 29, 2018) (“*June 2018 PJM MOPR Order*”), *clarif. and/or reh’g requested*.

¹²⁸ The proposed alternative approach would have (i) modified PJM’s MOPR such that it would apply to new and existing resources that receive out-of-market payments, regardless of resource type, but would include few to no exemptions; and (ii) in order to accommodate state policy decisions and allow resources that receive out-of-market support to remain online, established an option in PJM’s Tariff that would allow, on a resource-specific basis, resources receiving out-of-market support to choose to be removed from the PJM capacity market, along with a commensurate amount of load, for some period of time. That option, which is similar in concept to the Fixed Resource Requirement (“FRR”) that currently exists in PJM’s Tariff, is referred to as the “FRR Alternative.” Unlike the existing FRR construct, the FRR Alternative would apply only to resources receiving out-of-market support.

¹²⁹ *Dec 2019 PJM MOPR Order* at P 5.

¹³⁰ The FERC adopted an expanded MOPR rather than PJM’s Resource Carve-Out (“RCO”) and Extended RCO proposals. The FERC determined that those proposals would unacceptably distort the markets, inhibiting incentives for competitive investment in the PJM market over the long term. PJM’s longstanding FRR Alternative remains unchanged in the PJM tariff. *See Id.* at P 6.

¹³¹ Resources with federal subsidies will not be subject to the MOPR. *See Id.* at P 10.

¹³² *Id.* at P 9. Renewable Energy Credits (RECs) procured as part of a state-mandated or state-sponsored procurement process are State Subsidies. *Id.* at P 176. Demand response, energy efficiency, and capacity storage resources that participate in the PJM capacity market are considered to be capacity resources for purposes of this definition. *Id.* at P 9.

The FERC declined to adopt a materiality threshold for the level of State Subsidies or the size of State-Subsidized Resources. State-Subsidized Resources “that intend to offer below the default offer price floor for a given resource type, and do not qualify for [one of the four] categorical exemption[s], must support their offers through a Unit-Specific Exemption.”¹³³ While the FERC acknowledged that the extension of the MOPR may prevent certain existing resources that states have recently chosen to subsidize from clearing PJM’s capacity auctions, it noted that states may continue to support their preferred resource types in pursuit of state policy goals and make decisions about preferred generation resources, with “resources that states choose to support, and whose offers may fail to clear the capacity market under the revised MOPR directed in this order, ... still ... permitted to sell energy and ancillary services in the relevant PJM markets.”¹³⁴ The *Order*, the FERC highlighted, “addresses the growing impact of State-Subsidized Resources because those subsidies reject the premise of the capacity market and circumvent competitive outcomes.”¹³⁵

The *Dec 2019 PJM MOPR Order* was accompanied by a 28-page dissent of Commissioner Glick (“Glick Dissent”), who explained why he believes the Order to be “illegal, illogical, and truly bad public policy.”¹³⁶ Commissioner Glick further suggested that it “may well be that a mandatory capacity market is no longer a sensible approach to resource adequacy at a time when states are increasingly exercising their authority under the FPA to shape the generation mix. Indeed, the conclusion that I draw from the record in front of us is not that there is an urgent need to mitigate the effects of state public policies, but rather that we should be taking a hard look at whether a mandatory capacity market remains a just and reasonable resource adequacy construct in today’s rapidly evolving electricity sector.”¹³⁷

Requests for rehearing and/or clarification (“Requests”) of the *Dec 2019 PJM MOPR Order* were filed by over 50 parties, including: PJM IMM, AEP/Duke, AES, Buckeye Power, Calpine, Clean Energy Advocates,¹³⁸ CPower, Dominion, EDF Renewables, Exelon, FirstEnergy Utility Companies, First Energy Solutions, Hershey Co., J-POWER, Longroad Development, PSEG, Vistra, Allegheny Electric Coop., East Kentucky Power Coop. (“EKPC”), IL Municipal Electric Agency, North Carolina Electric Membership Corp., Old Dominion Elec. Coop., the S. MD Elec. Coop, the Organization of PJM States (“OPSI”), DC PSC, IL ICC, MD PSC, NJ BPU, OH PUC, PA PUC, VA State Corporation Commission, WV PSC, DE Public Advocate, DC AG, IL AG, MD AG, NJ Div. of Rate Counsel/People’s Counsel for DC/MD People’s Counsel, OH Consumers’ Counsel, PJM Consumer Representatives,¹³⁹ Advanced Energy Buyers Group, Advanced Energy Economy (“AEE”), APPA/AMP/Public Power Assoc. of NJ, AWEA, ELCON, EPSA and the PJM Power Providers Group, NEI, NRECA/EKPC, and Public Citizen. An answer to PJM IMM’s request for clarification was filed by the Talen PJM Companies. The Requests are pending before the FERC, with FERC action required on or before February 18, 2020, the first business day that is 30 days from the date the first Request was filed, or the Requests will be deemed denied

¹³³ *Id.* (“A threshold based on resource size will not prevent a collection of smaller resources from having a significant cumulative impact on competitive outcomes. In addition, if a State Subsidy is small enough for a capacity resource to perform economically without it, then the State-Subsidized Resource should be able to secure a Unit-Specific Exemption.”)

¹³⁴ *Id.* at P 7.

¹³⁵ *Id.* at P 17.

¹³⁶ Glick Dissent at P 1.

¹³⁷ *Id.* at P 62.

¹³⁸ “Clean Energy Advocates” are, for the purposes of this proceeding, Environmental Defense Fund (“EDF”), Natural Resources Defense Council (“NRDC”), Sierra Club, Sustainable FERC Project, and Union of Concerned Scientists (“UCS”).

¹³⁹ PJM Consumer Representatives are: PJM Industrial Customer Coalition (“PJMICC”), Illinois Industrial Energy Consumers (“IIEC”), the Electricity Consumers Resource Council, (“ELCON”), Industrial Energy Consumers of America (“IECA”), the Pennsylvania Energy Consumer Alliance (“PECA”), the Industrial Energy Consumers of Pennsylvania (“IECPA”), and the American Forest and Paper Association (“AF&PA”).

by operation of law. For further information on this proceeding, please contact Sebastian Lombardi (860-275-0663; slombardi@daypitney.com) or Rosendo Garza (860-275-0660; rgarza@daypitney.com).

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

This proceeding, which could impact potentially impact New England's markets, remains pending. As previously reported, CPV Power Holdings, L.P. ("CPV"), Calpine Corporation ("Calpine"), and Eastern Generation, LLC ("Eastern Generation") (collectively, "PJM MOPR Complainants") filed a complaint on May 31, 2018 requesting that the FERC protect PJM's Reliability Pricing Model ("RPM") market from below-cost offers for resources receiving out-of-market subsidies by requiring PJM to adopt a "Clean MOPR" (i.e. a MOPR applicable to all subsidized resources and without categorical exemptions like those in PJM's MOPR-Ex proposal). PJM MOPR Complainants state that the Complaint offers the FERC a procedural vehicle to require adoption of the "Clean MOPR" that Complainants opine is not otherwise available in EL16-49 and EL18-178 (the PJM MOPR-Related Proceedings). They assert that the "Clean MOPR" is required to effectively address the impacts of state subsidy programs, and is consistent with the FERC's MOPR principles identified in the *CASPR Order*. Comments on the PJM Clean MOPR Complaint were due on or before June 20, 2019. PJM's answer, as well as comments and protests from over 25 parties were filed. Given its potential to impact New England, NEPOOL filed a doc-less motion to intervene. More than 30 other parties also intervened. This matter is pending before the FERC. If you have any questions concerning this proceeding, please contact Sebastian Lombardi (860-275-0663; slombardi@daypitney.com).

- **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).

- **Related Facilities Agreement Cancellations: Clear River Energy (ER20-729/730)**

On January 2, both CL&P (ER20-729) and NSTAR (ER20-730) filed a notice of cancellation of their Related Facilities Agreements ("RFA") with Clear River. The RFAs provided the terms and conditions governing activities and cost responsibility associated with required upgrades in connection with Clear River's LGIA with ISO-NE and National Grid. In light of the cancellation of that LGIA (see ER20-586 in Section VI above), Clear River provided a written notice of cancellation of each of the RFAs on November 25, 2019. Accordingly, CL&P and NSTAR each requested that the notice of cancellation of its RFA with Clear River be accepted as of the November 25, 2019. Comments on these notices were due on or before January 23, 2020; none were filed. These proceedings are pending before the FERC. If there are questions on these proceedings, please contact Pat Gerity (pmgerity@daypitney.com; 860-275-0533).

- **EMM Contract (ER20-619)**

On February 4, 2020, the FERC accepted the new 3-year contract with Potomac Economics, Ltd.¹⁴⁰ pursuant to which Potomac Economics will to continue as the ISO-NE EMM. In its filing, ISO-NE noted that the new agreement is closely modeled on the existing agreement between Potomac and ISO-NE, including all of the functions laid out for the EMM in Section 9.4.3 of the Participants Agreement. The new EMM contract term will run from January 1, 2020 through December 31, 2022. Unless the February 4 order is challenged, this proceeding will be concluded. If there are questions on this matter, please contact Pat Gerity (860-275-0533; pmgerity@daypitney.com).

¹⁴⁰ ISO New England Inc., Docket No. ER20-619 (Feb. 4, 2020).

- **D&E Agreement: CL&P/CPV Towantic (ER20-521)**

On January 22, the FERC accepted the Preliminary Agreement for Design, Engineering and Construction services (the “D&E Agreement”) between Connecticut Light & Power (“CL&P”) and CPV Towantic LLC (“CPV Towantic”).¹⁴¹ The D&E Agreement sets forth the terms and conditions under which CL&P will undertake preliminary design and engineering activities on the mitigation of violations (including reconductoring a 115kV 1029-2 line from Bunker Hill to Baldwin Tap) that were identified in ISO-NE’s studies that preceded the LGIA executed amongst the parties and ISO-NE. The D&E Agreement was accepted for filing effective as of December 5, 2019, as requested. Unless the January 22 order is challenged, this proceeding will be concluded. If you have any questions concerning this matter, please contact Pat Gerity (pmgerity@daypitney.com; 860-275-0533).

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

On May 17, 2019, in response to the requirements of *Order 845*, Emera Maine submitted changes to the LGIP and LGIA in its Open Access Transmission Tariff for the Maine Public District (the “MPD OATT”). Emera Maine request a May 20, 2019 effective for the changes. Though no comments were filed, the FERC issued a letter in a number of utility filing proceedings, including this one, requesting additional information related to the provisions for surplus interconnection service be filed within 30 days (or July 15). Emera Maine filed a response to the FERC’s letter on July 15. Comments on that filing were due on or before August 5; none were filed. This matter remains 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 January 9, 2020, the FERC rejected the amendment filed by Constellation Mystic Power, LLC (“Mystic”) to its COS Agreement with ISO-NE (“Amendment”).¹⁴² As previously reported, the Amendment would have provided “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”. In rejecting the Amendment as unjust and unreasonable, the FERC agreed with protestors that “allowing Mystic 8 and 9 to potentially retire during the second year of the Mystic Agreement’s term would pose an unacceptable risk to reliability”¹⁴³ and disagreed with “Mystic’s contention that the Amendment is necessary for Mystic to manage ongoing uncertainty about certain aspects of the Mystic Agreement.”¹⁴⁴ Unless the *Mystic COS Amendment Order* is challenged, with any challenges due on or before February 10, 2020, this proceeding will be concluded. If you have any questions concerning this matter, please contact Sebastian Lombardi (860-275-0663; slombardi@daypitney.com).

- **FERC Enforcement Action: ExGen Start-Up Fuel Reporting to ISO-NE (IN20-3)**

On January 10, the FERC approved a Stipulation and Consent Agreement with Exelon Generation Company, LLC (“ExGen”)¹⁴⁵ that resolved the investigation by FERC’s Office of Enforcement (“OE”) into erroneous data transmitted to ISO-NE by ExGen regarding the type and quantity of fuel used to start up Mystic 7. OE determined and ExGen admitted that, from December 2014 through August 2016, as a result of an internal spreadsheet error, Mystic 7’s supply offers indicated that it exclusively used No. 6 fuel oil (rather than natural gas) to start up, which caused ExGen to be overcompensated by ISO-NE when Mystic 7 was dispatched out-of-merit. OE did not conclude that ExGen purposefully submitted false data to ISO-NE and accepted the ExGen’s representation that the errors were inadvertent. Under the Stipulation and Consent Agreement,

¹⁴¹ *The Conn. Light and Power Co.*, Docket No. ER20-521 (Jan. 22, 2020) (unpublished letter order).

¹⁴² *Constellation Mystic Power, LLC*, 170 FERC ¶ 61,006 (Jan. 23, 2020) (“*Mystic COS Amendment Order*”).

¹⁴³ *Id.* at P 14.

¹⁴⁴ *Id.* at P 15.

¹⁴⁵ *Exelon Generation Co., LLC*, 170 FERC ¶ 61,008 (Jan. 10, 2020).

ExGen must **disgorge \$101,756** (plus interest) to ISO-NE, to be allocated by ISO-NE in its discretion for the benefit of ISO-NE customers and upon approval by OE's of ISO-NE's plan for doing so, and **pay a \$32,500 civil penalty** to the United States Treasury. If you have any questions concerning this matter, please contact Pat Gerity (860-275-0533; pmgerity@daypitney.com).

- **FERC Enforcement Action: Emera ISO-NE Tariff Violations (IN20-2)**

Also on January 10, the FERC approved a Stipulation and Consent Agreement with Emera Energy ("Emera")¹⁴⁶ that resolved OE's investigation into Emera's violations of the ISO-NE Tariff requirement that Fuel Price Adjustment ("FPA") Requests ("FPA Requests") use fuel costs that reflect an arm's length fuel purchase transaction. OE determined that, on 16 occasions, Emera's FPA Requests for Rumford used information from postings by Emera Energy's gas desk (made specifically to provide the necessary documentation to support an FPA request) rather than information from an arm's length transaction. The reporting resulted in NCP overpayments of \$14,120 when Emera Energy increased its ISO-NE reference level by requesting an above-market fuel price adjustment. Under the Stipulation and Consent Agreement, Emera agreed to **disgorge \$14,120 (plus \$2,002.19 in interest)** to ISO-NE, to be allocated by ISO-NE in its discretion for the benefit of ISO-NE customers, and **pay a \$5,000 civil penalty** to the United States Treasury. If you have any questions concerning this matter, please contact Pat Gerity (860-275-0533; pmgerity@daypitney.com).

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

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

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

On October 25, 2019, the FERC issued an order¹⁴⁷ finding Vitol Inc. ("Vitol") and its co-head of FTR trading operations, Federico Corteggiano, violated from October 28-November 1, 2013, the FERC's Anti-Manipulation Rule by selling physical power at a loss in CAISO's market in order to eliminate congestion that they expected to cause losses on Vitol's congestion revenue rights ("CRRs").¹⁴⁸ The FERC assessed civil penalties of \$1,515,738 against Vitol and \$1 million against Corteggiano. In addition, the FERC directed Vitol to disgorge unjust profits, plus applicable interest of \$1,227,143.

Because Respondents' previously elected the FPA's *de novo* review procedures, which permits a reviewing federal court "to review *de novo* the law and the facts involved" and "jurisdiction to enter a judgment . . . modifying . . . or setting aside [the assessment] in whole or in Part", the *Vitol Penalties Order* is not subject to

¹⁴⁶ *Exelon Generation Co., LLC*, 170 FERC ¶ 61,008 (Jan. 10, 2020).

¹⁴⁷ *Vitol Inc. and Federico Corteggiano*, 169 FERC ¶ 61,070 (Oct. 25, 2019) ("*Vitol Penalties Order*").

¹⁴⁸ Enforcement Staff alleges that Vitol and Corteggiano ("Respondents") sold physical power at a loss at the Cragview node in CAISO's day-ahead market from Oct. 28 through Nov. 1, 2013, in order to eliminate congestion costs that they expected would negatively affect Vitol's CRRs. On Vitol's behalf, Corteggiano purchased CRRs sourcing at Cragview in CAISO's annual CRR auction for 2013. In mid-October 2013, CAISO derated the Cascade intertie to "0" in only the export direction, while still allowing imports. During the derate, an unusually high LMP appeared at Cragview due to congestion costs. The congestion costs caused Respondents' CRRs to lose money. CAISO announced that identical derates would occur during the week of October 28 through November 1 and on additional dates later in November and in December. Respondents were able to protect against losses on their CRR positions for November and December by buying counter-flow CRRs in the CRR auctions for those months (i.e., "flattening" the CRR position). However, because the monthly CRR auction for October had closed, it was too late for Respondents to flatten their CRR position for the last week of October. Facing over \$1.2 million in potential losses on their CRRs during that week's scheduled partial derate, Respondents imported physical power in the day-ahead market at an offering price of \$1/MWh, which prevented a recurrence of the congestion costs that Respondents had observed during the October 18-19 derate. Staff alleges Respondents undertook the import transactions in disregard of market fundamentals and were indifferent to whether they made a profit on them. In fact, Respondents lost money on the imports, but avoided a far larger loss on their CRRs. *Id.* at P 3.

rehearing, and should the penalty remain unpaid for 60 days, the FERC will institute an action in federal district court for an order affirming the penalties assessed against Respondents.

XII. Misc. - Administrative & Rulemaking Proceedings

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

On December 16, 2019, the Energy Trading Institute¹⁴⁹ requested that the FERC hold a technical conference and conduct a rulemaking to update the requirements adopted in *Order 741*¹⁵⁰ and Section 35.47 of the FERC's regulations addressing credit and risk management in the markets operated by RTO/ISOs. ETI, citing a recent filing by NYISO (which it protested),¹⁵¹ and stating that several expedited initiatives related to RTO/ISO credit policies are underway, suggested that it would be helpful for the FERC to consolidate any "filings with this proceeding and hold the technical conference ETI is requesting by March 30, 2020 so the ISOs, RTOs and their stakeholders consider those discussions in any initiatives they have underway." ETI suggested in its request that RTO/ISO credit support requirements be standardized, and that the requested technical conference and rulemaking explore various ways to identify and mitigate counterparty risk (including know-you-customer ("KYC") tools and participant suspensions or bans) and enhance risk management infrastructure/processes within the organized markets. While no technical conference has yet been scheduled or public comment date otherwise set, doc-less interventions have been filed by, among others, PJM, the PJM IMM, SPP, CAISO, Tenaska, Avangrid, and Roscommon Analytics. On January 24, the ISO/RTO Council ("IRC"), including ISO-NE, submitted comments and proposed, as an alternative approach to the one suggested by ETI, that the FERC not commence a rulemaking or schedule a technical conference at this time and instead allow individual RTO/ISOs to address their respective credit and risk management issues, permit sufficient time for experience with the evolving rules to be gained, and then consider the best path forward to facilitate a dialogue on best practices and potential points of alignment among the RTO/ISO.

- **Order 865: Civil Monetary Penalty Inflation Adjustments (RM20-2)**

On January 2, 2020, the FERC issued *Order 865*¹⁵² to amend its regulations governing the maximum civil monetary penalties assessable for violations of statutes, rules, and orders within FERC's jurisdiction. The FERC is required to update each such civil monetary penalty on an annual basis every January 15.¹⁵³ Of particular interest

¹⁴⁹ In its request, The Energy Trading Institute ("ETI") describes itself generally as "represent[ing] a diverse group of energy market participants, all with substantial interests in wholesale electricity transactions in Commission-jurisdictional markets. ETI members provide important services to a wide variety of wholesale energy market participants. They act as intermediaries between producers and consumers of electric energy that have mismatched quantity, timing, and contract type needs. In addition, they provide liquidity by engaging in energy related commercial transactions with a variety of market entities including, but not limited to, generation owners, project developers, load-serving entities, and investors. ETI members advocate for markets that are open, transparent, competitive and fair - all necessary attributes for markets ultimately to benefit electricity consumers."

¹⁵⁰ *Credit Reforms in Organized Wholesale Elec. Mkts.*, 75 Fed. Reg. 65942 (2010), FERC Stats. & Regs. ¶ 31,317 (2010) ("*Order 741*"); *order on reh'g*, 76 Fed. Reg. 10492 (2011), FERC Stats. & Regs. ¶ 31,320 (2011) ("*Order 741-A*"); *order on reh'g*, 135 FERC ¶ 61,242 (2011) ("*Order 741-B*"); 18 C.F.R. § 35.47.

¹⁵¹ See Proposed Tariff Amendments to Enhance Credit Reporting Requirements and Remedies, *New York Indep. Sys. Operator, Inc.*, Docket No. ER20-483 (filed Nov. 26, 2019).

¹⁵² *Civil Monetary Penalty Inflation Adjustments*, Order No. 865, 170 FERC ¶ 61,001 (Jan. 2, 2020) ("*Order 865*").

¹⁵³ See Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Sec. 701, Pub. L. 114-74, 129 Stat. 584, 599. The FERC made its first adjustment under the Act in July 2016. See *Civil Monetary Penalty Inflation Adjustments*, Order No. 826, 81 FR 43937 (July 6, 2016), FERC Stats. & Regs. ¶ 31,386 (2016). The second adjustment was made January 9, 2017. *Civil Monetary Penalty Inflation Adjustments*, Order No. 834, 158 FERC ¶ 61, 170 (Jan. 9, 2017). The third adjustment as made January 8, 2018. *Civil Monetary Penalty Inflation Adjustments*, Order No. 839, 162 FERC ¶ 61,010 (Jan. 8, 2018). The fourth adjustment was made January 9, 2019. *Civil Monetary Penalty Inflation Adjustments*, Order No. 853, 166 FERC ¶ 61,041 (Jan. 8, 2019). The fifth adjustment was made January 14, 2020. *Civil Monetary Penalty Inflation Adjustments*, Order No. 865, 170 FERC ¶ 61,001 (Jan. 2, 2020).

is the increase in potential civil penalties for market manipulation, which were increased from \$1,269,500 to \$1,291,894 per violation, per day. *Order 865* became effective January 14, 2020.¹⁵⁴

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

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

Public comment on the proposal was sought with respect to the following: (i) the potential security benefits from the new proposed format; (ii) potential security concerns that could arise from the new format; (iii) any other implementation difficulties or concerns that should be considered; and (iv) whether the proposed format provides sufficient transparency to the public. Other suggested approaches to CIP NOP submissions were welcomed. No changes to the CIP NOP filing format will be made prior to consideration of public comment on the White Paper. Comments were filed by over 80 parties. This matter is pending before the FERC.

- **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)¹⁵⁵ and terminated the DOE NOPR rulemaking proceeding (RM18-1).¹⁵⁶ In terminating the DOE NOPR proceeding, the FERC concluded that the Proposed Rule and comments received did not support FERC action under Section 206 of the FPA, but did suggest the need for further examination by the FERC and market participants of the risks that the bulk power system faces and possible ways to address those risks in the changing electric markets. On February 7, Foundation for Resilient Societies (“FRS”) requested rehearing of the January 8 order terminating the DOE NOPR proceeding. The FERC issued a tolling order on March 8, 2018 affording it additional time to consider the FRS request for rehearing, which remains pending.

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

¹⁵⁴ *Order 865* was published in the *Fed. Reg.* on Jan. 14, 2020 (Vol. 85, No. 9) pp. 2,016-2,018.

¹⁵⁵ *Grid Rel. and Resilience Pricing*, 162 FERC ¶ 61,012 (Jan. 8, 2018), *reh’g requested*.

¹⁵⁶ 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.

ISO-NE Response. In its response, ISO-NE identified fuel security¹⁵⁷ as the most significant resilience challenge facing the New England region. ISO-NE reported that it has established a process to discuss market-based solutions to address this risk, and indicated that it believed it will need through the second quarter of 2019 to develop a solution and test its robustness through the stakeholder process. In the meantime, ISO-NE indicated that it would continue to independently assess the level of fuel-security risk to reliable system operation and, if circumstances dictate, would take, with FERC approval when required, actions it determines to be necessary to address near-term reliability risks. ISO-NE's response was broken into three parts: (i) an introduction to fuel-security risk; (ii) background on how ISO-NE's work in transmission planning, markets, and operations support the New England bulk power system's resilience; and (iii) answers to the specific questions posed in the January 8 order.

Industry Comments. Following a 30-day extension issued on March 20, 2018, reply comments were due on or before May 9, 2018. NEPOOL's comments, which were approved at the May 4 meeting, were filed May 7, and were among over 100 sets of initial comments filed. A summary of the comments that seemed most relevant to New England and NEPOOL was circulated to the Participants Committee on May 15 and is posted on the [NEPOOL website](#). On May 23, NEPOOL submitted a limited response to four sets of comments, opposing the suggestions made in those pleadings to the extent that the suggestions would not permit full use of the Participant Processes. Supplemental comments and answers were also filed by FirstEnergy, MISO South Regulators, NEI, and EDF. Exelon and American Petroleum Institute filed reply comments. FirstEnergy included in this proceeding its motion for emergency action also filed in ER18-1509 (ISO-NE Waiver Filing: Mystic 8 & 9), which Eversource answered (in both proceedings). Reply comments were filed by APPA and AMP and the Nuclear Energy Institute ("NEI") moved to lodge presentations by the National Infrastructure Advisory Council. On December 6, the Harvard Electricity Law Initiative filed a comment suggesting that, as a matter of law, "Commission McNamee cannot be an impartial adjudicator in these proceedings" and "any proceeding about rates for 'fuel-secure' generators" and should recuse himself. Similarly, on December 18, "Clean Energy Advocates"¹⁵⁸ requested Commissioner McNamee recuse himself from these proceedings. These matters remain pending before the FERC.

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

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

In an action that could have significant impacts on the development and financing of renewable resources, the FERC, on September 19, 2019, proposed rules to reform its long-standing regulations implementing sections 201 and 210 of the Public Utility Regulatory Policies Act of 1978 ("PURPA").¹⁵⁹ Those regulations address the obligation of electric utilities to purchase power produced by "qualifying facilities" or "QFs" at rates that must be "just and reasonable to the electric consumers of the electric utility and in the public interest, and not discriminate against" those QFs.¹⁶⁰

¹⁵⁷ 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."

¹⁵⁸ For purposes of these proceedings, "Clean Energy Advocates" are NRDC, Sierra Club and UCS.

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

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

The *QF NOPR* seeks public comment on draft rule changes “to rebalance the benefits and obligations of the [FERC’s] PURPA Regulations in light of the changes in circumstances since the PURPA Regulations were promulgated.”¹⁶¹ The *QF NOPR* proposes the following changes that would revise how and when prices for QF power may be established and would reduce the circumstances under which a utility’s mandatory purchase obligation would be triggered:

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

Comments on the proposed rule changes were due on or before December 3, 2019.¹⁶² More than 130 sets of comments were submitted, including comments from Bloom Energy, Borrego Solar, ConEd, Covanta, CT PURA, MA AG, MA DPU, and AEE. Since the last Report, several Congressmen have sent comments supporting comments submitted by others. Chairman Chatterjee acknowledged each of the comments received from Congressmen. Late filed comments were submitted by the American Dams, California PUC, TerraForm and the Arizona Corporation Commission. This matter remains pending before the FERC.

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

On November 21, 2019, the FERC issued its final rule a NOPR (“*Order 864*”)¹⁶³ requiring all public utility transmission providers with transmission rates under an OATT, a transmission owner tariff, or a rate schedule to revise those rates to account for changes caused by the 2017 Tax Cuts and Jobs Act (“2017 Tax Law”). Specifically, for transmission formula rates, *Order 864* requires public utilities (i) to deduct excess ADIT from or add deficient ADIT to their rate bases and adjust their income tax allowances by amortized excess or deficient ADIT; and (ii) to incorporate a new permanent worksheet into their transmission formula rates that will annually track ADIT

¹⁶¹ *Qualifying Facility Rates and Requirements; Implementation Issues Under the Public Utility Regulatory Policies Act of 1978*, Notice of Proposed Rulemaking, 168 FERC ¶ 61,184 (2019) (“*QF NOPR*”).

¹⁶² The *QF NOPR* was published in the *Fed. Reg.* on Oct. 4, 2019 (Vol. 84, No. 193) pp. 53,246-53,275.

¹⁶³ *Public Util. Trans. Rate Changes to Address Accumulated Deferred Income Taxes*, Order No. 869, 169 FERC ¶ 61,139 (Nov. 21, 2019), *reh’g requested*.

information. The FERC did not adopt its proposals in the ADIT NOPR¹⁶⁴ that were applicable to public utilities with stated rates. *Order 864* will become effective January 27, 2020. Requests for rehearing were filed by APPA and Exelon. On January 21, 2020, the FERC issued a tolling order affording it additional time to consider the APPA and Exelon requests.

VTransco Extension of Time to File Compliance Filings. On February 3, 2020, the FERC granted VTransco's request that the deadline for submitting its compliance filings be extended until July 31, 2020—the date of the TOs' next annual informational filing for regional formula rates. VTransco stated that the “extension of time will avoid unnecessary duplication of effort by otherwise requiring VTransco to submit multiple compliance filings over the coming months before the details of the PTOs' regional compliance filing are finalized and will enable the Commission to review all of VTransco's compliance filings at the same time, thereby enhancing the efficiency of the regulatory process.”

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

On July 18, the FERC issued its final rule that relieves market-based rate (“MBR”) sellers of the obligation, when seeking to obtain or retain MBR authority in any RTO/ISO market with RTO/ISO-administered energy, ancillary services, and capacity markets subject to FERC-approved RTO/ISO monitoring and mitigation, to submit indicative screens (“*Order 861*”).¹⁶⁵ In RTOs and ISOs that lack an RTO/ISO-administered capacity market, MBR sellers will be relieved of the requirement to submit indicative screens if their MBR authority is limited to sales of energy and/or ancillary services. The FERC's regulations will continue to require RTO/ISO sellers to submit indicative screens for authorization to make capacity sales in any RTO/ISO markets that lack an RTO/ISO-administered capacity market subject to FERC-approved RTO/ISO monitoring and mitigation. The *NOPR* also proposes to eliminate the rebuttable presumption that FERC-approved RTO/ISO market monitoring and mitigation is sufficient to address any horizontal market power concerns regarding sales of capacity in RTOs/ISOs that do not have an RTO/ISO-administered capacity market. For those RTOs/ISOs that do not have an RTO/ISO-administered capacity market, FERC-approved RTO/ISO monitoring and mitigation is no longer presumed sufficient to address any horizontal market power concerns for capacity sales where there are indicative screen failures. *Order 861* will become effective September 24, 2019.¹⁶⁶ CAISO requested clarification and PG&E requested rehearing or in the alternative clarification of *Order 861*. On September 16, 2019, the FERC issued a tolling order affording it additional time to consider the requests for rehearing, which remain pending.

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

In *Order 841*¹⁶⁷ (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*.¹⁶⁸ 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 AD18-10,¹⁶⁹ were also to be filed in RM18-9. On June

¹⁶⁴ *Public Util. Trans. Rate Changes to Address Accumulated Deferred Income Taxes*, 165 FERC ¶ 61,117 (Nov. 15, 2018) (“*ADIT NOPR*”).

¹⁶⁵ *Refinements to Horizontal Market Power Analysis for Sellers in Certain Regional Trans. Org. and Indep. Sys. Op. Mkts.*, Order No. 861, 168 FERC ¶ 61,040 (July 18, 2019).

¹⁶⁶ *Order 861* was published *Fed. Reg.* on July 26, 2019 (Vol. 84, No. 144) pp. 36,374-36,387.

¹⁶⁷ *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*”).

¹⁶⁸ *Elec. Storage Participation in Mkts. Operated by Regional Trans. Orgs. and Indep. Sys. Operators*, 157 FERC ¶ 61,121 (Nov. 17, 2016) (“*Storage NOPR*”).

¹⁶⁹ 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

26, 2018, over 50 parties submitted post-technical conference comments in this proceeding, including comments from ISO-NE, Calpine, Direct, Eversource, Ictec, NRG, Utility Services, EEI, EPRI, EPSA, NARUC, NRECA, and SEI. On February 11, 2019, a group of 18 US Senators submitted a letter urging the FERC to adopt a final rule that enable all DERs the opportunity to participate in the RTO/ISO markets and requesting an update no later than March 1, 2019. Reply comments and answers were submitted by the Arkansas PUC, AEE, AEMA, and the Missouri PUC. APPA/NRECA submitted supplemental comments.

On September 5, the FERC requested that each of the RTO/ISOs provide responses to data requests seeking information on their policies and procedures that affect DER interconnections. The RTO/ISO responses were due and were filed on October 7, 2019. Comments on the responses were filed by 8 parties, including comments addressing ISO-NE's responses by MA DPU, MA DOER and MA AG (collectively, "Massachusetts"), MMWEC, AEE, EEI and NRECA. This matter is pending before the FERC.

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

On July 18, 2019, the FERC issued *Order 860*.¹⁷⁰ *Order 860*, issued three years after the FERC's *Data Collection NOPR*,¹⁷¹ (i) revises the FERC's MBR regulations by establishing a relational database of ownership and affiliate information for MBR Sellers (which, among other uses, will be used to create asset appendices and indicative screens), (ii) reduces the scope of information that must be provided in MBR filings, modifies the information required in, and format of, a MBR Seller's asset appendix, (iii) changes the process and timing of the requirements to advise the FERC of changes in status and affiliate information, and (iv) eliminates the requirement adopted in *Order 816* that MBR Sellers submit corporate organization charts. In addition, the FERC stated that it will not adopt the *Data Collection NOPR* proposal to collect Connected Entity data from MBR Sellers and entities trading virtuals or holding FTRs. The FERC will post on its website high-level instructions that describe the mechanics of the relational database submission process and how to prepare filings that incorporate information that is submitted to the relational database. While *Order 860* will become effective October 1, 2020, submitters will have until close of business on February 1, 2021 to make their initial baseline submissions. In the fall of 2020, submitters will be required to obtain FERC generated IDs for reportable entities that do not have CIDs or LEIs, as well as Asset IDs for reportable generation assets without an EIA code so that every ultimate upstream affiliate or other reportable entity has a FERC-assigned company identifiers ("CID"), Legal Entity Identifier,¹⁷² or FERC-generated ID and that all reportable generation assets have an code from the Energy Information Agency ("EIA") Form EIA-860 database or a FERC-assigned Asset ID. Requests for rehearing and/or clarification of *Order 860* were submitted by EEI, Fund Management Parties, Joint Consumer Advocates, NRG/Vistra, Starwood Energy Group, and TAPS. On September 16, 2019, the FERC issued a tolling order affording it additional time to consider the requests for rehearing, which remain pending.

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

Feb 27, 2020 Technical Conference. On February 27, 2020, FERC staff hold a technical workshop on the relational database being built in accordance with *Order 860* ("MBR Database"). The workshop will take

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.

¹⁷⁰ *Data Collection for Analytics and Surveillance and Market-Based Rate Purposes*, 168 FERC ¶ 61,039 (July 18, 2019) ("*Order 860*").

¹⁷¹ *Data Collection for Analytics and Surveillance and Market-Based Rate Purposes*, 156 FERC ¶ 61,045 (July 21, 2016) ("*Data Collection NOPR*").

¹⁷² An LEI is a unique 20-digit alpha-numeric code assigned to a single entity. They are issued by the Local Operating Units of the Global LEI System.

place from 9:00 a.m. to 12:30 p.m. (EST) in the Commission Meeting Room. All interested persons are invited to attend. For those unable to attend in person, access to the meeting will be available via webcast.

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

On May 16, 2019, the FERC issued a NOPR proposing to incorporate by reference, with certain enumerated exceptions, the latest version (Version 003.2) of certain Standards for Business Practices and Communication Protocols for Public Utilities adopted by the Wholesale Electric Quadrant (“WEQ”) of the North American Energy Standards Board (“NAESB”).¹⁷³ The Version 003.2 Standards include NAESB’s Version 003.1 revisions, which remain pending before the FERC following a July 2016 NOPR.¹⁷⁴ The FERC stated that comments already filed on the revisions made by NAESB in the WEQ Version 003.1 Standards will be given full consideration and need not be repeated in response to this NOPR. This NOPR invites comment on the latest revisions and corrections NAESB made in the WEQ Version 003.2 Standards. The FERC plans to act on all of the Version 003 revisions in this proceeding. NAESB’s WEQ-023 Modeling Business Practice Standards, which concern technical issues affecting the calculation of Available Transfer Capability for wholesale electric transmission services, will be addressed separately. The WEQ Version 003.2 Standards include modifications and reservations to existing standards and newly developed standards made to support the short-term preemption process (WEQ-001-25) and the merger of like transmission reservations (WEQ-001-24) prescribed in the OASIS Suite of Standards. Other changes were made to support consistency with NERC Standards, to support the use of “market operator” as a separate role within the EIR, a NAESB managed industry tool, and on electronic tags (e-Tags), to revise certain Abbreviations, Acronyms, and Definitions of Terms in WEQ-000, and to make minor corrections. Comments on the *NAESB WEQ v. 003.2 Standards NOPR* were due on or before July 23, 2019¹⁷⁵ and were filed by PJM, SPP, MISO, BPA, Southern Company, NV Energy, and Open Access Technology Inc. Also on July 23, NAESB submitted a report notifying the FERC of a minor correction to the Standards. This matter is pending before the FERC.

- **NOI: FERC’s ROE Policy (PL19-4)**

On March 21, 2019, the FERC issued a notice of inquiry seeking information and views to help the Commission explore whether, and if so how, it should modify its policies concerning the determination of the return on equity (“ROE”) to be used in designing jurisdictional rates charged by public utilities.¹⁷⁶ The Commission also seeks comment on whether any changes to its policies concerning public utility ROEs should be applied to interstate natural gas and oil pipelines. This NOI follows *Emera Maine*, which reversed *Opinion 531*, and seeks to engage interests beyond those represented in the *Emera Maine* proceeding (see EL11-66 *et al.* in Section I above). Initial comments were due June 26, 2019; reply comments, July 26, 2019.¹⁷⁷ Initial comments were been submitted by more than 60 organizations; nearly 15,000 initial comments were received from individuals. Reply comments were received from nearly 30 organizations. Further reply comments (also submitted in PL19-3, were submitted by a large group of state public utility commissions, public power utilities, electric cooperatives, consumer advocates, industrial users of electricity, and associations, TEC-RI and the RI Manufacturers Association. Since the last Report, SPP transmission owners submitted comments in

¹⁷³ *Standards for Business Practices and Communication Protocols for Public Utilities*, 167 FERC ¶ 61,127 (May 16, 2019) (“*NAESB WEQ v. 003.2 Standards NOPR*”).

¹⁷⁴ *Standards for Business Practices and Communication Protocols for Public Utilities*, 156 FERC ¶ 61,055 (July 21, 2016), (“*WEQ v. 003.1 NOPR*”).

¹⁷⁵ The *ONAESB WEQ v. 003.2 NOPR* was published in the *Fed. Reg.* on May 24, 2019 (Vol. 84, No. 101) pp. 24,050-24,059.

¹⁷⁶ *Inquiry Regarding the Commission’s Policy for Determining Return on Equity*, 166 FERC ¶ 61,207 (Mar. 21, 2019) (“*ROE Policy NOI*”).

¹⁷⁷ The *ROE Policy NOI* was published in the *Fed. Reg.* on Mar. 28, 2019 (Vol. 84, No. 61) pp. 11,769-11,777.

light of *Opinion 569*¹⁷⁸ and statements made by the FERC concurrent with the issuance of *Opinion 569*. This matter, and its voluminous record, are pending before the FERC.

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

Also on March 21, 2019, the FERC issued a notice of inquiry seeking comment on the scope and implementation of its electric transmission incentives regulations and policy pursuant to section 1241 of the Energy Policy Act of 2005 (“EPAAct 2005”), codified in FPA Section 219, which directed the FERC to use transmission incentives to help ensure reliability and reduce the cost of delivered power by reducing transmission congestion.¹⁷⁹ Given the passage of time since *Order 679* and the FERC’s 2012 Incentives Policy Statement and the “significant developments in how transmission is planned, developed, operated, and maintained,” the FERC stated that “it is appropriate to seek comment ... on the scope and implementation of the Commission’s transmission incentives policy and on how the Commission should evaluate future requests for transmission incentives in a manner consistent with Congress’s direction in section 219” and solicited comment on a variety of transmission incentives-related issues. Initial comments were due June 26, 2019¹⁸⁰ and were filed by more than 70 parties, including by Avangrid, Eversource, Exelon, Invenergy, MMWEC/NHEC, National Grid, NextEra, UCS, NESCOE, Potomac Economics, Southern New England State Agencies, AEE, AWEA, EEI, ESA, NRECA, PIOs, R Street Institute, and TAPS.

On May 10, 2019, APPA, EEI and NRECA, in a motion covering both this and the FERC’s ROE Policy proceeding, requested an extension of time to file reply comments. With respect to this proceeding, and unlike the ROE Policy proceeding, the FERC granted the motion to extend the reply period. Reply comments were due on or before Aug 26, 2019, and nearly 50 sets of reply comments were submitted, including from the entities identified in PL19-4 and from Avangrid, EMCOS, Eversource, Exelon, LS Power, National Grid, and NESCOE. Since the last Report, a group of organizations, led by the CT PURA,¹⁸¹ submitted comments on October 9, 2019 highlighting areas of agreement among them, and urging the FERC “to give these positional agreements consideration in assessing whether—and, if so, how—to modify current transmission incentive policies.” This matter is pending before the FERC.

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

On April 19, 2018, the FERC announced its intention to revisit its approach under its 1999 Certificate Policy Statement to determine whether a proposed jurisdictional natural gas project is or will be required by the present or future public convenience and necessity, as that standard is established in NGA Section 7. Specifically, the NOI¹⁸² 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,¹⁸³ comments were due on

¹⁷⁸ *Ass’n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, Opinion No. 569, 169 FERC ¶ 61,129 (2019) (“*Opinion 569*”).

¹⁷⁹ *Inquiry Regarding the Commission’s Elec. Trans. Incentives Policy*, 166 FERC ¶ 61,208 (Mar. 21, 2019) (“*Electric Transmission Incentives Policy NOI*”).

¹⁸⁰ 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.

¹⁸¹ The group of organizations included CT PURA, DT CEEP, NH PUC, VT DPS, MN PUC, DC PUC, PA PUC, MA AG, CT AG, CT OCC, MMWEC, NHEC, TAPS, and APPA.

¹⁸² The NOI was published in the *Fed. Reg.* on Apr. 26, 2018 (Vol. 83, No. 80) pp. 18,020-18,032.

¹⁸³ *Certification of New Interstate Natural Gas Facilities*, 163 FERC ¶ 61,138 (May 23, 2018).

or before July 25, 2018. Literally thousands of individual and mass-mailed comments were filed. This matter remains pending before the FERC.

XIII. Natural Gas Proceedings

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

- **Natural Gas-Related Enforcement Actions**

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

BP (IN13-15). On July 11, 2016, the FERC issued *Opinion 549*¹⁸⁴ 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.¹⁸⁵ 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."¹⁸⁶ 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.¹⁸⁷ BP was directed to pay the civil penalty and disgorgement amount within 60 days of the *BP Penalties Order*. On August 10, 2016 BP requested rehearing of the *BP Penalties Order*. On September 8, 2018 the FERC issued a tolling order, affording it additional time to consider BP's request for rehearing of the *BP Penalties Order*, which remains pending.

On September 7, 2016, BP submitted a motion for modification of the *BP Penalties Order's* disgorgement directive because it cannot comply with the disgorgement directive as ordered. BP explained that the entity to which disgorgement was to be directed, the Texas Low Income Home Energy Assistance Program ("LIHEAP"), is not set up to receive or disburse amounts received from any person other than the Texas Legislature. In response, on September 12, 2016, the FERC stayed the disgorgement directive (until an order on BP's pending request for rehearing is issued), but indicated that interest will continue to accrue on unpaid monies during the pendency of the stay.¹⁸⁸

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

¹⁸⁴ *BP America Inc.*, Opinion No. 549, 156 FERC ¶ 61,031 (July 11, 2016) ("*BP Penalties Order*").

¹⁸⁵ *BP America Inc.*, 152 FERC ¶ 63,016 (Aug. 13, 2015) ("*BP Initial Decision*").

¹⁸⁶ *BP Penalties Order* at P 3.

¹⁸⁷ *BP America Inc.*, 147 FERC ¶ 61,130 (May 15, 2014) ("*BP Hearing Order*"), *reh'g denied*, 156 FERC ¶ 61,031 (July 11, 2016).

¹⁸⁸ *BP America Inc.*, 156 FERC ¶ 61,174 (Sep. 12, 2016) ("*Order Staying BP Disgorgement*").

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 order¹⁸⁹ 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 2012.¹⁹⁰

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.

- **New England Pipeline Proceedings**

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

- **Constitution Pipeline (CP13-499) and Wright Interconnection Project (CP13-502)**
 - ▶ Constitution Pipeline Company and Iroquois Gas Transmission (Wright Interconnection) concurrently filed for Section 7(c) certificates on June 13, 2013.
 - ▶ 650,000 Dth/d of firm capacity from Susquehanna County, PA (Marcellus Shale) through NY to Iroquois/Tennessee interconnection (Wright Interconnection).
 - ▶ New 122-mile interstate pipeline.
 - ▶ Two firm shippers: Cabot Oil & Gas and Southwestern Energy Services.
 - ▶ Final EIS completed on Oct 24, 2014.
 - ▶ Certificates of public convenience and necessity granted Dec 2, 2014.
 - By letter order issued July 26, 2016, the Director of the Division of Pipeline Certificates (Director) granted Constitution's requested two-year extension of time to construct the project.
 - Construction was expected to begin Spring 2016 (after final Federal Authorizations), but has been plagued by delays (see below).
 - ▶ On April 22, 2016, New York State Department of Environmental Conservation (NY DEC) denied Constitution's application for a Section 401 permit under the Clean Water Act.

¹⁸⁹ *Total Gas & Power North America, Inc.*, 155 FERC ¶ 61,105 (Apr. 28, 2016) ("TGPNA Show Cause Order").

¹⁹⁰ 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.

- 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.¹⁹¹ Although noting that states and project sponsors that engage in repeated withdrawal and refile of applications for water quality certifications are acting, in many cases, contrary to the public interest and to the spirit of the Clean Water Act by failing to provide reasonably expeditious state decisions, the FERC did not conclude that the practice violates the letter of the statute, found factually that Constitution gave the NY DEC new deadlines, and found that the record did not show that the NY DEC in any instance failed to act on Constitution’s application for more than the outer time limit of one year.¹⁹²
 - 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.¹⁹³ On September 14, 2018, Constitution filed a petition for review in the U.S. Court of Appeals for the D.C. Circuit.¹⁹⁴
- ▶ 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

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

¹⁹² *Id.* at P 23.

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

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

answered some of the opposition pleadings. The FERC granted the requested two-year extension of time on November 5, 2018.¹⁹⁵

- ▶ Rehearing of the November 5, 2018 order was requested by Halleran Landowners and a group of intervenors comprised of Catskill Mountainkeeper; Clean Air Council; Delaware-Otsego Audubon Society; Delaware Riverkeeper Network; Riverkeeper, Inc.; and Sierra Club (“Intervenors”). On November 8, 2019, the FERC dismissed or denied the requests for rehearing.¹⁹⁶

- **Non-New England Pipeline Proceedings**

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

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

- ▶ The New York State Department of Environmental Conservation (“NY DEC”) and the Sierra Club requested rehearing of the *Northern Access Certificate Rehearing Order* on August 14 and September 5, 2018, respectively. On August 29, National Fuel Gas Supply Corporation and Empire Pipeline (“Applicants”) answered the NY DEC’s August 14 rehearing request and request for stay. On April 2, 2019, the FERC denied the NY DEC and Sierra Club requests for rehearing.¹⁹⁷ Those orders have been challenged on appeal to the US Court of Appeals for the Second Circuit (19-1610).
- ▶ As previously reported, the August 6, 2018 *Northern Access Certificate Rehearing Order* dismissed or denied the requests for rehearing of the *Northern Access Certificate Order*.¹⁹⁸ 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,¹⁹⁹ 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, 2017.²⁰⁰ 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

¹⁹⁵ *Constitution Pipeline Co.*, 165 FERC ¶ 61,081 (Nov. 5, 2018), *reh’g denied*, 169 FERC ¶ 61,102 (Nov. 8, 2019).

¹⁹⁶ *Constitution Pipeline Co.*, 169 FERC ¶ 61,102 (Nov. 8, 2019) (order on rehearing).

¹⁹⁷ *Nat’l Fuel Gas Supply Corp. and Empire Pipeline, Inc.*, 167 FERC ¶ 61,007 (Apr. 2, 2019).

¹⁹⁸ *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).

¹⁹⁹ 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).

²⁰⁰ *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*”).

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.²⁰¹ On February 2, 2019, the 2nd Circuit vacated the decision of the NY DEC and remanded the case with instructions for the NY DEC to more clearly articulate its basis for the denial and how that basis is connected to information in the existing administrative record. The matter is again before the NY DEC.

- ▶ On November 26, 2018, the Applicants filed a request at FERC for a 3-year extension of time, until February 3, 2022, to complete construction and to place the certificated facilities into service. The Applicants cited the fact that they “do not anticipate commencement of Project construction until early 2021 due to New York's continued legal actions and to time lines required for procurement of necessary pipe and compressor facility materials.” The extension request was granted on January 31, 2019.
- ▶ On August 8, 2019, the NY DEC again denied Applicants request for a Water Quality Certification, and as directed by the Second Circuit,²⁰² provided a “more clearly articulate[d] basis for denial.”
- ▶ On August 27, Applicants requested an additional order finding on additional grounds that the NY DEC waived its authority over the Northern Access 2016 Project under Section 401 of the CWA, even if the NY DEC and Sierra Club prevail in their currently pending court petitions challenging the basis for the Commission's Waiver Order.²⁰³

XIV.State Proceedings & Federal Legislative Proceedings

No Activity to Report

XV.Federal Courts

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

²⁰¹ *Nat'l Fuel Gas Supply Corp. v. NYSDEC et al.* (2d Cir., Case No. 17-1164).

²⁰² Summary Order, *Nat'l Fuel Gas Supply Corp. v. N.Y. State Dep't of Env'tl. Conservation*, Case 17-1164 (2d Cir, issued Feb. 5, 2019).

²⁰³ See *Sierra Club v. FERC*, No. 19-01618 (2d Cir. filed May 30, 2019); *NYSDEC v. FERC*, No. 19-1610 (2d. Cir. filed May 28, 2019) (consolidated).

- **ISO-NE's Inventoried Energy Program (Chapter 2B) Proposal (19-1224***; 19-1247; 19-1252; 19-1253)(consolidated)**

Underlying FERC Proceeding: ER19-1428²⁰⁴

Petitioners: ENECOS (19-1224); MA AG (19-1247); NH PUC/NH OCA (19-1252); RENEW (19-1253)

On October 24, 2019, ENECOS²⁰⁵ petitioned the DC Circuit Court of Appeals for review of the FERC's August 6, 2019 Chapter 2B Notice that ISO-NE's Chapter 2B Proposal took effect by operation of law. MA AG (November 25), the NH PUC and NH OCA (December 3), and RENEW Northeast (December 3) similarly filed separate appeals. All of the cases were ultimately consolidated on December 30, 2019 (with 19-1224 as the lead docket). Petitioners' initial submissions, procedural and dispositive motions were filed on January 6, 2020. Since the last Report, the FERC submitted a motion asking for 60 days between the filing of Petitioners' opening brief and the FERC's brief in response, and filed the Certified Index to the Record. Also, on January 21, the Court granted the motions to intervene of NEPOOL, ISO-NE, NEPGA, Calpine, and the MPUC.

- **Order 841 (19-1142, 19-1147) (consol.)**

Underlying FERC Proceeding: RM16-23; AD16-²⁰⁶

Petitioners: NARUC, APPA et al.

NARUC and APPA et al.²⁰⁷ petitioned the DC Circuit Court of Appeals for review of *Orders 841* and *841-A* (Electric Storage Participation in RTO/ISO Markets). The cases have been consolidated, with 19-1142 as the lead docket. Docketing statements, statement of issues and interventions,²⁰⁸ Petitioners' and Intervenor's for Petitioners' briefs, and FERC's Respondent Brief have been filed. Future deadlines include: Joint Briefs of Environmental and Industry Intervenor's for Respondent (Feb. 7, 2020); Petitioners' and Intervenor for Petitioners Reply Briefs (Mar. 2, 2020); Deferred Joint Appendix (Mar. 9, 2020); and Final Briefs (Mar. 16, 2020).

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

Underlying FERC Proceeding: EL14-7,²⁰⁹ EL15-23²¹⁰

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).²¹¹ 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.

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

²⁰⁵ "ENECOS" are Belmont; Block Island Utility District; Braintree; Energy New England ("ENE"); Georgetown Municipal Light Department; Groveland; Hingham; Littleton; Merrimac; Middleborough; Middleton; North Attleborough; Norwood; Pascoag; Reading; Rowley; Stowe; Taunton; and Wellesley.

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

²⁰⁷ "APPA et al." are the American Public Power Assoc. ("APPA"), National Rural Elec. Coop. Assoc. ("NRECA"), Edison Electric Institute ("EEL"), and American Municipal Power, Inc. ("AMP").

²⁰⁸ Interventions were filed and granted for Southern California Edison, Energy Storage Association ("ESA"), Transmission Access Policy Study Group ("TAPS"), Solar Energy Industries Association ("SEIA"), AEE, NRDC, EDF, Vote Solar, MISO, and NextEra Energy Resources.

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

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

²¹¹ *New England Power Generators Assoc. v FERC*, 881 F.3d 202 (DC Cir. 2018).

Other Federal Court Activity of Interest

- **PG&E Bankruptcy (19-71615) (9th Cir.)**
Underlying FERC Proceeding: EL19-35, EL19-36²¹²
Petitioner: PG&E

On June 26, PG&E appealed the FERC's orders finding that it has concurrent jurisdiction with the bankruptcy courts to review and address the disposition of wholesale power contracts sought to be rejected through its bankruptcy. On July 11, PG&E moved to suspend the briefing schedule pending the Court's decision on whether to authorize direct appeal of a decision by the Bankruptcy Court in the Northern District of California. In a declaratory judgment, the Bankruptcy Court came to a completely different conclusion than the FERC and held that it has "original and exclusive jurisdiction over . . . [PG&E's] rights to assume or reject executory contracts under 11 U.S.C. § 365" and that the FERC "does not have concurrent jurisdiction, or any jurisdiction, over the determination of whether any rejections of power purchase contracts by [PG&E] should be authorized."²¹³ Because of the opposite conclusions, PG&E suggested that, should the Ninth Circuit allow the direct appeal of the Bankruptcy Court decision, the two appeals should proceed together. The PG&E motion was granted on August 1.

Since the last Report, PG&E submitted its Reply Brief. This matter remains before the Ninth Circuit.

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

In this proceeding, the FERC appealed an Ohio bankruptcy court's August 2018 ruling that blocked the FERC from taking *any* action on FirstEnergy Solutions Corp.'s agreement with Ohio Valley Electric Corp. (a power purchase agreement that FES seeks to reject as part of its bankruptcy proceedings). The FERC asked the Sixth Circuit to vacate the bankruptcy court order, claiming that the ruling usurps its FPA authority over wholesale electricity contracts. Oral argument was held on June 26, 2019. This matter was decided. 2-1, on December 12, 2019.²¹⁴

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

On January 27, the FERC petitioned for *en banc* rehearing of the December 12 decision. That petition is pending before the 6th Circuit.

²¹² *NextEra Energy, Inc. v. PG&E*, 166 FERC ¶ 61,049 (Jan. 25, 2019); *Exelon Corp. v. PG&E*, 166 FERC ¶ 61,053 (Jan. 28, 2019); *Order Denying Rehearing*, 167 FERC ¶ 61,096 (May 1, 2019).

²¹³ Declaratory Judgment at 1-2, *PG&E v. FERC*, (Bankr. N.D. Cal. June 7, 2019).

²¹⁴ *In re: FirstEnergy Solution Corp., et al.*, No. 18-3767, ___ F.3d ___; 2019 WL 6767004 (6th Cir. Dec. 12, 2019).

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

Underlying FERC Proceeding: CP15-558²¹⁵

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

Pending before the DC Circuit is an appeal of the FERC's orders granting certificates of public convenience and necessity to PennEast Pipeline Company, LLC ("PennEast")²¹⁶ for the construction and operation of a new 116-mile natural gas pipeline from Luzerne County, Pennsylvania, to Mercer County, New Jersey, along with three laterals extending off the mainline, a compression station, and appurtenant above ground facilities ("PennEast Project"). All briefing is complete and oral argument was scheduled for October 4, 2019. However, on October 1, the court removed the cases from the oral argument calendar and will hold the cases in abeyance "pending final disposition of any post-dispositional proceedings in the Third Circuit or proceedings before the United States Supreme Court resulting from the Third Circuit's decision in No. 19-1191 (In re: PennEast Pipeline Company, LLC (3rd Cir. Sep. 10, 2019)), or other action that resolves the obstacle PennEast poses". That decision held that the Eleventh Amendment barred condemnation cases brought by PennEast in federal district court in New Jersey to gain access to property owned by the State or its agencies, thus calling into question the viability of PennEast's proposed project route, and the certificates issued in the underlying case. Until the Third Circuit case is resolved, the DC Circuit will not take up this case.

²¹⁵ *PennEast Pipeline Co., LLC*, 162 FERC ¶ 61,053 (Jan. 19, 2018), *reh'g denied*, 163 FERC ¶ 61,159 (May 30, 2018).

²¹⁶ 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.

INDEX
Status Report of Current Regulatory and Legal Proceedings
as of February 4, 2020

I. Complaints/Section 206 Proceedings

| | | |
|---|--|---|
| 206 Investigation: ISO-NE Implementation of <i>Order 1000</i> Exemptions for Immediate Need Reliability Projects | (EL19-90)..... | 1 |
| 206 Proceeding: RNS/LNS Rates and Rate Protocols..... | (EL16-19-002)..... | 3 |
| Base ROE Complaints I-IV: | (EL11-66, EL13-33; EL14-86; EL16-64) | 4 |
| Energy Security Improvements (Chapter 3) | (EL18-182)..... | 2 |
| RTO Insider Press Policy Complaint | (EL18-196)..... | 2 |

II. Rate, ICR, FCA, Cost Recovery Filings

| | | |
|---|-----------------------|----|
| 206 Proceeding: RNS/LNS Rates and Rate Protocols..... | (EL16-19-002)..... | 3 |
| Attachment F Modification: Inclusion of UI’s Pequonnock Substation Project CWIP | (ER20-499) | 7 |
| Energy Security Improvements (Chapter 3) | (EL18-182)..... | 2 |
| FCA14 Qualification Informational Filing..... | (ER20-308) | 7 |
| MPD OATT 2018 Annual Informational Filing..... | (ER15-1429-010) | 10 |
| MPD OATT 2019 Annual Informational Filing..... | (ER15-1429-000) | 10 |
| Mystic 8/9 Cost of Service Agreement | (ER18-1639) | 8 |
| TOs’ <i>Opinion 531-A</i> Compliance Filing Undo..... | (ER15-414) | 11 |

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

| | | |
|---|-----------------------------|----|
| 2013/14 Winter Reliability Program Remand Proceeding..... | (ER13-2266) | 20 |
| CASPR..... | (ER18-619) | 19 |
| CONE & ORTP Updates | (ER17-795) | 20 |
| Economic Life Determination Revisions | (ER18-1770) | 16 |
| Energy Security Improvements (Chapter 3) | (EL18-182)..... | 2 |
| Fuel Security Retention Limit Revision | (ER20-89) | 13 |
| Fuel Security Retention Proposal | (ER18-2364) | 16 |
| Fuel Security Retention Sunset..... | (ER20-645) | 12 |
| ISO-NE eTariff Versioning True-Up | (ER20-763) | 11 |
| ISO-NE Waiver Filing: Mystic 8 & 9..... | (ER18-1509; EL18-182) | 17 |
| ISO-NE Waiver Request: FCA15 De-List Bids Submission Deadline | (ER20-759) | 11 |
| <i>Order 841</i> Compliance Filing..... | (ER19-470) | 14 |
| Waiver Request: FCA14 Qualification (CPower) | (ER20-458) | 12 |
| Waiver Request: FCA14 Qualification (Genbright II) | (ER20-366) | 12 |
| Waiver Request: Vineyard Wind FCA13 Participation | (ER19-570) | 11 |

IV. OATT Amendments/Coordination Agreements

| | | |
|---|-------------------|----|
| 206 Investigation: ISO-NE Implementation of <i>Order 1000</i> Exemptions for Immediate Need Reliability Projects | (EL19-90)..... | 1 |
| CIP IROL Cost Recovery Rules | (ER20-739) | 20 |
| Interconnection Service Capability Changes | (ER20-450) | 21 |
| Interconnection Studies Scope and Reasonable Efforts Timelines Changes..... | (ER19-1952) | 21 |
| ISO-NE <i>Order 845</i> Compliance Filing | (ER19-1951) | 21 |

V. Financial Assurance/Billing Policy Amendments

NCFA Rate (ER20-395) 22

VI. Schedule 20/21/22/23 Updates

Schedule 20A-EM: Expiration of Talen IRH Rights Assignment (ER20-375) 23
 Schedule 21-EM: 2018 Annual Update Settlement Agreement (ER15-1434-003) 23
 Schedule 21-EM: Bangor Hydro/Maine Public Service Merger-Related Costs Recovery (ER15-1434-001 et al.) 24
 Schedule 21-ES: Berkshire Phase 2 LSA (ER20-585) 23
 Schedule 22: Notice of Cancellation of First Revised Clear River LGIA (ER20-586) 23

VII. NEPOOL Agreement/Participants Agreement Amendments

132nd Agreement (Press Membership Provisions) (ER18-2208) 24

VIII. Regional Reports

LFTR Implementation: 45th Quarterly Status Report (ER07-476; RM06-08) 25
 Opinion 531-A Local Refund Report: FG&E (EL11-66) 25
 Opinions 531-A/531-B Local Refund Reports (EL11-66) 25
 Opinions 531-A/531-B Regional Refund Reports (EL11-66) 25
 Transmission Projects Annual Informational Filing (ER13-193) 25

IX. Membership Filings

132nd Agreement (Press Membership Provisions) (ER18-2208) 24
 December 2019 Membership Filing (ER20-493) 26
 February 2020 Membership Filing (ER20-923) 26
 January 2020 Membership Filing (ER20-710) 26
 RTO Insider Press Policy Complaint (EL18-196) 2

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

5-Year ERO Performance Assessment Report (RR19-7) 28
 Joint Staff White Paper on Notices of Penalty for Violations of CIP Standards (AD19-18) 36
 NOPR - Retirement of Reliability Standard Requirements (Standards Efficiency Review) ... (RM19-17; RM19-16) 27
 Order 866 - New Reliability Standard: CIP-012-1 (RM18-20) 28
 Order 867 - Revised Reliability Standard: TPL-001-5 (RM19-10) 27
 Revised Regional Reliability Standard: PRC-006-NPCC-2 (RD20-1) 26

XI. Misc. Regional Interest

203 Application: CMP/NECEC (EC20-24) 28
 203 Application: Emera Maine/ENMAX (EC19-80) 29
 203 Application: Verso/Pixelle (EC20-20) 29
 D&E Agreement: CL&P/CPV Towantic (ER20-521) 33
 Emera Maine Order 845 Compliance Filing (ER19-1887) 33
 EMM Contract (ER20-619) 32
 FERC Enforcement Action: Emera ISO-NE Tariff Violations (IN20-2) 34
 FERC Enforcement Action: ExGen Start-Up Fuel Reporting to ISO-NE (IN20-3) 33
 FERC Enforcement Action: Formal Investigation
 (MISO Zone 4 Planning Resource Auction Offers) (IN15-10) 34
 FERC Enforcement Action: Show Cause Order – Vitol & F. Corteggiano (IN14-4) 34
 Mystic COS Agreement Amendment No. 1 (ER19-1164) 33
 NYISO MOPR-Related Proceeding (EL13-62) 32

PJM Clean MOPR Complaint..... (EL18-169)..... 32
 PJM MOPR-Related Proceedings..... (EL18-178; EL16-49)..... 29
 Related Facilities Agreement Cancellations: Clear River Energy (ER20-729/730)..... 32

XII. Misc: Administrative & Rulemaking Proceedings

Credit Reforms in Organized Wholesale Markets (AD20-6)..... 35
 DER Participation in RTO/ISOs (RM18-9)..... 39
 FirstEnergy DOE Application for Section 202(c) Order 36
 Grid Resilience in RTO/ISOs; DOE NOPR..... (AD18-7)..... 36
 Joint Staff White Paper on Notices of Penalty for Violations of CIP Standards..... (AD19-18)..... 36
 NOI: Certification of New Interstate Natural Gas Facilities (PL18-1)..... 42
 NOI: Electric Transmission Incentives Policy (PL19-3)..... 42
 NOI: FERC’s ROE Policy (PL19-4)..... 41
 NOPR: NAESB WEQ Standards v. 003.2 - Incorporation by Reference into FERC Regs (RM05-5-027)..... 41
 NOPR: Public Util. Trans. ADIT Rate Changes (RM19-5)..... 38
 NOPR: QF Rates and Requirements; Implementation Issues under PURPA..... (RM19-15)..... 37
Order 860: Data Collection for Analytics & Surveillance and MBR Purposes (RM16-17)..... 40
Order 861: Refinements to Horizontal Market Power Analysis Requirements (RM19-2)..... 39
Order 865: Civil Monetary Penalty Inflation Adjustments..... (RM20-2)..... 35

XIII. Natural Gas Proceedings

Enforcement Action: BP Initial Decision (IN13-15)..... 43
 Enforcement Action: Total Gas & Power North America, Inc..... (IN12-17)..... 43
 New England Pipeline Proceedings 44
 Non-New England Pipeline Proceedings 46

XIV. State Proceedings & Federal Legislative Proceedings

No Activity to Report

XV. Federal Courts

FCM Pricing Rules Complaints 15-1071/16-1042(DC Cir.).... 48
 First Energy Solutions Bankruptcy 18-3787 (6th Cir.)..... 49
 ISO-NE’s Inventoried Energy Program (Chapter 2B) Proposal..... 19-1224 (DC Cir.)..... 48
Order 841 19-1142/47 (DC Cir.)..... 48
 PennEast Project..... 18-1128.... (DC Cir.)..... 50
 PG&E Bankruptcy..... 19-71615... (9th Cir.)..... 49