EXECUTIVE SUMMARY
Status Report of Current Regulatory and Legal Proceedings
as of September 29, 2020

The following activity, as more fully described in the attached litigation report, has occurred since the report dated September 1, 2020 ("last Report") was circulated. New matters/proceedings since the last Report are preceded by an asterisk '*'. Page numbers precede the matter description.

COVID-19

	Page	Matter	Date	Activity
	1	Remote ALJ Hearings (AD20-12)	Sep 23	"Remote Hearing Guidance for Participants" revised to make 3 changes

I. Complaints/Section 206 Proceedings

	Page	Matter	Date	Activity
	2	New England Generators' Exelon Complaint (EL20-67)	Sep 2-14	Eversource, MA AG, National Grid intervene
			Sep 14	Exelon answers Complaint; NESCOE, Public Systems and Connecticut Parties file comments supporting Complaint
			Sep 28	NEPGA answers Exelon's answer
	3	206 Proceeding: FCM Pricing Rules Complaints Remand (EL20-54)	Sep 17	ESA intervenes (out-of-time)
			Sep 23	Reply Briefs filed by ISO-NE, BSW Project Co, MA AG, NEPGA, MA AG, CT PURA, PJM IMM, RENEW/ESA
	4	Exelon PP-10 Complaint (EL20-52)	Sep 16	Exelon request rehearing of *Order Denying PP-10 Complaint*; FERC action required on or before Oct 16
	5	206 Investigation Into ISO-NE Implementation of Order 1000 Exemptions for Immediate Need Reliability Projects (EL19-90)	Sep 29	FERC issues *Order 1000 Exemptions Allegheny Order* addressing arguments raised in requests for rehearing of the FERC's *Order Terminating Proceeding*

II. Rate, ICR, FCA, Cost Recovery Filings

	Page	Matter	Date	Activity
	9	Mystic 8/9 Cost of Service Agreement (ER18-1639)	Sep 17	FERC issues Notice of Denial by Operation of Law of the requests for rehearing of its *July 17 Orders*
		July 17 Orders	Sep 8-16	Mystic, MA AG, CT Parties, NESCOE appeal to the DC Circuit one or more of the *July 2018, Dec 2018, or July 17 Orders*
		ROE Paper Hearing	Sep 28	CT Parties, EMCOS, MA AG, and FERC Trial Staff file initial briefs presenting written evidence applying the FERC's *Opinion 569-A* ROE methodology to the facts of this proceeding; responses due ***Oct 28, 2020***
		Sep 2020 Compliance Filing	Sep 15	Mystic submits changes to COS Agreement in response to requirements of *July 17 Compliance Order*; comment date ***Oct 6, 2020***

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

	Page	Matter	Date	Activity
*	10	Gross Load Forecast Reconstitution Revisions (ER20-2869)	Sep 11	ISO-NE and NEPOOL jointly file revisions; comment date ***Oct 2, 2020***
			Sep 14-29	Acadia Center, Calpine, Dominion, Eversource, Exelon, FirstLight, National Grid, NESCOE, NRDC/Sustainable FERC Project, NRG intervene
	11	Information Policy §2.3 Revisions (ER20-2518)	Sep 17	FERC accepts revisions; eff. Oct 1, 2020
	11	DAM Offer Window Modification (ER20-2511)	Sep 28	FERC accepts modification, eff. Sep 30, 2020
	11	Waiver Request: Settlement Only Resources Definition -- GMP's Searsburg facility (ER20-1755)	Sep 17	FERC denies requested waiver of definition of Settlement Only Resource for GMP's Searsburg facility

	12	*Order 841* Compliance Filings (Electric Storage in RTO/ISO Markets) (ER19-470)	Sep 10	FERC grants NEPOOL and ISO-NE request for a 35-day extension of time to comply with requirements in the *Order 841 Compliance Filing II Order;* compliance filing due ***Dec 7, 2020***

V. OATT Amendments / TOAs / Coordination Agreements

	17	CIP IROL Cost Recovery Rules (ER20-739)	Sep 17	FERC issues *CIP IROL Allegheny Order* addressing arguments raised by the IROL-Critical Facility Owners in their request for rehearing of the FERC's *CIP IROL Cost Recovery Order*
	17	*Order 845* Compliance Filing II (ER19-1951-002)	Sep 17	FERC accepts Jul 17, 2020 compliance filing, eff. Mar 19, 2020

V. Financial Assurance/Billing Policy Amendments

	17	FAP Enhancements and Clean-Up Changes (ER20-2145)	Sep 2	FERC accepts changes, eff. Sep 10, 2020

VI. Schedule 20/21/22/23 Changes

	18	Schedule 22: NSTAR/Vineyard Wind LGIA (ER20-2489)	Sep 17	FERC accepts LGIA, eff. Jul 10, 2020
	18	Schedule 21-NEP: DWW E&P Agreement (ER20-2454)	Sep 14	FERC accepts Agreement, eff. Jun 17, 2020

VII. NEPOOL Agreement/Participants Agreement Amendments

No Activity to Report

VIII. Regional Reports

*	21	FCA14 Fuel Security Reliability Review Info Filing (ER18-2364)	Sep 25	ISO-NE files report assessing the study triggers, assumptions and scenarios used by ISO-NE in its FCA14 fuel security reliability review in comparison to actual conditions experienced during Winter 2019-20
*	21	ISO-NE Third Revised 2018 FERC Form 714 (not docketed)	Sep 3	ISO-NE submits third revision to 2018 FERC Form 714

IX. Membership Filings

	21	August 2020 Membership Filing (ER20-2581)	Sep 22	FERC accepts memberships of: Blueprint Power Technologies Inc. (Provisional Member); and Advanced Energy Economy Inc. (Fuels Industry Participant); and (ii) the termination of the Participant status of two End Users, New Hampshire Industries Inc. and TEC-RI

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

*	22	Cyber Planning for Response and Recovery Study (CYPRES) Report (not docketed)	Sep 14	FERC and NERC Staff publish a report on cyber planning for response and recovery that outlines best practices for the electric utility industry
	22	Joint Staff White Papers on Notices of Penalty for Violations of CIP Standards (AD19-18)	Sep 23	Joint Staffs issue Second White Paper; going forward, CIP non-compliance submissions will be filed and designated as CEII and NERC will no longer publicly post redacted versions of such submissions
	23	CIP Standards Development: Virtualization & Cloud Computing Services Projects (RD20-2)	Sep 17	NERC submits quarterly informational filing, reporting revised schedules (3-mo. delay) for Project 2016-02 (now targeted for a Mar 2022 filing) and Project 2019-02 (now targeted for a Mar 2021 filing)

XI. Misc. - of Regional Interest

*	25	203 Application: Millennium Power Partners (EC20-103)	Sep 18	Millennium requests authorization for transaction pursuant to which Beal Bank will acquire from Talen all of Millennium's membership interests; comment date ***Oct 9***
			Sep 24	Public Citizen intervenes
*	25	D&E Agreement: CL&P/UConn (ER20-2927)	Sep 21	CL&P files Agreement for D&E services related to UConn's increase of the real power capacity of the transmission service to its large generating facility; comment date ***Oct 9***
*	26	D&E Agrm't Cancellation: NSTAR/ Vineyward Wind (ER20-2915)	Sep 18	NSTAR submits notice of cancellation of D&E Agreement; comment date Oct 7
*	26	LGIA Cancellations: Superseded Great River Hydro LGIAs (Moore, Vernon, Comerford) (ER20-2897 et al.)	Sep 3, 16	National Grid files notice of cancellation of LGIAs superseded by, and to become effective concurrently with the effectiveness of, new conforming LGIAs among ISO-NE, NEP and Great River Hydro
	26	Use Rights Transfer Agreement: NSTAR/HQUS (ER20-2724)	Sep 16	National Grid intervenes (out-of-time)
	27	D&E Agreement Cancellation: CL&P-NTE CT (ER20-2327)	Sep 3	FERC accepts notice of cancellation, eff. Jun 16, 2020

XII. Misc. - Administrative & Rulemaking Proceedings

28	Carbon Pricing in RTO/ISO Markets Tech Conf (Sep 30, 2020) (AD20-14)	Sep 16	FERC issues third supplemental notice of tech conf.
28	Hybrid Resources Tech Conf (Jul 23, 2020) (AD20-9)	Sep 23-28	Post-tech conf comments filed by ISO-NE, Enel, EEI, CAISO, MISO, NYISO, R Street, Savion, SEIA
32	*Order 872*: Pricing and Eligibility Changes to PURPA Regulations (RM19-15)	Sep 17	FERC issues Notice of Denial by Operation of Law of requests for reh'g of *Order 872*, though it indicated that the requests would be addressed in a future order (which can be issued up until the record of the proceeding is filed with the Court of Appeals)
		Sep 18	SEIA petitions 9th Circuit for review of *Order 872*
33	*Order 2222*: DER Participation in RTO/ISO Markets (RM18-9)	Sep 17	FERC issues Order 2222; RTO/ISO compliance filings due within [270 days of the publication date of *Order 2222* in the *Federal Register*]

XIII. Natural Gas Proceedings

40	Iroquois ExC Project (CP20-48)	Sep 3, 18, 21	Iroquois further supplements application
		Sep 14	FERC issues data request regarding A&G Expenses
		Sep 21	Iroquois responds to Sep 14 data request

XIV. State Proceedings & Federal Legislative Proceedings

No Activity to Report

XV. Federal Courts

*	43	Mystic 8/9 Cost of Service Agreement (20-1343 et al. (consol.)	Sep 8	Mystic appeals *Mystic Orders*; Clerk issues order requiring appearances, docketing statement, procedural motions (if any), statement of issues to be filed by Oct 8; certified index to the record and dispositive motions by Oct 23
			Sep 16-18	NESCOE, MA AG, CT Parties also appeal certain of *Mystic Orders*; cases consolidated with 20-1343

	43	CASPR (20-1333)	Sep 2	Clerk issues order requiring appearances, docketing statement, procedural motions (if any), statement of issues to be filed by Oct 2; certified index to the record and dispositive motions by Oct 16
	43	2013/14 Winter Reliability Program Order on Compliance and Remand (20-1289, 20-1366) (consol.)	Sep 15	TransCanada again files appeal following FERC's Aug 27, 2020 Order Addressing Arguments Raised on Rehearing
			Sep 16	Cases consolidated; deadline for submission of certified index to the record extended to Oct 29, 2020
*	44	*Order 872* (20-72728) (9th Cir.)	Sep 17	SEIA petitions 9th Circuit for review of *Order 872*

M E M O R A N D U M

TO: NEPOOL Participants Committee Members and Alternates

FROM: Patrick M. Gerity, NEPOOL Counsel

DATE: September 29, 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 September 29, 2020. If you have questions, please contact us.

COVID-19

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

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

Interested parties were invited to file, on or before August 31, 2020, post-technical conference comments on any or all of the topics discussed at the July 8-9 technical conference, as well as to respond to the questions outlined in the July 1, 2020 supplemental notice of technical conference. Comments were filed by AEP, APPA, America Forest & Paper, America's Power, EEI, IEEE Power & Energy Society, Clearview Energy Partners, TAPS, Assoc. of Oil Pipelines, Pilot Travel Centers, and Process Gas. This matter is pending before the FERC.

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

All hearings before Administrative Law Judges ("ALJs") are being held remotely through video conference software (WebEx and SharePoint) until further notice.[2] The Presiding Judge in each remote hearing will ensure that the participants have access to an "IT Day" prior to the hearing to allow all participants, witnesses, and the public who will attend the hearing to learn more about the remote hearing software and to get their technical questions answered by the appropriate FERC staff. Uniform Hearing Rules for all Office of the ALJ hearings were adopted effective September 15, 2020.[3] The "Remote Hearing Guidance

[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] *Chief Administrative Law Judge's Notices to the Public*, Docket No. AD20-12 (June 17, 2020).

[3] *Chief Administrative Law Judge's Notices to the Public*, Docket No. AD20-12 (Sep. 1, 2020).

for Participants" was revised on September 23, 2020 to make three changes.[4] The Uniform Hearing Rules and Remote Hearing Guidance for Participants are publicly available in this proceeding in eLibrary and on the FERC's Administrative Litigation webpage.

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

The wavier of FERC regulations that require that filings with the FERC be notarized or supported by sworn declarations is ***in effect through January 29, 2021***.[5] The August 20 notice extended the waiver first noticed in May.[6] As previously reported, Entities may also seek waiver of FERC orders, regulations, tariffs and rate schedules, including motions for waiver of regulations that govern the form of filings, as appropriate, to address needs resulting from steps they have taken in response to the coronavirus.[7]

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

The extension of the blanket waivers of ISO/RTO Tariff *in-person*[8] meeting and notarization requirements has similarly been ***extended through January 29, 2021***.[9] The August 20, 2020 order extended the blanket waivers first granted in the FERC's April 2, 2020 order.[10]

I. Complaints/Section 206 Proceedings

- **New England Generators' Exelon Complaint (EL20-67)**

On August 25, 2020, New England Generators[11] filed a complaint against Exelon[12] requesting that, if and to the extent the FERC does not grant all relief requested by the New England Generators in its August 27, 2020 request for clarification and/or rehearing of the *July 17 Orders* in the Mystic 8/9 Cost of Service Agreement ("COS Agreement") proceeding (*see* ER18-1639 below), the FERC should find that the new information about Exelon's two new queue positions and Exelon's intention to continue to operate Everett beyond the term of the Mystic Agreement makes the existing rate in the Mystic Agreement unjust and unreasonable. New England Generators further requested that the FERC change the Mystic Agreement to: (i) apply the clawback mechanisms to Exelon's two new interconnection queue positions (to prevent Exelon from using interconnection queue positions for "new" or "repowered" units to skirt restrictions imposed on Mystic's recovery of costs pursuant to the COS Agreement); (ii) delete or give no meaning to the words "that were expensed" (in order to prevent Exelon from shielding costs paid for by captive ratepayers from the application of the COS Agreement's clawback provision);

[4] *Chief Administrative Law Judge's Notices to the Public*, Docket No. AD20-12 (Sep. 23, 2020) (removing law clerk requirement to share screen when moving exhibits, revising procedures for requesting Live Litigation, and revising witness communication guidance to require that "[c]ommunications with a witness through concealed channels of communications are prohibited while the witness is providing testimony on the witness stand. Communications with a witness are allowed during breaks and when they are not on the witness stand.")

[5] See *Extension of Non-Statutory Deadlines*, Docket No. AD20-11-000 (Aug. 20, 2020).

[6] *Extension of Non-Statutory Deadlines*, Docket No. AD20-11-000 (May 8, 2020).

[7] *Extension of Non-Statutory Deadlines*, Docket No. AD20-11-000 (Apr. 2, 2020).

[8] The waiver only applies to a specific requirement that meetings be held *in person*. Other than the in-person requirement, such meetings must still be held consistent with the tariff, but should be conducted by other means (e.g. telephonically).

[9] *Temporary Action to Facilitate Social Distancing*, 172 FERC ¶ 61,151 (Aug. 20, 2020).

[10] *Temporary Action to Facilitate Social Distancing*, 171 FERC ¶ 61,004 (Apr. 2, 2020) (waiving notarization requirements through Sep. 1, 2020, contained in any tariff, rate schedule, service agreement, or contract subject to the FERC's jurisdiction under the Federal Power Act ("FPA"), the Natural Gas Act ("NGA"), or the Interstate Commerce Act).

[11] "New England Generators" are Vistra, Dynegy Marketing and Trade, NextEra Energy Resources, NRG Power Marketing, LS Power Associates, FirstLight Power, and Cogentrix Energy Power Management.

[12] For purposes of this Complaint, "Exelon" is short for Constellation Mystic Power, LLC ("Mystic"), Exelon Generation Company, LLC ("Exelon Generation") and Exelon Corporation ("Exelon Corp.").

and (iii) require that Mystic return any of the undepreciated Everett repair and capital expenditure costs in the event that Mystic 8 or 9 return to the market after the end of the COS Agreement.

Exelon's answer and all interventions, or protests were due on or before September 14, 2020. In addition to Exelon's answer, comments supporting the Complaint were filed by NESCOE, Public Systems[13] and Connecticut Parties.[14] On September 28, NEPGA answer Exelon's answer. Interventions only were filed by Calpine, Energy New England ("ENE"), Eversource, Massachusetts Attorney General ("MA AG") National Grid, and Public Citizen. The Complaint, as well as all of the pleadings in response, are 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).

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

In response to the February 2, 2018 remand by the United States Court of Appeals for the District of Columbia Circuit ("DC Circuit")[15] (where the DC Circuit found that the FERC did not adequately explain why it allowed ISO-NE to forego an offer floor for its seven-year price lock period despite previously rejecting PJM's request to remove the offer floor for its three-year price lock period), the FERC instituted this proceeding, pursuant to section 206 of the FPA, finding preliminarily that ISO-NE's new entrant rules may be unjust and unreasonable.[16] The FERC established paper hearing procedures and posed the following questions, which needed to be addressed in initial briefs due on or before ***August 24, 2020***:[17]

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

(b) ***to evaluate retaining the price-lock and adding an offer floor***: (i) how would an offer floor be implemented? (2) would an offer floor require significant market redesign? and (iii) what would be the timeline for implementing an offer floor in ISO-NE?

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

Interventions were due on or before July 22, 2020 and were filed by NEPOOL, ISO-NE, ISO-NE EMM, Avangrid, Brookfield, BSW Project Co. (out-of-time), Calpine, CPV Towantic, Dominion, ENE, Eversource, Exelon, FirstLight, HQUS, LS Power, MA AG, MMWEC, National Grid, NESCOE, NHEC, NextEra, NRG, NTE Energy, Talen,

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[13] "Public Systems" are Mass. Municipal Wholesale Elec. Co. ("MMWEC") and New Hampshire Elec. Coop., Inc. ("NHEC").

[14] "Connecticut Parties" are CT PURA, CT DEEP, and the CT OCC.

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

[16] *ISO New England Inc.*, 172 FERC ¶ 61,005 (Jul 1, 2020) ("*FCM Pricing Rules Complaints Remand Order*").

[17] Notice of the initiation of this proceeding was published in the *Fed. Reg.* on July 9, 2020 (Vol. 85, No. 132) p. 41,237. Aug. 24, 2020 was the first Business Day that was 45 days after publication.

Vistra, NEPGA, EPSA, CT AG, CT DEEP, CT PURA, MA DPU (out-of-time), PJM IMM, Public Citizen, RENEW Northeast (out-of-time), and Energy Storage Association ("ESA") (out-of-time).

Initial briefs were filed by ISO-NE, ISO-NE External Market Monitor ("EMM"), MA AG, NEPGA, NRG, and RENEW Northeast. NEPOOL filed limited comments (urging the FERC, should it conclude that the Tariff is unjust and unreasonable and/or unduly discriminatory, to allow sufficient time and flexibility to permit meaningful opportunities for New England stakeholders to work with ISO-NE to develop any required market adjustments through the complete NEPOOL Participant Processes).

Responses to the initial briefs were due September 23, 2020 and were filed by ISO-NE, BSW Project Co, MA AG, NEPGA, MA AG, CT PURA, PJM IMM, and RENEW/ESA. No additional answers or briefs will be permitted. This matter is again pending before the FERC.

In order to accept the changes originally filed, the FERC must provide some analysis and explanation why it changed course. The FERC established July 9, 2020 (the date of publication in the *Federal Register*) as the refund effective date. The FERC noted its expectation that it would issue a final order in this proceeding within the 180-day period contemplated under FPA section 206(b). 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).

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

On September 16, 2020, Exelon requested of the FERC's order denying Constellation Mystic Power, LLC's ("Exelon") June 10, 2020 complaint ("PP-10 Complaint").[18] As previously reported, the PP-10 Complaint requested that ISO-NE be prohibited from (i) implementing changes to the Planning Procedure to Support the Forward Capacity Market ("PP-10"),[19] which Exelon asserted would significantly affect the rates, terms and conditions of jurisdictional services by dramatically changing the way in which ISO-NE conducts its annual transmission security review of capacity auction retirement bids and the Network Model upon which the capacity auction is based, and (ii) violating the requirements of its Tariff for *Order 1000* competitive transmission procurements.

In denying the Complaint, the FERC found that it is Tariff § III.13.2.5.2.5(e), and not the PP-10 Revisions, which significantly affects the rates, terms and conditions of service that concern Mystic.[20] The PP-10 Revisions, which are similar to the "instructions [and] guidelines . . . [that] guide internal operations" that the FERC has found to be more appropriately placed in non-tariff materials,[21] did not need to be included in the Tariff under the FERC's rule of reason policy. The FERC disagreed with Mystic's assertion that the Tariff requires ISO-NE to use the Network Model for the transmission security review for a resource that has previously submitted a Retirement De-List Bid, finding "the Boston RFP results provide ISO-NE with sufficient information to ensure that it can address violations of applicable reliability criteria due to the absence of Mystic 8 and 9 and had no need to use the Network Model in order to comply with Tariff section III.13.2.5.2.5."[22] In addition, the FERC found that the PP-10 Revisions did not violate the Attachment K provisions related to the *Order 1000* RFP process,[23] that Mystic failed to

[18] *Constellation Mystic Power, LLC v. ISO New England Inc.*, 172 FERC ¶ 61,144 (Aug. 17, 2020), *reh'g requested* ("*Order Denying PP-10 Complaint*").

[19] The PP-10 Revisions were supported by the Participants Committee at its June 4 meeting by a vote of 99.12% in support (only Exelon opposing).

[20] *Id.* at P 29.

[21] *Id.* at P 31.

[22] *Id.* at P 42.

[23] *Id.* at P 57.

demonstrate that ISO-NE violated its Tariff in conducting the Boston RFP process,[24] or that the PP-10 Revisions jeopardize reliability.[25]

Exelon requested rehearing of the *Order Denying PP-10 Complaint* on September 16, 2020. Exelon's request for rehearing is pending, with FERC action required on or before October 16, 2020, or the request will be deemed denied by operation of law. If you have any questions concerning this matter, please contact Eric Runge (617-345-4735; ekrunge@daypitney.com) or Sophia Browning (202-218-3904; sbrowning@daypitney.com).

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

As previously reported, the FERC issued a "Notice of Denial of Rehearings by Operation of Law and Providing for Further Consideration" on August 20, 2020.[26] The Notice confirmed that the 60-day period during which a petition for review of the FERC's *Order Terminating Proceeding*[27] can be filed with an appropriate federal court was triggered when the FERC did not act on the requests for rehearing (filed by CT PURA/CT OCC/MA AG ("CT/MA Parties"), LS Power and MMWEC/NHEC) of the *Order Terminating Proceeding*. On September 29, 2020, the FERC issued an order addressing arguments raised by those requests for rehearing.[28] As it is permitted under section 313(a) of the FPA[29] (since the record of this proceeding has not yet been filed in an appeal before a Federal Appeal Court), the FERC modified the discussion in the *Order Terminating Proceeding* but reached the same the result. Of note, the FERC "disagree[d] with the arguments raised on rehearing. In the June 2020 Order, the Commission found that there was insufficient evidence in the record to find under FPA section 206 that ISO-NE's implementation of the immediate need reliability project exemption was unjust, unreasonable, or unduly discriminatory or preferential … [or] inconsistent with or more expansive than the Commission directed. The arguments raised on rehearing have not persuaded us otherwise."[30] This matter has not, as of the date of this Report, been appealed to a Federal Court. If you have any questions concerning this proceeding, please contact Eric Runge (617-345-4735; ekrunge@daypitney.com).

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[24] *Id.* at P 58.

[25] *Id.* at PP 69-71.

[26] *ISO New England Inc.*, 172 FERC ¶ 61,096 (Aug. 20, 2020).

[27] *ISO New England Inc.*, 171 FERC ¶ 61,211 (June 18, 2020) ("*Order Terminating Proceeding*") (finding (i) "insufficient evidence in the record to find under FPA section 206 that [ISO-NE's] implementation of the exemption for immediate need reliability projects is unjust, unreasonable, or unduly discriminatory or preferential; (ii) "insufficient evidence in the record to find that ISO-NE implemented the immediate need reliability project exemption in a manner that is inconsistent with or more expansive than [the FERC] directed"; and (iii) that ISO-NE complies with the five criteria established for the immediate need reliability project exemption).

[28] *ISO New England Inc.*, 172 FERC ¶ 61,293 (Sep. 29, 2020) ("*Order 1000 Exemptions Allegheny Order*").

[29] 16 U.S.C. § 825l(a) (2020) ("Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.").

[30] *Order 1000 Exemptions Allegheny Order* at P 22.

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

The uncontested Joint Offer of Settlement ("Settlement Agreement II") filed by the Transmission Owners to resolve all issues in this proceeding,[31] certified by Presiding ALJ Coffman to the Commission,[32] remains pending before the Commission.[33] 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,[34] set the TOs' Base ROE at 10.57% (reduced from 11.14%), capped the TOs' total ROE (Base ROE *plus* transmission incentive adders) at 11.74%, and required implementation effective as of October 16, 2014 (the date of *Opinion 531-A*).[35] However, the FERC's orders were challenged, and in *Emera Maine,*[36] the DC Circuit vacated the FERC's prior orders, and remanded the case for further proceedings consistent with its order. The FERC's determinations in *Opinion 531* are thus no longer precedential, though the FERC remains free to re-adopt those determinations on remand as long as it provides a reasoned basis for doing so.

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[31] Recall that, as previously reported, the first joint offer of settlement filed ("Settlement Agreement I") proposed changes to Section II.25, Schedules 8 and 9, Attachment F (including the addition of Interim Formula Rate Protocols ("Interim Protocols")), and the Schedule 21s to the ISO-NE OATT. The Interim Protocols, as well as the changes to Section II.25 and Schedules 8 and 9, were supported by the Participants Committee at its July 24, 2018 meeting. However, Settlement Agreement I was contested by FERC Trial Staff and "Municipal PTF Owners" (Braintree, Chicopee, Middleborough, Norwood, Reading, Taunton, and Wallingford) and subsequently rejected by the FERC. *ISO New England Inc. Participating Transmission Owners Admin. Comm., et al.*, 167 FERC ¶ 61,164 (May 22, 2019) ("*RNS Rate/Rate Protocol Settlement I Order*") (finding (i) 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"); and (ii) the RNS and LNS rates themselves "unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful" because "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").

[32] *ISO New England Inc. Participating Transmission Owners Admin. Comm.*, 172 FERC ¶ 63,017 (Aug. 18, 2020).

[33] The Tariff changes included with Settlement Agreement II were considered through the Participants Processes (Transmission and Participants Committee review), and supported by the Participants Committee at its June 4, 2020 meeting (Agenda Item # 13). NEPOOL filed comments supporting the Tariff changes included with Settlement Agreement II. FERC Trial Staff filed comments not opposing Settlement Agreement II. The TOs filed reply comments supporting Settlement Agreement II.

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

[35] *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*").

[36] *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).

- ***Base ROE Complaints II & III (EL13-33 and EL14-86) (consolidated)***. The second (EL13-33)[37] and third (EL14-86)[38] 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.[39] The *Initial Decision* also lowered the ROE ceilings. Parties to these proceedings filed briefs on exception to the FERC, which has not yet issued an opinion on the ALJ's *Initial Decision*.

- ***Base ROE Complaint IV (EL16-64)***. The fourth and final ROE proceeding[40] also went to hearing before an ALJ, Judge Glazer, who issued his initial decision on March 27, 2017.[41] 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.[42] Parties in this proceeding filed briefs on exception to the FERC, which has not yet issued an opinion on the *Base ROE IV Initial Decision*.

October 16, 2018 Order Proposing Methodology for Addressing ROE Issues Remanded in Emera Maine and Directing Briefs. On October 16, 2018, the FERC, addressing the issues that were remanded in *Emera Maine,* proposed a new methodology for determining whether an existing ROE remains just and reasonable.[43] The FERC indicated its intention that the methodology be its policy going forward, including in the four currently pending New England proceedings (*see*, however, *Opinion 569-A*[44] (EL14-12; EL15-45) in

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[37] 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%.

[38] 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.

[39] *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*").

[40] 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.

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

[42] *Id.* at P 2.; Finding of Fact (B).

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

[44] *Ass'n of Buss. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, Opinion No. 569-A, 171 FERC ¶ 61,154 (2020) ("*Opinion 569-A*"). The refinements to the FERC's ROE methodology included: (i) the use of the Risk Premium model instead of only relying on the DCF model and CAPM under both prongs of FPA Section 206; (ii) adjusting the relative weighting of long- and short-term growth rates, increasing the weight for the short-term growth rate to 80% and reducing to 20% the weight given to the long-term growth rate in the two-step DCF model; (iii) modifying the high-end outlier test to treat any proxy company as high-end outlier if its cost of equity estimated under the model in question is more than 200% of the median result of all the potential proxy group members in that model before any high- or low-end outlier test is applied, subject to a natural break analysis. This is a shift from the 150% threshold applied in

Section XI below). The FERC established a paper hearing on how its proposed methodology should apply to the four pending ROE proceedings.[45]

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

The FERC directed participants in the four proceedings to submit briefs regarding the proposed approaches to the FPA section 206 inquiry and how to apply them to the complaints (separate briefs for each proceeding). Additional financial data or evidence concerning economic conditions in any proceeding must relate to periods before the conclusion of the hearings in the relevant complaint proceeding. Following a FERC notice granting a request by the TOs and Customers[47] for an extension of time to submit briefs, the latest date for filing initial and reply briefs was extended to January 11 and March 8, 2019, respectively. On January 11, initial briefs were filed by EMCOS, Complainant-Aligned Parties, TOs, EEI, Louisiana PSC, Southern California Edison, and AEP. As part of their initial briefs, each of the Louisiana PSC, SEC and AEP also moved to intervene out-of-time. Those interventions were opposed by the TOs on January 24. The Louisiana PSC answered the TOs' January 24 motion on February 12. Reply briefs were due March 8, 2019 and were submitted by the TOs, Complainant-Aligned Parties, EMCOS, FERC Trial Staff.

Opinion 569; and (iv) calculating the zone of reasonableness in equal thirds, instead of using the quartile approach that was applied in *Opinion 569*.

[45] *Id.* at P 19.

[46] *Id.* at P 59.

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

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*[48] and requested that the FERC re-open the record to permit that additional testimony on the impacts of the *MISO ROE Order*'s changes. On January 21, EMCOS and CAPs opposed the TOs' request and brief.

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

II. Rate, ICR, FCA, Cost Recovery Filings

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

As previously reported, the FERC issued four orders in this proceeding in July 2020 (three on July 17 (together, the "*July 17 Orders*"); one on July 28, 2020). Each of the orders addressed in part or in whole the Cost-of-Service Agreement ("COS Agreement")[49] among Constellation Mystic Power ("Mystic"), Exelon Generation Company ("ExGen") and ISO-NE, which is to provide compensation for the continued operation of the Mystic 8 & 9 units from June 1, 2022 through May 31, 2024.

July 17 Orders. The *July 17 Orders* addressed (i) requests for rehearing of the *July 2018 Order*[50] (the FERC's initial order in this proceeding, accepting the COS Agreement but suspending its effectiveness and setting the matter for accelerated hearings and settlement discussions); (ii) *Dec 2018 Order*[51] (the FERC's order following hearings ordered in the *July 2018 Order* conditionally accepting the COS Agreement, subject to a compliance filing modifying aspects of the COS Agreement that FERC rejected or directed be changed, and establishing a paper hearing to ascertain whether and how the ROE methodology that FERC proposed in *Coakley* should apply in this case); and (iii) the Mar 2019 Compliance Filing[52] (submitted in response to the requirements of the *Dec 2018 Order*).

Requests for rehearing and/or clarification of one or more of the *July 17 Orders* were filed by ISO-NE (the *Dec 2018 Rehearing Order*),[53] CT Parties[54] (the *Dec 2018 Rehearing Order* and on the Mar 2019

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

49 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.

50 *Constellation Mystic Power, LLC,* 164 FERC ¶ 61,022 (July 13, 2018) ("*July 2018 Order*"), *clarif. granted in part and denied in part, reh'g denied*, 172 FERC ¶ 61,043 (July 17, 2020) ("*July 2018 Rehearing Order*").

51 *Constellation Mystic Power, LLC*, 165 FERC ¶ 61,267 (Dec. 20, 2018) ("*Dec 2018 Order*"), *set aside in part, clarification granted in part and clarification denied in part*, 172 FERC ¶ 61,044 (July 17, 2020) ("*Dec 2018* Rehearing *Order*"). The *Dec 2018* Rehearing *Order* set aside the parts of the *Dec 2018 Order* that required the COS Agreement to include a sliding scale or other revenue crediting mechanism and the part that required Mystic to true-up revenues, granted clarification requested by Mystic that the FERC did not intend to re-state its prudence standard in the *Dec 2018 Order*, and denying clarifications requested by Mystic, NESCOE and ENECOS.

52 *Constellation Mystic Power, LLC*, 172 FERC ¶ 61,045 (July 17, 2020) ("*July 17 Compliance Order*") (order on compliance and directing further compliance).

53 ISO-NE seeks rehearing of the FERC's finding that the Tank Congestion Charge will no longer be applied in the determination of Mystic's fuel costs.

54 "CT Parties" for purposes of this proceeding are CT PURA, CT DEEP and the CT OCC.

Compliance Filing), NESCOE (the *Dec 2018 Rehearing Order*), and NEPGA (each of the *July 17 Orders*). The FERC did not take action on those requests. On September 17, 2020, the FERC issued a "Notice of Denial of Rehearings by Operation of Law and Providing for Further Consideration".[55] The Notice confirmed that the 60-day period during which a petition for review of the FERC's *July 17 Orders* can be filed with an appropriate federal court was triggered when the FERC did not act on the requests for rehearing of the *July 17 Orders*. The Notice also indicated that the FERC would address, as is its right, the rehearing requests in a future order, and may modify or set aside its orders, in whole or in part, "in such manner as it shall deem proper." That order must be issued by the date that the record of the proceeding must be filed with the court of appeals.[56]

As noted in Section XV below, each of the *July 17 Orders* (and the earlier, underlying orders) have been appealed to the DC Circuit: by Mystic (*Dec 2018 Order* and the *Dec 2018 Rehearing Order);* MA AG (*July 2018 Order*, *July 2018 Rehearing Order, Dec 2018 Order,* the *Dec 2018 Rehearing Order*); CT Parties I (*Dec 2018 Order,* February 15, 2019 Tolling Order, the *Dec 2018 Rehearing Order)*; CT Parties II (*July 17 Compliance Order*), and NESCOE (*Dec 2018 Order,* the *Dec 2018 Rehearing Order*).

ROE Paper Hearings. The *Dec 2018 Order* established a paper hearing to determine the just and reasonable ROE to be used in setting charges under Mystic's COS Agreement. On April 19, 2019, Mystic, Connecticut Parties, ENECOS, MA AG, and FERC Trial Staff filed initial briefs. On July 18, 2019, Constellation Mystic Power, CT Parties, ENECOS, MA AG, National Grid, FERC Trial Staff filed reply briefs. In a July 28, 2020 order,[57] the FERC reopened the record to allow parties an opportunity to present written evidence applying the FERC's *Opinion 569-A* ROE methodology to the facts of this proceeding. CT Parties, EMCOS, MA AG, and FERC Trial Staff filed their initial "Opinion 569-A" briefs on September 28, 2020. Responses to those initial briefs are due on or before October 28, 2020.

Sep 2020 Compliance Filing. On September 15, 2020, Mystic filed a revised COS Agreement in response to the requirements of the *July 17 Compliance Order*. Also included were typographical edits proposed by NESCOE in its protest of the First Compliance Filing. Mystic also filed revisions to the Fuel Security Agreement ("FSA") for informational purposes because some of the compliance directives required changes to the FSA. Comments on the Sep 2020 Compliance Filing are due on or before October 6, 2020.

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

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

- **Gross Load Forecast Reconstitution Revisions (ER20-2869)**

On September 11, 2020, ISO-NE and NEPOOL jointly filed changes (i) to improve the methodology that ISO-NE uses to reconstitute On-Peak Demand Resources and Seasonal Peak Demand Resources (collectively, "Passive Demand Resources") in the long-term gross load forecast; and (ii) to delete obsolete language in Section III.12.8 (b), and make conforming, non-substantive changes in the preamble of Section III.12.8 – Load Modeling Assumptions (together, the "Gross Load Forecast Reconstitution Revisions"). The Gross Load Forecast Reconstitution Revisions were supported by the Participants Committee at its September 3, 2020 meeting (Agenda Item #7). A November 10, 2020 effective date was requested. Comments on this filing are due on or before October 2, 2020. Thus far, doc-less interventions have been filed by Acadia Center, Calpine, Dominion,

[55] *ISO New England Inc.*, 172 FERC ¶ 62,149 (Sep. 17, 2020).

[56] *See* 16 USC § 825l(a) ("Until the record in a proceeding shall have been filed in a court of appeals, … the [FERC] may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.").

[57] *Constellation Mystic Power, LLC*, 172 FERC ¶ 61,093 (July 28, 2020).

Eversource, Exelon, FirstLight, National Grid, NESCOE, NRD/Sustainable FERC Project, and NRG. If you have any questions concerning this proceeding, please contact Eric Runge (617-345-4735; ekrunge@daypitney.com).

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

On September 17, 2020, the FERC accepted revisions to Section 2.3 of the Information Policy filed jointly by ISO-NE and NEPOOL.[58] As previously reported, the revisions are designed (i) to improve and clarify communications with Participants regarding the status of Participants emerging from bankruptcy and (ii) to provide ISO-NE with greater flexibility when disclosing confidential information of defaulting Participants to the FERC, courts of competent jurisdiction (esp. bankruptcy courts), and/or other agencies. The revisions do not modify the type of information that will be disclosed on weekly notices and do not affect the confidentiality and non-disclosure obligations of Participants under the Information Policy. The revisions were accepted effective as of October 1, 2020, as requested. Unless the September 17 order is challenged, this proceeding will be concluded. If you have any questions concerning this proceeding, please contact Sebastian Lombardi (860-275-0663; slombardi@daypitney.com) or Rosendo Garza (860-275-0660; rgarza@daypitney.com).

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

On September 28, 2020, the FERC accepted revisions to Market Rule 1 Section 1.10.1A to extend by 30 minutes the Day-Ahead Energy Market ("DAM") offer window jointly filed by ISO-NE and NEPOOL.[59] Also included with the DAM Offer Window modification were two Offer Cap clean-up changes, one to add Demand Reduction Offers to the consolidated offer floor provisions of Section III.1.9.1.2, the other to remove "Energy Offer Cap" from Section III.1.10.1A(e)(ii). The revisions were accepted effective September 30, 2020, as requested. Unless the September 28 order is challenged, this proceeding will be concluded. If you have any questions concerning this proceeding, please contact Sebastian Lombardi (860-275-0663; slombardi@daypitney.com) or Rosendo Garza (860-275-0660; rgarza@daypitney.com).

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

On September 17, 2020, the FERC denied Green Mountain Power ("GMP")'s May 4, 2020 request for a limited waiver from the revised definition of Settlement Only Resources[60] as applied to GMP's Searsburg wind power facility.[61] In denying the request, the FERC found that GMP's request did not satisfy the FERC's criteria for the granting of waiver of tariff provisions.[62] Specifically, the GMP request failed to demonstrate that its waiver was limited in scope or that it would not have undesirable consequences.[63] Unless the *Order Denying Searsburg Waiver* is challenged, with any challenges due on or before October 19, 2020, this proceeding will be concluded. If

[58] *ISO New England Inc. and the New England Power Pool Participants Comm.*, Docket No. ER20-2518 (Sep. 17, 2020) (unpublished letter order).

[59] *ISO New England Inc. and New England Power Pool Participants Comm.*, Docket No. ER20-2511 (Sep. 28, 2020) (unpublished letter order).

[60] As of January 1, 2021, Settlement Only Resources will be "generators of less than 5 MW of maximum net output when operating at any temperature at or above zero degrees Fahrenheit, that meet the metering, interconnection and other requirements in or otherwise eligible for Settlement Only Resource treatment as described in ISO New England Operating Procedure No. 14 and that have elected Settlement Only Resource treatment as described in the ISO New England Manual for Registration and Performance Auditing." As previously reported, the Searsburg facility has a nameplate rating of 6 MW (11 Zond Z-40 turbines, each of which is rated at 550 kW). Searsburg's SCADA system does not have the ability to set an active power limit for the wind facility, the GMP control room does not have any turbine-level control capability, and GMP is unable to acquire turbine software capable of allowing Searsburg to set up an active power limit.

[61] *Green Mountain Power Corp.*, 172 FERC ¶ 61,250 (Sep. 17, 2020) ("*Order Denying Searsburg Waiver*").

[62] The FERC has granted waiver of tariff provisions where it meet each of the following four criteria: (1) the applicant acted in good faith; (2) the waiver is of limited scope; (3) the waiver addresses a concrete problem; and (4) the waiver does not have undesirable consequences, such as harming third parties. *See, e.g.*, *Midcontinent Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,059, at P 13 (2016).

[63] *Order Denying Searsburg Waiver* at PP 12-13 (finding the Waiver not limited in scope (for failure to identify a specific and limited period of time) and the small size of the facility insufficient in and of itself to establish that there would be no undesirable consequences).

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

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

This proceeding was initiated by ISO-NE's April 15, 2020 filing of Tariff revisions to incorporate comprehensive, long-term market enhancements to address the fuel security challenges facing the New England region ("Energy Security Improvements" or "ESI").[64] The revisions included NEPOOL-supported alternatives to certain aspects of the enhancements proposed by ISO-NE, which ISO-NE and NEPOOL agreed would be considered on equal legal footing with ISO-NE's favored alternative. ISO-NE asked that the FERC issue an order and accept the changes effective no later than November 1, 2020, conditioned on ISO-NE's filing of an appropriate market power mitigation proposal supported by a Market Power Assessment by the fourth quarter of 2021. The ESI Proposals were considered at the April 2 Participants Committee meeting. ISO-NE's ESI proposal with three amendments proposed by NESCOE was approved by NEPOOL and is the NEPOOL Alternative. ISO-NE's ESI proposal without the amendments (the "ISO-NE Proposal") was not supported. Comments on this filing are due on or before May 15, 2020. On April 24, NEPOOL submitted comments to provide NEPOOL's support for the NEPOOL Alternative.

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

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

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

As previously reported, the FERC has now conditionally accepted both the November 22, 2019[65] and February 10, 2020[66] *Order 841*[67] compliance filings, each subject to additional compliance filing(s). In its most recent order, the *Order 841 Compliance Filing II Order*, the FERC directed that the following be addressed in further compliance (now due on or before December 7, 2020, as described below):

♦ ***Application of Transmission Charges***. ISO-NE directed to file proposed Tariff revisions: (i) specifying that it will not apply transmission charges to electric storage resources when they are dispatched to withdraw energy to provide voltage support and reactive control, provide operating reserves, provide regulation, balance energy supply and demand on an economic basis, or address a reliability concern;

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

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

[66] *ISO New England Inc.*, 172 FERC ¶ 61,125 (Aug. 4, 2020) ("*Order 841 Compliance Filing II Order*").

[67] *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*").

and (ii) applying transmission charges to electric storage resources when they are not being dispatched to provide one of those tariff-defined services.[68]

- ♦ ***ISO-NE Market Participation***. Section III.1.10.6(d)(ii) must be modified to either (i) eliminate any suggestion that a host utility could be allowed, through an unwillingness to support the necessary registration, metering, and accounting of the electric storage resource, to decide whether an electric storage resource may participate in the ISO-NE markets; or (ii) to clarify how the section does not serve as a barrier to the participation of electric storage resources.
- ♦ ***State of Charge and Duration Characteristics in the Day-Ahead Energy Market.*** Tariff Section III.1.10.6(d) must be modified to specify how ISO-NE will account for State of Charge and Duration Characteristics of electric storage resources in the Day-Ahead Energy Market. If new bidding parameters will be relied on, the Tariff must define those bidding parameters and the transmittal letter must explain how those bidding parameters will be incorporated into the Day-Ahead Energy Market engine. If "other means" will be relied on, the Tariff must specify those other means with sufficient detail and the transmittal letter must explain how those other means will account for State of Charge and Duration Characteristics of electric storage resources in the Day-Ahead Energy Market.

On September 10, 2020, the FERC accepted the joint request by NEPOOL and ISO-NE for a 35-day extension of time to submit all of the changes required by the *Order 841 Compliance Filing II Order* in one comprehensive compliance filing. That compliance filing must be filed on or before December 7, 2020, with plans for the Tariff changes to be proposed to be considered at the December 3 Participants Committee meeting (following completion of Markets Committee consideration). 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*[69] remain pending before the FERC. As previously reported, the *Fuel Security Retention Proposal Order* accepted ISO-NE's Proposal[70] 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,

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[68] *Order 841 Compliance Filing II Order* at P 52.

[69] *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.

[70] 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").

MPUC, and PIOs.[71] On February 1, 2019, the FERC issued a tolling order to afford it additional time to consider the requests for rehearing, which remain pending. There has been no substantive activity since the Last Report. If you have further 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 order[72] 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)."[73] 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."[74]

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).[75] 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.[76] The FERC also directed ISO-NE include with any proposed Tariff revisions a mechanism that addresses how cost-of-service-retained resources would be treated in the FCM[77] and an *ex ante* cost allocation proposal that appropriately identifies beneficiaries and adheres to FERC cost causation precedent.[78]

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

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

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

[73] *Id.* at P 47.

[74] *Id.* at P 48.

[75] *Id.* at P 55.

[76] *Id.* at PP 56-57.

[77] *Id.* at P 57.

[78] *Id.* at P 58.

- ***NEPGA*** (requesting that the FERC grant clarification that it directed, or on rehearing direct, ISO-NE to adopt a mechanism that prohibits the re-pricing of Fuel Security Resources in the FCA at $0/kW-mo. or at any other uncompetitive offer price);
- ***Connecticut Parties***[79] (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***[80] (requesting clarification that (i) the central purpose of ISO-NE's July 1, 2019 filing is to assure that New England adds needed new infrastructure to address the fuel supply shortfalls and associated threats to electric reliability that ISO-NE identified in its OFSA and (ii) that, in developing the July 1, 2019 filing, ISO-NE is to evaluate Tariff revisions (such as those the EDCs described in their request), through which ISO-NE customers would pay for the costs of natural gas pipeline capacity additions via rates under the ISO-NE Tariff);
- ***PIOs***[81] (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

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[79] "Connecticut Parties" are CT PURA and CT DEEP.

[80] 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).

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

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

There has been no substantive activity since the Last Report. 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).

- **CASPR (ER18-619)**

On August 31, 2020, Sierra Club, NRDC, RENEW, and CLF petitioned the DC Circuit Court of Appeals for review of the *CASPR Order*.[82] As previously reported, the FERC had issued a May 7, 2018 tolling order to afford it additional time to consider, but has never issued an order on, the requests for rehearing of the *CASPR Order* filed by (i) ***NextEra/NRG*** (challenging the RTR Exemption Phase Out); (ii) ***ENECOS***[83] (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***[84] (challenging the CASPR construct in its entirety, asserting that state-sponsored resources should not be subject to the MOPR); and (iv) ***Public Citizen*** (also challenged the CASPR construct in its entirety and the *CASPR Order*'s failure to define "investor confidence"). In light of the DC Circuit's *Allegheny* decision, which recently held that tolling orders "are not the kind of action on a rehearing application that can fend off a deemed denial and the opportunity for judicial review", and the August 31 appeal, this matter has now moved on to the DC Circuit. Absent any further FERC activity prior to the filing of the record in the DC Circuit proceeding,[85] reporting on this matter will move to Section XV in future Reports. 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).

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

[83] 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.

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

[85] Under 16 USC § 825l(a), the FERC retains the right to address the rehearing request in a future order, modifying or setting aside its order, in whole or in part, up until the record of the proceeding is filed with a court of appeals. *See* n. 89 *infra*.

IV. OATT Amendments / TOAs / Coordination Agreements

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

On September 17, 2020, the FERC issued an order ("*CIP IROL Allegheny Order*")[86] addressing arguments raised by the IROL-Critical Facility Owners[87] in their request for rehearing of the FERC's *CIP IROL Cost Recovery Order*.[88] As it is permitted under section 313(a) of the FPA[89] (since the record of this proceeding has not yet been filed in an appeal before the DC Circuit), the FERC modified the discussion in the *CIP IROL Cost Recovery Order* but reached the same the result. Of note, the FERC continued "to interpret the language in section 2.2(A) of Schedule 17 as allowing recovery only for those costs incurred on or after the effective date of the relevant individual FPA section 205 filing"[90] (which provides the legally required notice of a potential rate adjustment). The FERC did note that "IROL-Critical Facility Owners may seek recovery of the undepreciated costs of any such past capital expenditures to comply with the IROL-CIP requirements. This may include a return of and on such previously-incurred costs, as well as any appropriate prospective costs, in their FPA section 205 filings submitted to the Commission pursuant to Schedule 17."[91] If you have any questions concerning this proceeding, please contact Eric Runge (617-345-4735; ekrunge@daypitney.com).

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

On September 17, 2020, the FERC accepted the July 17, 2020 additional compliance filing jointly submitted by ISO-NE, NEPOOL and the PTO AC ("*Order 845* Compliance Filing II") in response to the March 19, 2020 order[92] conditionally accepting the first set of changes filed in response to the requirements of *Order 845* ("*Order 845* Compliance Filing I").[93] The changes in *Order 845* Compliance Filing II were accepted effective as of March 19, 2020, as requested. Unless the September 17 order is challenged, this proceeding will be concluded. If you have any questions concerning this matter, please contact Eric Runge (617-345-4735; ekrunge@daypitney.com).

V. Financial Assurance/Billing Policy Amendments

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

On September 2, 2020, the FERC accepted enhancements and clean-up changes to the Financial Assurance Policy ("FAP") jointly filed by ISO-NE and the NEPOOL on June 24, 2020.[94] Among other things, those changes included: (i) updates and enhancements to the credit insurance provisions; (ii) updates to the

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[86] *ISO New England Inc.*, 172 FERC ¶ 61,251 (Sep. 17, 2020) ("*CIP IROL Allegheny Order*").

[87] "IROL-Critical Facility Owners" are Calpine, Cogentrix, Cross-Sound Cable, FirstLight, NextEra, NRG, and Vistra.

[88] *ISO New England Inc.*, 171 FERC ¶ 61,160 (May 26, 2020) ("*CIP IROL Cost Recovery Order*").

[89] 16 U.S.C. § 825l(a) (2020) ("Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.").

[90] *CIP IROL Allegheny Order* at P 11.

[91] *Id.* at P 22.

[92] *ISO New England Inc. and Participating Transmission Owners Admin. Comm.*, 170 FERC ¶ 61,209 (Mar. 19, 2020) ("*Order 845 Compliance Filing Order*"). The *Order 845 Compliance Filing Order* identified a number of ways in which *Order 845* Compliance Filing I only partially or did not comply at all with *Order 845.* The *Order 845 Compliance Filing Order* directed changes that needed to include additional justification for proposed changes or revisions that make no modification to the *pro forma* LGIA/LGIP in the following areas: Stand-Alone Network Upgrades definition, Interconnection Customer's ability to exercise the option to build; Option to Build Cost Recovery; Determination of Contingent Facilities; requesting interconnection service below generating facility capacity; Provisional Interconnection Service; definition of Surplus Interconnection Service; and Surplus Interconnection Service process.

[93] *ISO-NE New England Inc. and New England Power Pool Participants Comm.*, Docket No. ER19-1951-002 (Sep. 17, 2020).

[94] *ISO New England Inc.*, Docket No. ER20-2145 (Sep. 2, 2020) (unpublished letter order).

form letter of credit and related provisions; and (iii) miscellaneous revisions, including a change to the retention period for financial assurance after membership termination and a conforming change in the FCM Charge Rate calculation (collectively, the "FAP Changes"). The changes were accepted effective as of September 10, 2020, as requested. Unless the September 2 order is challenged, this proceeding will be concluded. If you have any questions concerning this matter, please contact Paul Belval (pnbelval@daypitney.com; 860-275-0381).

VI. Schedule 20/21/22/23 Changes

- **Schedule 20A-VP: Renaming/Clean-Up (ER20-2783)**

On August 31, Versant Power filed an amended version of Schedule 20A-VP in order to reflect the renaming of Emera Maine as Versant Power and to correct certain typographical errors. A November 1, 2020 effective date was requested. Comments on this filing were due on or before September 21, 2020; none were filed. This matter is pending before the FERC. If you have any questions concerning this matter, please contact Pat Gerity (pmgerity@daypitney.com; 860-275-0533).

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

On September 17, the FERC accepted a non-conforming LGIA by and among ISO-NE, NSTAR and Vineyard Wind, LLC ("Vineyard Wind"), effective July 10, 2020, as requested.[95] As previously reported, the LGIA is non-conforming in that it contains certain deviations in Appendix C.3 necessary to reflect unique characteristics of the proposed interconnection -- the location of the met gathering station(s) and the layout of the facility due to its location in offshore federal waters rather than onshore. Unless the September 17 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-NEP: DWW E&P Agreement (ER20-2454)**

On September 14, the FERC accepted the Engineering & Procurement Agreement ("E&P Agreement") between NEP and DWW REV I, LLC ("DWW") filed by the New England Power Company ("NEP") under Schedule 21-NEP.[96] The E&P Agreement (designated as Service Agreement No. E&P-NEP-01) is to facilitate NEP's performance of preliminary engineering and certain procurement-related activities in connection with the interconnection of DWW's Revolution Wind project, a proposed 704 MW offshore wind generating facility project, to NEP's transmission system at the 115kV Davisville substation in Washington County, Rhode Island, prior to the parties entering into an LGIA. The E&P Agreement was accepted effective as of June 17, 2020, as requested. Unless the September 14 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-VP: 2019 Annual Update Settlement Agreement (ER15-1434-004)**

On March 19, 2020, Emera Maine submitted a joint offer of settlement between itself and the MPUC to resolve all issues raised by the MPUC in response to Emera Maine's 2019 annual charges update filed, as previously reported, on June 10, 2019 (the "Emera 2019 Annual Update Settlement Agreement"). Under Part V of Attachment P, "Interested Parties shall have the opportunity to conduct discovery seeking any information relevant to implementation of the [Attachment P] Rate Formula. . . ." and follow a dispute resolution procedure set forth there. In accordance with those provisions, the MPUC identified certain disputes with the 2019 Annual Update, all of which are resolved by the Emera 2019 Annual Update Settlement Agreement. Comments on the Emera 2019 Annual Update Settlement Agreement were due on or before April

[95] *ISO New England Inc. and NSTAR Elec. Co.*, Docket No. ER20-2489 (Sep. 17, 2020) (unpublished letter order). The LGIA was designated as Original Service Agreement No. LGIA-ISONE/NSTAR-20-01 under Schedule 22 of the ISO-NE OATT.

[96] *New England Power Co.*, Docket No. ER20-2454 (Sep. 14, 2020) (unpublished letter order).

9, 2020; none were filed. This matter is pending before the FERC. If you have any questions concerning this proceeding, please contact Pat Gerity (860-275-0533; pmgerity@daypitney.com).

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

The MPS Merger Cost Recovery Settlement, filed by Emera Maine on May 8, 2018 to resolve all issues pending before the FERC in the consolidated proceedings set for hearing in the *MPS Merger-Related Costs Order,*[97] and certified by Settlement Judge Dring[98] to the Commission,[99] remains pending before the FERC. As previously reported, under the Settlement, permitted cost recovery over a period from June 1, 2018 to May 31, 2021 will be $390,000 under Attachment P of the BHD OATT and $260,000 under the MPD OATT. If you have any questions concerning these matters, please contact Pat Gerity (860-275-0533; pmgerity@daypitney.com).

VII. NEPOOL Agreement/Participants Agreement Amendments

No Activity to Report

VIII. Regional Reports

- ***Opinion 531-A* Local Refund Report: FG&E (EL11-66)**

FG&E's June 29, 2015 refund report for its customers taking local service during *Opinion 531-A's* refund period remains pending. If there are questions on this matter, please contact Pat Gerity (860-275-0533; pmgerity@daypitney.com).

- ***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*[100] *and 531-B*[101] 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

[97] *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.

[98] 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.

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

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

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

- Emera Maine
- Eversource
- NHT
- NSTAR
- VTransco

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

- **Capital Projects Report - 2020 Q2 (ER20-2640)**

On August 10, 2020, ISO-NE filed its Capital Projects Report and Unamortized Cost Schedule covering the second quarter of calendar year 2020 (the "Report"). ISO-NE is required to file the Report under Section 205 of the FPA pursuant to Section IV.B.6.2 of the Tariff. Report highlights included the following new projects: (i) Forward Capacity Tracking System Infrastructure Conversion Part II ($1.7 million); (ii) Data Governance, Risk Management & Compliance ("GRC") Software Phase I ($1.1 million); 2020 Corrective Action Preventative Actions ($873,300); (iv) Markets Database Enhancements ($420,000); and Gateway Data Management Application Conversion ($365,000). Projects with a significant changes were (i) nGEM Software Development Part II ($1.36 budget decrease for 2020; reallocated to 2021); (ii) Identity and Access Management Phase II (budget decrease of $1.1 million; $715,000 reallocated to 2021); (iii) TranSMART Technical Architecture Update ($399,200 budget decrease for 2020; reallocated to 2021); (iv) IMM Data Analysis Phase II (budget decrease of $250,000); (v) Sub-accounts for FTR Market (budget decrease of $191,200; reallocated to 2021); (vi) Enterprise Application Integration Replacement Phase II (budget decrease of $153,600); (vii) CIMNET Simultaneous Feasibility Test with Data Transfer Enhancements (budget increase of $361,000). Comments on this filing were due on or before August 31. On August 25, NEPOOL filed comments supporting the filing. Eversource and National Grid filed doc-less interventions. This matter is pending before the FERC. If you have any questions concerning this matter, please contact Paul Belval (860-275-0381; pnbelval@daypitney.com).

- **Interconnection Study Metrics Processing Time Exceedance Report Q2 2020 (ER19-1951)**

On August 14, 2020, ISO-NE filed, as required,[102] public and confidential[103] versions of its Interconnection Study Metrics Processing Time Exceedance Report (the "Exceedance Report") for the Second Quarter of 2020 ("2020 Q2"). ISO-NE reported that all four ***Interconnection Feasibility Study ("IFS") reports*** delivered to Interconnection Customers were delivered later than the best efforts completion timeline.[104] The average mean time from ISO-NE's receipt of the executed IFS Agreement to delivery of the completed IFS report to the Interconnection Customer was 241 days. Three ***System Impact Study ("SIS") reports*** were delivered to Interconnection Customers, with one delivered later than the best efforts completion timeline of 270 days. The average mean time from ISO-NE's receipt of the executed SIS Agreement to delivery of the completed SIS report to the Interconnection Customer was 227 days. There were no Interconnection Requests with projects in the Interconnection Facilities Study phase of the interconnection process. Section 4 of the Report identifies steps ISO-NE has identified to remedy issues and prevent future delays, including implementing certain interconnection studies timeline modifications accepted in the *Order 845* compliance proceeding, moving to earlier in the process certain Interconnection Customer data reviews, and enhanced information sharing and coordination efforts with Interconnecting TOs. This report was not noticed for public comment.

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[102] Under section 3.5.4 of ISO-NE's Large Generator Interconnection Procedures ("LGIP"), ISO-NE must submit an informational report to the FERC describing each study that exceeds its Interconnection Study deadline, the basis for the delay, and any steps taken to remedy the issue and prevent such delays in the future. The Exceedance Report must be filed within 45 days of the end of the calendar quarter, and ISO-NE must continue to report the information until it reports four consecutive quarters where the delayed amounts do not exceed 25 percent of all the studies conducted for any study type in two consecutive quarters.

[103] ISO-NE requested that the information contained in Section 3 of the un-redacted version of the Exceedance Report, which contains detailed information regarding ongoing Interconnection Studies and if released could harm or prejudice the competitive position of the Interconnection Customer, be treated as confidential under FERC regulations.

[104] 90 days from the Interconnection Customer's execution of the study agreement.

- **FCA14 Fuel Security Reliability Review Info Filing (ER18-2364)**

Pursuant to the *Fuel Security Retention Proposal Order*, ISO-NE filed on September 25, 2020 its informational filing assessing the study triggers, assumptions and scenarios that it used in performing its fuel security reliability review for FCA14 in comparison to the actual conditions experienced during Winter 2019-2020. This filing is for informational purposes only and will not be noticed for public comment or subject to a FERC order.

- **ISO-NE FERC Form 3Q (2020/Q2) (not docketed)**

On August 26, 2020, ISO-NE submitted its 2020/Q2 FERC Form 3Q (Quarterly financial report of electric utilities, licensees, and natural gas companies). FERC Form 3-Q is a quarterly regulatory requirement which supplements the annual FERC Form 1 financial reporting requirement. These filings are not noticed for comment.

- **ISO-NE Third Revised 2018 FERC Form 714 (not docketed)**

On September 3, 2020, ISO-NE submitted a third revision[105] to its Annual Electric Balancing Authority Area and Planning Area Report (Form 714)[106] for calendar year 2018. The 2018 Form 714 was revised to include the addition of Real-Time DR to Net Generation for all months beginning in June (25,500 MWh total for the year). These values are now included in ISO-NE's NEL totals. These filings are not noticed for comment.

IX. Membership Filings

- **September 2020 Membership Filing (ER20-2772)**

On August 28, 2020, NEPOOL requested that the FERC accept (i) the memberships of: Acadia Renewable Energy, L.L.C. [Related Person to Nautilus Power (Generation Sector)], Sky View Ventures LLC (AR Sector, DG Sub-Sector Small Group Seat) and SYSO LLC (AR Sector, DG Sub-Sector Small Group Seat); and (ii) the name change of ENGIE Power & Gas LLC (f/k/a Plymouth Rock Energy, LLC). Comments on this filing were due on or before September 18; none were filed. This matter is pending before the FERC.

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

On September 22, 2020, the FERC accepted (i) the memberships of: Blueprint Power Technologies Inc. (Provisional Member); and Advanced Energy Economy Inc. (Fuels Industry Participant); and (ii) the termination of the Participant status of two End Users, New Hampshire Industries Inc. and The Energy Council of Rhode Island ("TEC-RI").[107] Unless the September 22 order is challenged, this proceeding will be concluded.

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

On June 5, 2020, pursuant to Section II.A.1(b) of the FAP, ISO-NE submitted an informational filing identifying the additional condition (supplemental financial assurance) required of Invenia for participation in the New England Markets. The additional condition was supported, and made a condition of Invenia's membership,

[105] The first revision, filed May 31, 2019, converted Column e in Part III Schedule 2 from GWh (as reported in the original filing) to MWh; The second revision, filed June 3, 2019, included complete Balancing Authority names in Part II Schedules 4 and 5 and,in Part III - Schedule 1, included the full utility names for each of the nodes.

[106] Through its Form 714 filings, ISO-NE reports, among other things, generation in the New England Control Area, actual and scheduled inter-balancing authority area power transfers, and net energy for load, summer-winter generation peaks and system lambda. The FERC uses the data to obtain a broad picture of interconnected balancing authority area operations including comprehensive information of balancing authority area generation, actual and scheduled inter-balancing authority area power transfers, and load; and to prepare status reports on the electric utility industry including review of inter-balancing authority area bulk power trade information. Planning area data is used to monitor forecasted demands by electric utility entities with fundamental demand responsibility, and to develop hourly demand characteristics.

[107] *New England Power Pool Participants Comm.*, Docket No. ER20-2581 (Sep. 22, 2020) (unpublished letter order).

by the Participants Committee at its June 4 meeting. A doc-less intervention was submitted by Public Citizen. This informational filing is pending before the FERC.

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).

- **CYPRES Report (not docketed)**

On September 14, 2020, FERC and NERC Staff published a report on cyber planning for response and recovery that outlines best practices for the electric utility industry ("CYPRES Report"). The joint staffs of FERC and NERC, and the NERC Regional Entities, developed the report after interviewing subject matter experts from eight electric utilities of varying size and function. The report includes the joint staffs' observations on their defensive capabilities and on the effectiveness of their Incident Response and Recovery ("IRR") plans. The report identifies common elements and best practices among the IRR plans. The report concludes that effective IRR plans are important resources for addressing cyber threats, and that effective IRR plans should be in place and response teams should be prepared to detect, contain, and, when appropriate, eradicate cyber threats before they can harm utility operations.

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

On September 23, 2020, following review of the comments submitted on their First White Paper,[108] FERC and NERC staff ("Joint Staffs") issued their second White Paper on Notices of Penalty Pertaining to Violations of Cortical Infrastructure Protection ("CIP") Reliability Standards ("Second White Paper"). Having determined based on those comments that the First White Paper proposal was insufficient to protect the security of the BPS, Joint Staffs modified the prior proposal. Going forward, CIP noncompliance submissions[109] will be filed or submitted by NERC with a request that the *entire* filing or submittal be designated as Critical Energy/Electric Infrastructure Information ("CEII") and FERC staff will designate the entire filing or submittal accordingly. Because of the risk associated with the disclosure of CIP noncompliance information, NERC will no longer publicly post redacted versions of CIP noncompliance filings and submittals.

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

Still pending before the FERC are the proposed changes, filed on February 21, 2020, to the following Reliability Standards: FAC-002-3 (Facility Interconnection Studies); IRO-010-3 (Reliability Coordinator Data Specification and Collection); MOD-031-3 (Demand and Energy Data); MOD-033-2 (Steady-State and Dynamic System Model Validation); NUC-001-4 (Nuclear Plant Interface Coordination); PRC-006-4 (Automatic Underfrequency Load Shedding); and TOP-003-4 (Operational Reliability Data) ("Revised Standards"). The changes

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[108] The first White Paper, prepared jointly by FERC and NERC staff, was issued on August 27, 2019. The First White Paper set out a proposed new format for NERC Notices of Penalty ("NOP") involving violations of CIP Reliability Standards. The First White Paper explained that the revised format was 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.

Few commenters supported the First Joint White Paper proposal without seeking modifications to either expand or reduce the amount of information that would be publicly disclosed. Comments submitted by private citizens, state representatives, and consumer advocate offices supported more disclosure of CIP noncompliance information. By contrast, most industry commenters and trade organizations raised concerns with at least some of the proposed disclosures because of the increased risk to the security of the Bulk-Power System ("BPS").

[109] Non-compliance submissions include Notices of Penalty ("NOPs"), Spreadsheet NOPs ("SNOPs"), Find, Fix and Track submissions ("FFTs") and Compliance Exceptions ("CEs")).

remove references to Load Serving Entity (which is no longer an applicable entity), add Underfrequency Load Shedding ("UFLS")-Only Distribution Provider to PRC-006-3 as an applicable entity, and make consistent across the Standards the use of the term "Planning Coordinator". NERC asked that revised Reliability Standards become effective (and the currently effective versions be retired) on the first day of the first calendar quarter that is three months following FERC approval. Comments on the Revised Standards were due on or before March 23, 2020; none were filed. American Municipal Power ("AMP") submitted a doc-less intervention.

On July 17, 2020, the FERC issued a notice of revised information collections that would impact these Reliability Standards and requested that comments on the collections of information be filed in this proceeding on or before September 22, 2020;[110] none were filed.

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

On March 19, 2020, NERC submitted, as directed by the FERC,[111] an informational filing describing the activity of two NERC CIP standard drafting projects pertaining to virtualization and cloud computing services, including a schedule for Project 2016-02 (Modifications to CIP Standards) and Project 2019-02 (BES Cyber System Information Access Management) (collectively, the "NERC Projects"). Comments were submitted by a private citizen (Barry Jones) and VMware, Inc. on April 21 and 27, 2020, respectively.

In addition, NERC is required to file on an information basis quarterly status updates, until such time as new or modified Reliability Standards are filed with the FERC. NERC filed its third informational filing on September 17, 2020, reporting a three-month deferral for each Project underway. With respect to Project 2016-02, NERC reported that "the standard drafting team anticipates filing the proposed Reliability Standards with the Commission in March 2022 (deferred from the original target date of December 2021)." With respect to Project 2019-02, NERC reported that "the standard drafting team anticipates filing the proposed Reliability Standards with the Commission in March 2021 (deferred from the December 2020 target date provided in the June Informational Filing)."

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

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

- **NOI: Enhancements to CIP Standards (RM20-12)**

On June 18, 2020, the FERC issued a notice of inquiry ("NOI") seeking comments on certain potential enhancements to the currently-effective CIP Reliability Standards. In particular, the FERC asked for comments on whether the CIP Standards adequately address: (i) cybersecurity risks pertaining to data security, (ii) detection of anomalies and events, and (iii) mitigation of cybersecurity events. In addition, the FERC asked for comments on the potential risk of a coordinated cyberattack on geographically distributed targets and whether FERC action including potential modifications to the CIP Standards would be appropriate to address such risk.

Comments were filed by NERC, the ISO/RTO Council ("IRC"), APPA/LPPC, Canadian Electricity Assoc. ("CEA"), Cogentrix, EEI/EPSA, Forescout Technologies, MISO TOs, NJ BPU, NRECA, Reliable Energy Analytics, Southwestern Power Administration, Solar Energy Industries Association ("SEIA"), Siemen's Energy, Southern Companies, TAPS, U.S. Bureau of Reclamation, U.S Corp of Army Engineers, Western Area Power Administration

[110] *See Fed. Reg.* July 24, 2020 (Vol. 85, No. 143) pp. 44,875-44,880.

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

("WAPA"), Wolverine Power Supply Cooperative, XTec, and J. Applebaum, J. Christopher/T. Conway, and J. Cotter. No reply comments were filed. This matter is pending before the FERC.

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

On February 20, 2020, the FERC issued a NOI seeking comments on (i) the potential benefits and risks associated with the use of virtualization and cloud computing services in association with bulk electric system ("BES") operations; and (ii) whether the CIP Reliability Standards impede the voluntary adoption of virtualization or cloud computing services.[112] On March 25, 2020, Joint Associations[113] requested an extension of time to submit comments and reply comments. On April 2, the FERC granted Joint Associations' request and extended the deadline for initial comments on the NOI to July 1, 2020; the deadline for reply comments, July 31, 2020. Comments were filed by NERC, the ISO/RTO Council ("IRC"), Accenture, Amazon Web Services ("Amazon"), Bonneville, the Bureau of Reclamation, Barry Jones, Georgia System Operations, GridBright, Idaho Power, Microsoft, MISO, MISO Transmission Owners, Siemens Energy Management, Tri-State Generation and Transmission Association, VMware, Inc., AEE, American Association for Laboratory Accreditation ("A2LA"), APPA, Canadian Electricity Assoc., EEI, NRECA, and Waterfall Security Solutions. Reply comments were due on or before July 31, 2020, and were filed by AEE, Amazon and Microsoft. This matter is pending before the FERC.

- ***Order 873*** **- Retirement of Reliability Standard Requirements (Standards Efficiency Review) (RM19-17; RM19-16)**

On September 17, 2020, the FERC approved the retirement of the 18 Reliability Standard requirements through the retirement of four Reliability Standards and the modification of five Reliability Standards,[114] concluding that the 18 requirements "(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."[115] The FERC also approved the associated violation risk factors, violation severity levels, implementation plan, and effective dates proposed by NERC. Because it was not persuaded by NERC's justification for the retirement of FAC-008-4 requirement R8, the FERC remanded the retirement of requirements R7 and R8 to NERC for further consideration.[116]

The FERC left for another day its final action on the remaining 56 requirements for which the FERC proposed to approve retirement in the *Retirements NOPR*[117] (the "MOD A Reliability Standards"). The FERC intends to coordinate the effective dates for the retirement of the MOD A Reliability Standards with successor

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

113 "Joint Associations" are for purposes of this proceeding: EEI, APPA, NRECA, and LPPC.

114 *Elec. Rel. Org. Proposal to Retire Reqs. in Rel. Standards Under the NERC Standards Efficiency Review*, Order No. 873, 172 FERC ¶ 61,225 (Sep. 17, 2020) ("*Order 873*"). The four Reliability Standards being eliminated in their entirety are 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-020-0 (Providing Interruptible Demands and Direct Control Load Management Data to System Operations and Reliability Coordinators). The five modified Reliability Standards are INT-006-5 (Evaluation of Interchange Transactions), INT-009-3 (Implementation of Interchange) and PRC-004-6 (Protection System Misoperation Identification and Correction), IRO-002-7 (Reliability Coordination—Monitoring and Analysis), TOP-001-5 (Transmission Operations).

115 *Order 873* at P 2.

116 *Order 873* at P 5. Pursuant to FPA section 215(d)(4), if the FERC disapproves a modification to a Reliability Standard in whole or in part, it must remand the entire Reliability Standard to NERC for further consideration. Accordingly, although it was satisfied here with the justification for the retirement of R7, the FERC was required to remand both R7 and R8 so that its concerns with the retirement of Requirement R8 could be addressed.

117 *Electric Reliability Organization Proposal to Retire Requirements in Rel. Standards Under the NERC Standards Efficiency Review*, 170 FERC ¶ 61,032 (Jan. 23, 2020) ("*Retirements NOPR*") (proposing to approve the retirement of 74 of 77 Reliability Standard requirements requested to be retired by NERC in these two dockets in connection with the first phase of work under NERC's Standards Efficiency Review, an initiative begun in 2017 that 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). As previously reported, NERC withdrew its proposed changes to VAR-001-6 on May 14, 2020, reducing to 76 the number of requirements proposed to be retired.

North American Energy Standards Board ("NAESB") business practice standards (v. 003.3) that include Modeling business practices pending in the *NAESB WEQ v. 003.3 Standards NOPR* (*see* Section XII below).[118]

- **2021 NERC/NPCC Business Plans and Budgets (RR20-6)**

On August 24, 2020, NERC submitted its proposed Business Plan and Budget, as well as the Business Plans and Budgets for the Regional Entities, including NPCC, for 2021. FERC regulations[119] require NERC to file its proposed annual budget for statutory and non-statutory activities 130 days before the beginning of its fiscal year (January 1), as well as the annual budget of each Regional Entity for their statutory and non-statutory activities, including complete business plans, organization charts, and explanations of the proposed collection of all dues, fees and charges and the proposed expenditure of funds collected. NERC reports that its proposed 2021Funding requirement represents an overall decrease of approximately 1.0% over NERC's 2020 Funding requirement. The NPCC U.S. allocation of NERC's net funding requirement is $4.44 million. NPCC has requested $16.4 million in statutory funding (a U.S. assessment per kWh (2020 NEL) of $0.0000494) and $1 million for non-statutory functions. Comments on this filing were due on or before September 14, 2020; none were filed. This matter is pending before the FERC.

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

Still pending before the FERC is the comparisons of actual to budgeted costs for 2019 for NERC and the seven Regional Entities operating in 2019, including NPCC, filed by NERC on May 29, 2020. The Report includes comparisons of actual funding received and costs incurred, with explanations of significant actual cost-to-budget variances, audited financial statements, and tables showing metrics concerning NERC and Regional Entity administrative costs in their 2019 budgets and actual results. Comments on this filing were due on or before June 19, 2020; none were filed. On July 21, 2020, NERC supplemented its May 29, 2020 filing to include the final, audited 2019 financial report for Texas Reliability Entity, Inc. ("Texas RE") (not available to be included at the time of the May 29 filing). As noted, this matter remains pending before the FERC.

XI. Misc. - of Regional Interest

- **203 Application: Millennium Power Partners (EC20-103)**

On September 18, 2020, Millennium Power Partners, L.P. ("Millennium") and New Athens Generating Company, LLC (which owns facilities in New York) requested authorization for a transaction whereby Beal Bank USA, Beal Bank, SSB or their designee(s) ("Beal Bank") will acquire all of their membership interests from Talen. A FERC order approving the transaction on or before November 17, 2020 was requested. Comments on this application are due on or before October 9, 2020. Thus far, Public Citizen has filed a doc-less intervention.

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

On March 13, 2020, the FERC authorized CMP to transfer to NECEC Transmission LLC 7 TSAs, executed on June 13, 2018, that provide the rates, terms, and conditions under which transmission service will be provided over the New England Clean Energy Connect ("NECEC") Transmission Line to the participants that are funding construction of the Line.[120] Pursuant to the March 13 order, notice must be filed within 10 days of consummation of the transaction, which as of the date of this Report has not yet occurred.

- **D&E Agreement: CL&P/UConn (ER20-2927)**

On September 21, 2020, CL&P filed a Preliminary Agreement for Design, Engineering and Construction services (the "D&E Agreement") between itself and The University of Connecticut ("UConn"). The D&E Agreement sets forth the terms and conditions under which CL&P will undertake preliminary design and engineering activities

[118] *Standards for Business Practices and Communication Protocols for Public Utilities*, 85 Fed. Reg. 55201 (September 4, 2020).

[119] 18 CFR § 39.4(b) (2014).

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

to increase the real power capacity of the transmission interconnection service to UConn's large generating facility. CL&P requested that the D&E Agreement be accepted for filing as of the date of filing, or September 21, 2020. Comments on this filing are due on or before October 9. If you have any questions concerning this matter, please contact Pat Gerity (pmgerity@daypitney.com; 860-275-0533).

- **D&E Agreement Cancellation: NSTAR/Vineyard Wind (ER20-2915)**

On September 18, 2020, NSTAR filed a notice of cancellation of the Design and Engineering Agreement ("D&E Agreement") with Vineyard Wind. The D&E Agreement set forth the terms and conditions under which CL&P undertook preliminary engineering and design activities for the Vineyard Wind interconnection facilities prior to execution of the LGIA described in Section VI (ER20-2489) above. The D&E Agreement terminated by its terms as of the effective date of the LGIA. A July 10, 2020 effective date to coincide with the effective date of the LGIA was requested. Comments on this filing are due on or before October 9. If you have any questions concerning this matter, please contact Pat Gerity (pmgerity@daypitney.com; 860-275-0533).

- **LGIA Cancellations: Superseded Great River Hydro LGIAs (Moore, Vernon, Comerford) (ER20-2897 et al.)**

On September 3 and 16, 2020, New England Power Company ("NEP") filed notices of cancellation of its LGIAs with GreatRiver Hydro (f/k/a TransCanada Hydro Northeast) governing the interconnection of the following hydroelectric facilities: (i) Moore (ER20-2897); (ii) Vernon (ER20-2896); and (iii) Comerford (ER20-2815). NEP, ISO-NE and Great River Hydro entered into a fully conforming, standard LGIAs superseding the LGIAs to be cancelled. NEP requested that the cancellation notice be accepted for filing as of the effective date of the superseding LGIAs (Moore – December 10, 2018; Vernon – May 8, 2019; and Comerford - August 7, 2020). If you have any questions concerning these matters, please contact Pat Gerity (pmgerity@daypitney.com; 860-275-0533).

- **Use Rights Transfer Agreement: NSTAR/HQUS (ER20-2724)**

On August 24, NSTAR filed an Agreement between NSTAR and H.Q. Energy Services (U.S.), Inc. ("HQUS") for the continued reassignment (through May 31, 2021) of NSTAR's Use Rights on the Phase I/II HVDC Transmission Facilities ("Transfer Agreement") to HQUS. Comments on this filing were due on or before September 14, 2020; none were filed. Doc-less interventions were filed by HQ US and National Grid (out-of-time). This matter is pending before the FERC. If you have any questions concerning this matter, please contact Pat Gerity (pmgerity@daypitney.com; 860-275-0533).

- **TSAs: Second Amendments to New England Clean Energy Connect TSAs (ER20-2674 et al.)**

On August 14, 2020, CMP filed executed second amendments to 7 of its previously filed and accepted, cost-based transmission service agreements ("TSAs") with the participants that will fund the construction, operation and maintenance of CMP's portion of a the NECEC Transmission Line.[121] The amendments are intended to implement conforming changes to some provisions of the TSAs in anticipation of, and to acknowledge, the assignment of the TSAs from CMP to NECEC Transmission LLC. Comments on the second amendments were due on or before September 4, 2020; none were filed. Doc-less interventions were filed by Eversource, HQ US and National Grid. This matter is pending before the FERC. If you have any questions concerning this matter, please contact Pat Gerity (pmgerity@daypitney.com; 860-275-0533).

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

On July 27, 2020, VTransco filed a notice of cancellation of two agreements,[122] both entered into in 2006, among Vermont Electric Power Company, Inc. ("VELCO"), Central Vermont Public Service Corporation

[121] The second amendments to the 7 TSAs were separately docketed as follows: Eversource (ER20-2674); National Grid (ER20-2675); Unitil (ER20-2676); HQUS/Eversource (ER20-2677); HQUS/National Grid (ER20-2678); HQUS/Unitil (ER20-2679); and HQUS Additional (ER20-2680).

[122] The Agreements are an Amended and Restated Three Party Transmission Agreement and an Amended and Restated Three Party Agreement.

("CVPS"), Green Mountain Power Corporation ("GMP"), and VTransco, which are no longer in use. VTransco requested that the notice of cancellation be accepted for filing as of July 30, 2020. Comments on this filing were due on or before August 17, 2020; none were filed. This matter is pending before the FERC. If you have any questions concerning this matter, please contact Pat Gerity (pmgerity@daypitney.com; 860-275-0533).

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

On September 3, 2020, the FERC accepted CL&P's notice of cancellation of its Design, Engineering and Procurement Agreement (the "D&E Agreement") with NTE Connecticut, LLC ("NTE CT").[123] The D&E Agreement, which set forth the terms and conditions under which CL&P would undertake certain preliminary design and engineering activities on the Interconnection Facilities that were identified in ISO-NE's studies, prior to execution of a Standard Large Generator Interconnection Agreement ("LGIA"), expired when an LGIA was signed on June 16, 2020. The notice of cancellation was accepted for filing as of June 16, 2020, as requested. Unless the September 3 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).

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

VELCO's filing, as an agent of the Joint Owners, that describes why no changes were required to the Phase II Vermont Dedicated Metallic Neutral Return Conductor ("DMNRC") Support Agreement[124] as a result of *Order 864*, remains pending before the FERC. Comments on this filing were due April 22 and were filed by GMP, which supported the filing and agreed with VELCO that no *Order 864* compliance filing is necessary. The IRH Management Committee, Eversource and National Grid intervened doc-lessly. If you have any questions concerning this matter, please contact Eric Runge (617-345-4735; ekrunge@daypitney.com).

- ***Orders 864/864-A* (Public Util. Trans. ADIT Rate Changes): *New England Compliance Filings* (various)**

In accordance with *Order 864*[125] and *Order 864-A,*[126] and extensions of time granted, New England's public utilities with transmission have submitted their Order 864 compliance filings, with the specific dockets and filing dates identified in the following table al remain pending):

Date Filed	Docket	Transmission Provider	Date Accepted
Aug 5, 2020	ER20-2614	New England Power Support Agreement	pending
Aug 5, 2020	ER20-2610	CL&P	pending
Aug 5, 2020	ER20-2609	NSTAR	pending
Aug 5, 2020	ER20-2608	PSNH	pending
Aug 4, 2020	ER20-2607	NEP – Seabrook Transmission Support Agreement	pending
Jul 31, 2020	ER20-2594	VTransco	pending
Jul 30, 2020	ER20-2551	New England Power	pending

[123] *The Conn. Light and Power Co.*, Docket No. ER20-2327 (Sep. 3, 2020) (unpublished letter order).

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

[125] *Public Util. Trans. Rate Changes to Address Accumulated Deferred Income Taxes*, Order No. 864, 169 FERC ¶ 61,139 (Nov. 21, 2019), *reh'g denied and clarification granted in part,* 171 FERC ¶ 61,033 (Apr. 16, 2020) ("*Order 864*"). requiring all public utility transmission providers with transmission rates under an OATT, a transmission owner tariff, or a rate schedule to revise those rates to account for changes caused by the 2017 Tax Cuts and Jobs Act ("2017 Tax Law"). Specifically, for transmission formula rates, Order 864 requires public utilities (i) to deduct excess ADIT from or add deficient ADIT to their rate bases and adjust their income tax allowances by amortized excess or deficient ADIT; and (ii) to incorporate a new permanent worksheet into their transmission formula rates that will annually track ADIT information.

[126] *Public Util. Trans. Rate Changes to Address Accumulated Deferred Income Taxes*, 171 FERC ¶ 61,033, Order No. 864-A (Apr. 16, 2020) ("*Order 864-A*").

Jul 30, 2020	ER20-2553	NEP – LSA with MECO/Nantucket	pending
Jul 30, 2020	ER20-2572	New England TOs	pending
Jul 15, 2020	ER20-2429	CMP	pending
Jun 29, 2020	ER20-2219	New England Power	pending
Jun 23, 2020	ER20-2133	Versant Power	pending
May 18, 2020	ER20-1839	VETCO	Pending
Feb 26, 2020	ER20-1089	New England Elec. Trans. Corp.	pending
Feb 26, 2020	ER20-1088	New England Hydro Trans. Elec. Co.	pending
Feb 26, 2020	ER20-1087	New England Hydro Trans. Corp.	pending

XII. Misc. - Administrative & Rulemaking Proceedings

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

On June 17, 2020, the FERC issued a notice that it would convene a Commissioner-led technical conference on September 30, 2020, from 9:00 am – 6:00 pm. The purpose of the conference, which will be held electronically, is to discuss considerations related to state adoption of mechanisms to price carbon dioxide emissions, commonly referred to as carbon pricing, in regions with FERC-jurisdictional organized wholesale electricity markets. The September 30 conference is a response to (i) the April 14, 2020 request by Interest Parties,[127] who asserted that a technical conference "would be helpful to the Commission and stakeholders in the electric energy industry in deciding how best to move forward at the state and regional levels on these issues and in the relevant organized markets" complementing "state, regional, and national discussions currently taking place" as well as to (ii) the more than 30 sets of comments on the request that were filed.

Since the last Report, the FERC issued a supplemental notice (September 16) with a revised agenda and list of panelists, with changes to the agenda since the August 28, 2020 notice identified in italics. Of note, panelists during the day will include Gordon van Welie and Matt White. There is no fee for attendance, and the conference will be webcast for the public to attend electronically. Information on this technical conference, including a link to the webcast, are posted on this conference's event page on the FERC's website (https://www.ferc.gov/news-events/events/technical-conference-regarding-carbon-pricing-organized-wholesale-electricity).

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

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

On August 10, 2020, the FERC invited interested persons to file post-technical conference comments to address issues raised during the technical conference and identified in the Supplemental Notice of Technical Conference issued July 13, 2020. Post-technical conference comments were due on or before September 24, 2020 and were filed by ISO-NE, CAISO, MISO, NYISO, Enel, American Council on Renewable Energy, AWEA, EEI, R Street institute, Savion, and SEIA. This matter is pending before the FERC.

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

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

Energy Trading Institute's[128] December 16, 2019 request that the FERC hold a technical conference and conduct a rulemaking to update the requirements adopted in *Order 741*[129] and Section 35.47 of the FERC's regulations addressing credit and risk management in the markets operated by RTO/ISOs remains pending. As previously reported, ETI, citing a recent filing by NYISO (which it protested),[130] and stating that several expedited initiatives related to RTO/ISO credit policies are underway, suggested that it would be helpful for the FERC to consolidate any "filings with this proceeding and hold the technical conference ETI is requesting by March 30, 2020 so the ISOs, RTOs and their stakeholders consider those discussions in any initiatives they have underway." ETI suggested in its request that RTO/ISO credit support requirements be standardized, and that the requested technical conference and rulemaking explore various ways to identify and mitigate counterparty risk (including know-you-customer ("KYC") tools and participant suspensions or bans) and enhance risk management infrastructure/processes within the organized markets. Doc-less interventions have been filed by, among others, PJM, the PJM IMM, SPP, CAISO, Tenaska, Avangrid, and Roscommon Analytics. On January 24, the IRC, including ISO-NE, submitted comments and proposed, as an alternative approach to the one suggested by ETI, that the FERC not commence a rulemaking or schedule a technical conference at this time and instead allow individual RTO/ISOs to address their respective credit and risk management issues, permit sufficient time for experience with the evolving rules to be gained, and then consider the best path forward to facilitate a dialogue on best practices and potential points of alignment among the RTO/ISO. ETI responded to those comments on February 10, 2020.

The FERC issued a notice of ETI's request for technical conference and petition for rulemaking on February 11, 2020, setting March 12, 2020 as the deadline for comments thereon. Comments were submitted by a number of parties, including APPA, CAISO, the Committee of Chief Risk Officers ("CCRO"), DC Energy, EEI, EPSA, Indicated PJM Transmission Owners,[131] and an independent consultant.[132] This matter remains 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)[133] and terminated the DOE NOPR rulemaking proceeding (RM18-1).[134] In terminating the DOE NOPR proceeding, the

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[128] 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."

[129] *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.

[130] *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).

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

[132] W. Scott Miller, III, Whitehall Bay Energy Services, LLC.

[133] *Grid Rel. and Resilience Pricing*, 162 FERC ¶ 61,012 (Jan. 8, 2018), *reh'g requested*.

[134] 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

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

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

ISO-NE Response. In its response, ISO-NE identified fuel security[135] 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"[136] 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

materials for the November 3, 2017 Participants Committee meeting. Reply comments and answers to those comments were filed by over 100 parties.

[135] 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."

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

issue emergency orders to keep plants operating, but has previously been exercised only in response to natural disasters. Action on that 2018 request is pending.

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

On March 20, 2020, the FERC issued a NOPR[137] proposing to revise its existing transmission incentives policy and corresponding regulations.[138] The proposed revisions include the following:

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

A more detailed summary of the NOPR was distributed to the Transmission Committee and discussed at its March 25, 2020 meeting. Over 80 sets of comments on the proposed revisions were filed on or before the July 1, 2020[139] comment date, including comments by: Avangrid, EDF Renewables, EMCOS, Eversource, Exelon, LS Power, MMWEC/NHEC/CMEEC, National Grid, NESOCE, NextEra, UCS, CT PURA, and Potomac Economics. Reply comments were filed by AEP, ITC Holding, the N. California Transmission Agency, and WIRES. The NOPR is now pending before the FERC. If you have any questions concerning this matter, please contact Eric Runge (617-345-4735; ekrunge@daypitney.com).

[137] *Electric Transmission Incentives Policy Under Section 219 of the Federal Power Act*, 170 FERC ¶ 61,204 (Mar. 20, 2020) ("*Electric Transmission Incentives NOPR*").

[138] 18 CFR 35.35 (2020).

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

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

On July 16, 2020, the FERC issued its final rule[140] approving pricing and eligibility revisions to its long-standing regulations implementing sections 201 and 210 of the Public Utility Regulatory Policies Act of 1978 ("PURPA").[141] 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.[142] *Order 872* implements the following significant revisions:

- ***State Flexibility in Setting QF Rates***: Previous regulations required that rates paid to qualifying facilities (QFs) under PURPA must be at "avoided costs" of the purchasing utility, with the QF electing whether to accept avoided cost rates that vary over a contract period or a fixed rate for the duration of the contract. *Order 872* eliminates that requirement; instead, states will have the option of requiring energy rates (but not capacity rates) in QF power sales contracts to vary with changes in the purchasing utility's "as-available" avoided costs at the time energy is delivered. If a state exercises this option, then a QF cannot elect to fix the energy rate but can continue to receive a fixed capacity rate for the term of its agreement with the purchasing utility. In addition, *Order 872* allows states in an ISO/RTO market to set the rate for as-available energy at a variable rate equal to the ISO/RTO LMP, based on a rebuttable presumption (rather than a *per se* rule as FERC proposed in its NOPR) that the LMP represents the as-available avoided costs of utilities located in that market. These regulations provide greater flexibility to the states in determining whether such rates accurately reflect the purchasing utility's avoided cost at the time of delivery. *Order 872* also permits states to set energy and capacity rates pursuant to competitive solicitation processes but only so long as those processes are transparent and nondiscriminatory. FERC, however, declined to adopt a NOPR proposal to permit states with retail competition to relieve their utilities from PURPA's mandatory purchase obligation.
- ***Decreases (to 5 MW) the Threshold for Rebuttable Presumption of Access to Nondiscriminatory, Competitive Markets***. PURPA regulations previously provided a rebuttable presumption that certain 20 MW or larger QFs located in ISO/RTO markets had nondiscriminatory access to those markets and exempted utilities from any purchase obligations from such resources. *Order 872* reduces the threshold from 20 MW to 5 MW (rather than 1 MW as proposed in the NOPR). QFs above 5 MW can challenge the presumption that they have nondiscriminatory access to wholesale markets based on a list of factors specified in *Order 872*, including barriers to connecting to the transmission grid and lack of affiliation with entities participating in RTO/ISO markets. This modification does not apply to QFs that are cogenerators, which are still subject to the 20 MW threshold.
- ***Updates the "One-Mile Rule"***. Under current PURPA regulations, a small power production facility must be 80 MW or less to be eligible for QF treatment. To prevent gaming of that rule (QF certification of multiple projects that, if combined, would otherwise exceed the 80 MW cap), *Order 872* establishes two irrebuttable presumptions: (1) facilities under common ownership located less than one mile apart that use the same energy resource will be aggregated into a single project for purposes of QF eligibility; and (2) facilities under common ownership located more than 10 miles apart that use the same energy resource will be presumed to be separate projects for QF eligibility. *Order 872* also establishes a rebuttable presumption that facilities under common ownership located more than one mile apart but less than 10 miles apart are located on a separate site and are not aggregated in determining whether they fall below the 80 MW cap. The FERC explained that this rule also will be applied to QFs developed by unaffiliated developers and later acquired by a single entity.

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

[141] 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.

[142] 16 U.S.C. § 824a–3; PURPA, Sec. 210(a)-(b).

- ***Clarifies When a QF Establishes Its Entitlement to a Purchase Obligation***. *Order 872* requires a utility to purchase the power only from QFs that can demonstrate commercial viability and a financial commitment pursuant to objective and reasonable state-defined criteria. The FERC clarified that, to the extent that a permitting factor is relied upon, a QF need only show that it has applied for all required permits and paid all applicable fees, but not that it has obtained such permits or has a reasonable likelihood of obtaining such permits.
- ***Provides for Certification Challenges***. *Order 872* provides that interested stakeholders may challenge a QF self-certification or self-recertification. Challenges to recertifications, however, will be limited to those QFs making substantive changes (e.g., a change in electrical generating equipment that increases power production capacity by the greater of 1 MW or 5 percent of the previously certified capacity, or a change in ownership in which an owner increases its equity interest by at least 10 percent from the equity interest previously reported).

Order 872 will become effective December 31, 2020.[143] Requests for rehearing and/or clarification of *Order 872* were filed by California Utilities, EPSA, Northwest Coalition, One Energy Enterprises, Public Interest Organizations, SEIA, and Thomas Mattson. On September 17, 2020, the FERC issued a "Notice of Denial of Rehearings by Operation of Law and Providing for Further Consideration".[144] The Notice confirmed that the 60-day period during which a petition for review of *Order 872* can be filed with an appropriate federal court was triggered when the FERC did not act on the requests for rehearing of *Order 872*. The Notice also indicated that the FERC would address, as is its right, the rehearing requests in a future order, and may modify or set aside its orders, in whole or in part, "in such manner as it shall deem proper." That order must be issued by the date that the record of the proceeding must be filed with the court of appeals.[145] Thus far, SEIA has petitioned the 9th Circuit Court of Appeals for review of *Order 872* (*see* Section XV below).

- ***Order 2222*: DER Participation in RTO/ISO Markets (RM18-9)**

On September 17, the FERC issued a final rule ("*Order 2222*")[146] adopting reforms to remove what it found were barriers to the participation of distributed energy resource ("DER")[147] aggregations in the RTO/ISO markets. *Order 2222* requires each RTO/ISO to revise its tariff to ensure that its market rules facilitate the participation of DER aggregations. Specifically, the tariff provisions addressing distributed energy resource aggregations must:

(1) allow distributed energy resource aggregations to participate directly in RTO/ISO markets and establish distributed energy resource aggregators as a type of market participant;

(2) allow distributed energy resource aggregators to register distributed energy resource aggregations under one or more participation models that accommodate the physical and operational characteristics of the distributed energy resource aggregations;

[143] *Order 872* was published *Fed. Reg.* on Sep. 2, 2020 (Vol. 85, No. 171) pp. 54,638-54,740.

[144] *Qualifying Facility Rates and Requirements; Implementation Issues Under the Public Utility Regulatory Policies Act of 1978*, 172 FERC ¶ 62,154 (Sep. 11, 2020).

[145] *See* 16 USC § 825l(a) ("Until the record in a proceeding shall have been filed in a court of appeals, … the [FERC] may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.").

[146] *Participation of Distributed Energy Resource Aggregations in Markets Operated by Regional Transmission Organizations and Independent System Operators*, 172 FERC ¶ 61,247 (Sep. 17, 2020).

[147] The FERC defined a DER as "any resource located on the distribution system, any subsystem thereof or behind a customer meter. These resources may include, but are not limited to, electric storage resources, distributed generation, demand response, energy efficiency, thermal storage, and electric vehicles and their supply equipment."

(3) establish a minimum size requirement for distributed energy resource aggregations that does not exceed 100 kW;

(4) address locational requirements for distributed energy resource aggregations;

(5) address distribution factors and bidding parameters for distributed energy resource aggregations;

(6) address information and data requirements for distributed energy resource aggregations;

(7) address metering and telemetry requirements for distributed energy resource aggregations;

(8) address coordination between the RTO/ISO, the distributed energy resource aggregator, the distribution utility, and the relevant electric retail regulatory authorities;

(9) address modifications to the list of resources in a distributed energy resource aggregation;

(10) address market participation agreements for distributed energy resource aggregators; and

(11) Accept bids from a DER aggregator if its aggregation includes DERs that are customers of utilities that distributed more than 4 million MWh in the previous fiscal year. An RTO/ISO must not accept bids from a DER aggregator if its aggregation includes DERs that are customers of utilities that distributed 4 million MWhs or less in the previous fiscal year, unless the relevant electric retail regulatory authority permits such customers to be bid into RTO/ISO markets by a DER aggregator.

Each RTO/ISO must file the tariff changes needed to implement the requirements of *Order 2222* within [270 days of the publication date of *Order 2222* in the *Federal Register*].[148] To the extent that an RTO/ISO proposes to comply with any or all of the requirements in *Order 2222* using its currently effective requirements for distributed energy resources, it must demonstrate on compliance that its existing approach meets *Order 2222*'s requirements.

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

As previously reported, *Order 860,*[149] issued three years after the FERC's *Data Collection NOPR,*[150] (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 <u>not</u> adopt the *Data Collection NOPR* proposal to collect Connected Entity data from MBR Sellers and entities trading virtuals or holding FTRs. The FERC will post on its website high-level instructions that describe the mechanics of the relational database submission process and how to prepare filings that incorporate information that is submitted to the relational database. As recently extended (*see* below), *Order 860* will become effective April 1, 2021, and submitters will have until close of business on August 2, 2021 to make their initial baseline submissions. Submitters will be required to obtain in Spring 2021 FERC-generated IDs for reportable entities that do not have CIDs or LEIs, as well as Asset IDs for reportable generation assets without

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[148] As of the date of this Report, *Order 2222* has not been published in the *Federal Register*.

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

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

an EIA code so that every ultimate upstream affiliate or other reportable entity has a FERC-assigned company identifiers ("CID"), Legal Entity Identifier,[151] or FERC-generated ID and that all reportable generation assets have an code from the Energy Information Agency ("EIA") Form EIA-860 database or a FERC-assigned Asset ID. Requests for rehearing and/or clarification of *Order 860* were denied,[152] other than TAPS' request that the FERC clarify that the public will be able to access the relational database. On that point, the FERC clarified "that we will make available services through which the public will be able to access organizational charts, asset appendices, and other reports, as well as have access to the same historical data as Sellers, including all market-based rate information submitted into the database. We also clarify that the database will retain information submitted by Sellers and that historical data can be accessed by the public."

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

Effective Date Extended by 6 Months. On May 6, 2020, EEI requested a four-month extension of implementation of *Order 860*. EPSA supported that request on May 13, 2020. On May 20, the FERC issued a notice extending the effective and associated implementation dates of *Order 860* by *six* months. The new *Order 860* effective date will be April 1, 2021, and the deadline for baseline submissions to and including August 2, 2021. First change in status filings under these new timelines will be due August 31, 2021.

- **NOPR: NAESB WEQ Standards v. 003.3 - Incorporation by Reference into FERC Regs (RM05-5-029, -030)**

On July 16, 2020, the FERC issued a NOPR proposing to incorporate by reference, with certain enumerated exceptions, the latest version (Version 003.3) of certain Standards for Business Practices and Communication Protocols for Public Utilities adopted by the NAESB Wholesale Electric Quadrant ("WEQ").[153] Despite having only recently incorporated Version 003.2 in its regulations, the FERC proposed to move forward on Version 003.3 because this Version contains a number of major initiatives whose incorporation by reference "will improve the security and the efficiency of business transactions. These include enhanced cybersecurity standards resulting from an assessment by Sandia, improved methodologies for resolving transmission loading relief, and standards for determining available transfer capacity."[154] Comments on the *NAESB WEQ v. 003.3 Standards NOPR* are due on or before November 3, 2020.[155]

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

On February 4, 2020, the FERC issued Order *676-I*,[156] which incorporates by reference into its regulations, with certain enumerated exceptions, the latest version (Version 003.2) of certain Standards for Business Practices and Communication Protocols for Public Utilities adopted by the NAESB Wholesale Electric Quadrant.[157] The Version 003.2 Standards included NAESB's Version 003.1 revisions, which were the subject

[151] 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.

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

[153] *Standards for Business Practices and Communication Protocols for Public Utilities*, 172 FERC ¶ 61,047 (July 16, 2020) ("*NAESB WEQ v. 003.3 Standards NOPR*").

[154] The *NAESB WEQ v. 003.3 NOPR* at P .

[155] The *NAESB WEQ v. 003.3 NOPR* was published in the *Fed. Reg.* on Sep. 4, 2020 (Vol. 85, No. 173) pp. 55,201-55,219.

[156] *Standards for Business Practices and Communication Protocols for Public Utilities*, Order No. 676-I, 170 FERC ¶ 61,062 (Feb. 4, 2020) ("*Order 676-I*"), *reh'g and/or clarif. pending*.

[157] *Standards for Business Practices and Communication Protocols for Public Utilities*, 167 FERC ¶ 61,127 (May 16, 2019) ("*NAESB WEQ v. 003.2 Standards NOPR*").

of an earlier NOPR.[158] The FERC declined to adopt the proposal to remove the incorporation by reference of the WEQ-006 Manual Time Error Correction Business Practice Standards as adopted by NAESB. *Order 676-I* will become effective April 27, 2020.[159] Requests for clarification and/or rehearing of *Order 676-I* were filed by EEI and Southern Companies. On April 6, 2020, the FERC issued a tolling order to afford it additional time to consider those requests, which remain pending before the FERC.

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

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

On May 21, 2020, the FERC issued a Proposed Policy Statement that would clarify its policy regarding requests for waiver of tariff provisions.[160] The *Proposed Policy Statement* sets forth the approach the FERC would take going forward to ensure compliance with the filed rate doctrine and the rule against retroactive making. The proposed policy will both clarify and modify waiver standards, and in some instances, make it harder to obtain waivers.

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

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

2. *Form of Filing*. When the entity requesting remedial relief is the entity that acted (or believes it may have acted) in a manner inconsistent with the tariff, such requests should be filed as petitions for declaratory order under Rule 207 of the FERC's Rules of Practice and Procedure. When the filing entity alleges a different entity has acted in a manner inconsistent with the tariff, such requests should be filed as complaints under Rule 206. Given the filing fees associated with petitions for declaratory order, the industry was encouraged to directly address this aspect of the proposal.

3. *Expressly Request FERC Action pursuant to FPA section 309 or NGA section 16.4*. These provisions have been found to afford the FERC the latitude to remedy past non-compliance "provided the agency's action conforms with the purposes and policies of Congress and does not contravene any terms of the Act."

The FERC acknowledged that this Policy would represent a change from its past approach, particularly in situations where inadvertent failures to comply with ministerial tariff requirements have not been

[158] *Standards for Business Practices and Communication Protocols for Public Utilities*, 156 FERC ¶ 61,055 (July 21, 2016), ("*WEQ v. 003.1 NOPR*").

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

[160] *Waiver of Tariff Requirements*, 171 FERC ¶ 61,156 (May 21, 2020) ("*Proposed Policy Statement*").

protested. The FERC suggested a few ways tariffs may be modified to avoid what may appear by comparison to be harsh outcomes, including expressly stating in the tariff that a failure to comply with a certain deadline may be waived by order of the FERC or by allowing various kinds of errors to be cured within a reasonable period of time after a default has occurred or an error has been discovered, but is difficult to imagine how feasible or how well these options might work in practice.

The FERC proposed to incorporate its current four-part analysis[161] in considering both requests for prospective waiver and petitions for remedial relief, but cautioned that it would apply that analysis only in those limited circumstances where the request for remedial relief would not violate the filed rate doctrine or the rule against retroactive ratemaking due to adequate prior notice, or the requested relief is within the FERC's authority to grant under FPA section 309 or NGA section 16.

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

With respect to prospective requests to waive the 60-day prior notice requirement under FPA section 205(d) (or the 30-day prior notice requirement under NGA section 4(d)), which the FERC has discretion to waive "for good cause shown," the FERC proposes to leave in effect its policy of generally granting such waivers,[162] to the extent that entities seek an effective date no earlier than the day *after* the date a rate change is submitted to the FERC.

Comments on the Proposed Policy Statement were due on or before June 18, 2020 and were filed by the IRC, AEE, APPA, AWEA/SEIA, EEI, EPSA, Indicated Generators,[163] INGAA, Kansas Electric Power Coop. ("KEPC"), NGA, NGSA, NRECA, Public Citizen, Sunflower Electric Power, and TAPS. Reply comments were filed by APPA, Joint Trade Associations,[164] KEPC, and the Sustainable FERC Project. The proposed Policy Statement is pending before the FERC.

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

On May 21, 2020, the FERC issued a Policy Statement that applies to natural gas and oil pipelines, with certain exceptions to account for the statutory, operational, organizational and competitive differences among the electric, natural gas and oil pipeline industries, the FERC's ROE methodology adopted in *Opinion No. 569-A*.[165] Specifically, the FFERC revised its policy and will determine natural gas and oil pipeline ROEs by averaging the results of the DCF and CAPM, but will not use the risk premium model discussed in *Opinion 569/569-A* ("Risk Premium").[166] In addition, the FERC clarified its policies governing the formation of proxy

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

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

163 "Indicated Generators" are Vistra, NRG, FirstLight, Cogentrix, and LS Power.

164 "Joint Trade Associations" are AEE, AWEA, EEI, EPSA, INGAA, NGSA, NRECA and SEIA.

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

166 As previously reported, the FERC issued a notice of inquiry on March 21, 2019 seeking information and views to help the FERC explore whether, and if so how, it should modify its policies concerning the determination of ROE to be used in designing jurisdictional rates charged by public utilities.[166] The FERC also sought comment on whether any changes to its policies concerning public utility ROEs should

groups and the treatment of outliers in proceedings addressing natural gas and oil pipeline ROEs. Finally, the FERC encouraged oil pipelines to file revised FERC Form No. 6, page 700s for 2019 reflecting the revised ROE policy. This Policy Statement became effective May 27, 2020.[167] On July 7, the FERC issued a notice that pipelines choosing to file updated FERC Form No. 6, page 700 data consistent with the ROE Policy Statement should file such data on or before July 21, 2020.

Complainant-Aligned Parties[168] answered the New England TO's May 10 supplemental comments. On June 15, 2020, Joint Parties[169] submitted supplemental comments arguing that the FERC should use the midpoint, rather than the median, as the measure of central tendency for public utilities that file individually to establish a ROE. Joint Parties' comments were opposed by Six Cities.[170] WIRES submitted supplemental comments on June 18, 2020 requesting that the FERC take further action in this proceeding to "resolve the uncertainty surrounding its base ROE methodology and establish a policy consistent with the recommendations made in these comments" (recommending a framework that employs all four of the previously proposed ROE models, including the Expected Earnings model, along with certain modifications, to ensure that ROEs attract capital investment in needed transmission infrastructure). On June 24, EEI and WIRES requested the FERC issue a NOI regarding the FERC's policy for determining base ROE applicable to the electric industry as a whole. Six Cities answered Joint Parties on June 30. APPA answered EEI and WIRES' June 24 motion.

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

On April 19, 2018, the FERC announced its intention to revisit its approach under its 1999 Certificate Policy Statement to determine whether a proposed jurisdictional natural gas project is or will be required by the present or future public convenience and necessity, as that standard is established in NGA Section 7. Specifically, the NOI[171] 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,[172] comments were due on or before July 25, 2018. Literally thousands of individual and mass-mailed comments were filed. This matter remains pending before the FERC.

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be applied to interstate natural gas and oil pipelines. This NOI followed *Emera Maine*, which reversed *Opinion 531*, and seeks to engage interests beyond those represented in the *Emera Maine* proceeding (see EL11-66 *et al.* in Section I above).

[167] The *Natural Gas and Oil Pipeline ROE Policy Statement* was published *Fed. Reg.* on May 27, 2020 (Vol. 85, No. 102) pp. 31,760-31,773.

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

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

[170] "Six Cities" are the Cities of Anaheim, Azusa, Banning, Colton, Pasadena, and Riverside, California.

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

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

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*[173] 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.[174] 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."[175] 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.[176] 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 to afford it additional time to consider BP's request for rehearing of the *BP Penalties Order*, which remains pending.

On September 7, 2016, BP submitted a motion for modification of the *BP Penalties Order's* disgorgement directive because it cannot comply with the disgorgement directive as ordered. BP explained that the entity to which disgorgement was to be directed, the Texas Low Income Home Energy Assistance Program ("LIHEAP"), is not set up to receive or disburse amounts received from any person other than the Texas Legislature. In response, on September 12, 2016, the FERC stayed the disgorgement directive (until an order on BP's pending request for rehearing is issued), but indicated that interest will continue to accrue on unpaid monies during the pendency of the stay.[177]

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

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

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

[175] *BP Penalties Order* at P 3.

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

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

25, 2018, and revised that answer on January 31. On February 9, BP replied to FERC Staff's revised answer. This matter remains pending before the FERC.

Total Gas & Power North America, Inc. et al. (IN12-17). On April 28, 2016, the FERC issued a show cause order[178] 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.[179]

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:
  - ***Iroquois ExC Project (CP20-48)***
    - 125,000 Dth/d of incremental firm transportation service to ConEd and KeySpan by building and operating new natural gas compression and cooling facilities at the sites of four existing Iroquois compressor stations in Connecticut (Brookfield and Milford) and New York (Athens and Dover)
    - Three-year construction project; service request by November 1, 2023
    - Application for a certificate of public convenience and necessity pending.
    - Since the Last Report, the FERC issued and Iroquois responded to a September 14 data request regarding Administrative and General (A&G) Expenses. In addition, Iroqious further supplemented its application with additional information on September 3, 18 and 21.

- **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

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

[179] 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.

and request for stay. On April 2, 2019, the FERC denied the NY DEC and Sierra Club requests for rehearing.[180] Those orders have been challenged on appeal to the US Court of Appeals for the Second Circuit (19-1610).

- As previously reported, the August 6, 2018 *Northern Access Certificate Rehearing Order* dismissed or denied the requests for rehearing of the *Northern Access Certificate Order*.[181] Further, in an interesting twist, the FERC found that a December 5, 2017 "Renewed Motion for Expedited Action" filed by National Fuel Gas Supply Corporation and Empire Pipeline, Inc. (the "Companies"), in which the Companies asserted a separate basis for their claim that the NY DEC waived its authority under section 401 of the Clean Water Act ("CWA") to issue or deny a water quality certification for the Northern Access Project, served as a motion requesting a waiver determination by the FERC,[182] and proceeded to find that the NY DEC was obligated to act on the application within one year, failed to do so, and so waived its authority under section 401 of the CWA.
- The FERC authorized the Companies to construct and operate pipeline, compression, and ancillary facilities in McKean County, Pennsylvania, and Allegany, Cattaraugus, Erie, and Niagara Counties, New York ("Northern Access Project") in an order issued February 3, 2017.[183] The Allegheny Defense Project and Sierra Club (collectively, "Allegheny") requested rehearing of the *Northern Access Certificate Order*.
- Despite the FERC's *Northern Access Certificate Order*, the project remained halted pending the outcome of National Fuel's fight with the NY DEC's April denial of a Clean Water Act permit. NY DEC found National Fuel's application for a water quality certification under Section 401 of the Clean Water Act, as well as for stream and wetlands disturbance permits, failed to comply with water regulations aimed at protecting wetlands and wildlife and that the pipeline failed to explore construction alternatives. National Fuel appealed the NY DEC's decision to the 2nd Circuit on the grounds that the denial was improper.[184] On February 2, 2019, the 2nd Circuit vacated the decision of the NY DEC and remanded the case with instructions for the NY DEC to more clearly articulate its basis for the denial and how that basis is connected to information in the existing administrative record. The matter is again before the NY DEC.
- On November 26, 2018, the Applicants filed a request at FERC for a 3-year extension of time, until February 3, 2022, to complete construction and to place the certificated facilities into service. The Applicants cited the fact that they "do not anticipate commencement of Project construction until early 2021 due to New York's continued legal actions and to time lines required for procurement of necessary pipe and compressor facility materials." The extension request was granted on January 31, 2019.

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

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

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

[183] *Nat'l Fuel Gas Supply Corp.*, 158 FERC ¶ 61,145 (2017) ("*Northern Access Certificate Order*"), *reh'g denied*, 164 FERC ¶ 61,084 (Aug 6, 2018) ("*Northern Access Certificate Rehearing Order*").

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

- On August 8, 2019, the NY DEC again denied Applicants request for a Water Quality Certification, and as directed by the Second Circuit,[185] provided a "more clearly articulate[d] basis for denial."
- On August 27, 2019, Applicants requested an additional order finding on additional grounds that the NY DEC waived its authority over the Northern Access 2016 Project under Section 401 of the CWA, even if the NY DEC and Sierra Club prevail in their currently pending court petitions challenging the basis for the Commission's Waiver Order.[186]

XIV. State Proceedings & Federal Legislative Proceedings

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

On May 1, 2020, President Trump signed an Executive Order that authorizes U.S. Secretary of Energy Dan Brouillette to work with the Cabinet and energy industry to secure America's BPS. The Executive Order prohibits Federal agencies and U.S. persons from "acquiring, transferring, or installing BPS equipment in which any foreign country or foreign national has any interest and the transaction poses an unacceptable risk to national security or the security and safety of American citizens. Evolving threats facing our critical infrastructure have only served to highlight the supply chain risks faced by all sectors, including energy, and the need to ensure the availability of secure components from American companies and other trusted sources." The Secretary of Energy is accordingly authorized to (i) establish and publish criteria for recognizing particular equipment and vendors as "pre-qualified" (pre-qualified vendor list); (ii) identify any now-prohibited equipment already in use, allowing the government to develop strategies and work with asset owners to identify, isolate, monitor, and replace this equipment as appropriate; and (iii) work closely with the Departments of Commerce, Defense, Homeland Security, Interior; the Director of National Intelligence; and other appropriate Federal agencies to carry out the authorities and responsibilities outlined in the Executive Order. A Task Force led by Secretary Brouillette will develop energy infrastructure procurement policies to ensure national security considerations are fully integrated into government energy security and cybersecurity policymaking. The Task Force will consult with the energy industry through the Electricity and Oil and Natural Gas Subsector Coordinating Councils to further its efforts on securing the BPS. A copy of the Executive Order may be accessed here.

XV. Federal Courts

The following are matters of interest, including petitions for review of FERC decisions in NEPOOL-related proceedings, that are currently pending before the federal courts (unless otherwise noted, the cases are before the U.S. Court of Appeals for the District of Columbia Circuit). An "**" following the Case No. indicates that NEPOOL has intervened or is a litigant in the appeal. The remaining matters are appeals as to which NEPOOL has no organizational interest but that may be of interest to Participants. For further information on any of these proceedings, please contact Pat Gerity (860-275-0533; pmgerity@daypitney.com). [*due to technological glitches in Westlaw, not all of the proceedings were able to be fully updated for this Report.*]

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

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

- **Mystic 8/9 Cost of Service Agreement (20-1343; 20-1361, 20-1362; 20-1365, 20-1368)(consolidated); Underlying FERC Proceeding: ER18-1639[187]**
  Petitioners: Mystic (1343), NESCOE (1361), MA AG (1362), CT Parties (1365, 1368)

Mystic, NESCOE, MA AG, and CT Parties separately petitioned the DC Circuit Court of Appeals for review of the FERC's orders addressing the COS Agreement among Mystic, ExGen and ISO-NE.[188] The cases have been consolidated into Case No. 20-1343. Appearances due October 8, 2020. Parties must file docketing statements and statement of issues to be raised by October 16 (October 19 for Parties in Case No. 20-1365). Dispositive motions and a Certified Index to the Record must be filed by October 23, 2020.

- ***CASPR* (20-1333)**
  Underlying FERC Proceeding: ER18-619[189]
  Petitioners: Sierra Club, NRDC, RENEW Northeast, and CLF

On August 31, 2020, the Sierra Club, NRDC, RENEW Northeast, and CLF petitioned the DC Circuit Court of Appeals for review of the FERC's order accepting ISO-NE's CASPR revisions (which, under *Allegheny*, is ripe for review). Appearances, together with a docketing statement, procedural motions (if any), statement of issues to be raised, and a statement of intent to utilize deferred joint appendix are due Entry of Appearance Form October 2, 2020. The Certified Index to the Record and dispositive motions, if any, are due October 19, 2020.

- ***Opinion 531-A* Compliance Filing Undo (20-1329)**
  Underlying FERC Proceeding: ER15-414[190]
  Petitioners: TOs' (CMP et al.)

On August 28, 2020, the TOs[191] petitioned the DC Circuit Court of Appeals for review of the FERC's October 6, 2017 order rejecting the TOs' filing that sought to reinstate their transmission rates to those in place prior to the FERC's orders later vacated by the DC Circuit's *Emera Maine*[192] decision. Among other submissions, the TOs must file by September 30, 2020 a docketing statement, statement of issues, and any procedural motions. Dispositive motions and a Certified Index to the Record must be filed by October 15, 2020. Appearances by others in this case must be filed by September 30, 2020.

- **2013/14 Winter Reliability Program Order on Compliance and Remand (20-1289, 20-1366) (consol.)**
  Underlying FERC Proceeding: ER13-2266[193]
  Petitioner: TransCanada

On July 30, 2020, TransCanada Power Marketing ("Petitioner") again petitioned the DC Circuit Court of Appeals for review of the FERC's action on the 2013/2014 Winter Reliability Program, this time in the FERC's April 1, 2020 *2013/14 Winter Reliability Program Order on Compliance and Remand*.[194] Among other submissions, TransCanada must file by August 31, 2020 a docketing statement, statement of issues, and any procedural

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[187] *July 2018 Order*; *July 2018 Rehearing Order*; *Dec 2018 Order*; *Dec 2018 Rehearing Order; Jul 17 Compliance Order*.

[188] The COS Agreement is to provide compensation for the continued operation of the Mystic 8 & 9 units from June 1, 2022 through May 31, 2024.

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

[190] *ISO New England Inc.*, 161 FERC ¶ 61,031 (Oct. 6, 2017) ("*Order Rejecting Filing*").

[191] The "TOs" are CMP; Eversource Energy Service Co., on behalf of its affiliates CL&P, NSTAR and PSNH; National Grid; New Hampshire Transmission; UI; Unitil and Fitchburg; VTransco; and Versant Power.

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

[193] 171 FERC ¶ 61,003 (Apr. 1, 2020) ("*2013/14 Winter Reliability Program Order on Compliance and Remand*") (accepting ISO-NE's January 23, 2017 compliance filing, finding that the bid results from the 2013/14 Winter Reliability Program were just and reasonable, and providing for this finding the further reasoning requested by the DC Circuit in *TransCanada Power Mktg. Ltd. v. FERC*, 811 F.3d 1 (DC Cir. 2015) ("*TransCanada*").)

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

motions. Dispositive motions and a Certified Index to the Record must be filed by September 14. Appearances by others in this case were due by August 31, 2020.

- **ISO-NE's Inventoried Energy Program (Chapter 2B) Proposal (19-1224***; 19-1247; 19-1252; 19-1253)(consolidated); Underlying FERC Proceeding: ER19-1428**[195]
Petitioners: ENECOS (Belmont et al.) (19-1224); MA AG (19-1247); NH PUC/NH OCA (19-1252); Sierra Club/UCS (19-1253)

At the unopposed request of the FERC, the Court issued an order suspending the briefing schedule and remanded the record back to the FERC. In the request to suspend the briefing schedule and remand the record, the FERC stated that it "now has a quorum of Commissioners who can participate in the review of the ISO New England tariff filing," that remand "could obviate the need for a subsequent appeal by Petitioners", and it "anticipates issuing an order on remand within 90 days of this Court's order remanding the agency record and an order addressing the merits of any subsequent requests for rehearing within 180 days of the close of the 30-day period for applying for rehearing". (As reported in Section III above, the FERC issued the *IEP Remand Order* on June 18, 2020.) The Court directed the FERC to file status reports at 90-day intervals, the first of which was filed on July 17, 2020. Parties were directed to file motions to govern further proceedings in these consolidated cases within 30 days of the completion of the remand proceedings (now, September 16, 2020).

Other Federal Court Activity of Interest

- ***Order 872* (20-72728) (9th Cir.)**
Underlying FERC Proceeding: RM19-15[196]
Petitioner: SEIA
On September 17, 2020, SEIA petitioned the 9th Circuit Court of Appeals for review of *Order 872*.

- **Allegheny Defense Project v. FERC (17-1098)**
Underlying FERC Proceeding: CP15-138[197]
Petitioner: Allegheny Defense Project

On June 30, in a decision[198] that will likely have a profound effect on current and future proceedings before the FERC, the DC Circuit ruled that the Natural Gas Act ("NGA") does not allow FERC to delay appellate review of its substantive orders through its common practice of issuing tolling[199] orders. The decision at the very least modifies—if not wholly overrules—a long-unbroken line of cases that rejected as premature appeals from FERC orders while applications for rehearing were pending. While the case was decided under the NGA,[200] there is

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195 162 FERC ¶ 61,127 (Feb. 15, 2018) ("*Order 841*"); 167 FERC ¶ 61,154 (May 16, 2019) ("*Order 841-A*").

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

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

198 *Allegheny Def. Project v. FERC*, 964 F.3d 1, 2020 WL 3525547 (D.C. Cir. June 30, 2020).

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

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

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

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

- **FERC orders on PG&E Bankruptcy (19-71615) (9th Cir.)**
  Underlying FERC Proceeding: EL19-35, EL19-36[201]
  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."[202] 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.

The Court ordered the parties to submit supplemental briefs by July 8, 2020 addressing the impact on this appeal of the confirmation of PG&E's bankruptcy plan. (PG&E has since successfully emerged from bankruptcy). While the parties agreed in their briefs that the case is moot given PG&E's voluntary assumption of its contracts in its reorganization plan, there was disagreement over whether the FERC's orders should be vacated. Hearings were held on August 14, 2020. This matter is now pending before the 9th Circuit.

- **PennEast Project (18-1128)**
  Underlying FERC Proceeding: CP15-558[203]
  Petitioners: NJ DEP, DE and Raritan Canal Commission, NJ Div. of Rate Counsel

Abeyance continues of the appeal before the DC Circuit of the FERC's orders granting certificates of public convenience and necessity to PennEast Pipeline Company, LLC ("PennEast")[204] for the construction and operation of a new 116-mile natural gas pipeline from Luzerne County, Pennsylvania, to Mercer County, New Jersey, along with three laterals extending off the mainline, a compression station, and appurtenant above ground facilities ("PennEast Project"). The cases are being held in abeyance "pending final disposition of any post-dispositional

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condemn land and begin construction activities. By the time the first panel of the court heard oral arguments on the petitions for review, the project had been built and in service for two months.

[201] *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).

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

[203] *PennEa*st *Pipeline Co., LLC*, 162 FERC ¶ 61,053 (Jan. 19, 2018), *reh'g denied*, 163 FERC ¶ 61,159 (May 30, 2018).

[204] 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.

proceedings [ ] before the United States Supreme Court resulting from the Third Circuit's decision in No. 19-1191 (In re: PennEast Pipeline Company, LLC (3rd Cir. Sep. 10, 2019)), or other action that resolves the obstacle PennEast poses". That decision held that the Eleventh Amendment barred condemnation cases brought by PennEast in federal district court in New Jersey to gain access to property owned by the State or its agencies, thus calling into question the viability of PennEast's proposed project route, and the certificates issued in the underlying case. Until the Third Circuit case is resolved, which is in the midst of proceedings before the Supreme Court, the DC Circuit will not take up this case. Since the last Report, on June 29, 2020, a Joint Status Report was filed, noting developments since the May 4, 2020 Status Report, and reporting that none of the events "constitute any of the conditions that [the DC Circuit] enumerated in its October 1, 2019 Order as triggering an obligation to file a motion governing future proceedings."

- **Opinion 569/569-A: FERC's Base ROE Methodology (16-1325, 20-1227, 20-1240)**
  Underlying FERC Proceeding: EL14-12; EL15-45[205]
  Petitioners: MISO TOs, FirstEnergy, Transource Energy

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

Since the last Report, on August 5, 2020, the FERC asked the Court to hold the appeals in abeyance, including the filing of the certified index to the record, for a period of four months, ending December 7, 2020, with parties to file motions to govern further proceedings at the end of that period. The FERC requested abeyance to permit it to issue a further order on rehearing of challenged orders. MISO TOs opposed the FERC's request on August 14. The FERC responded to that opposition on August 20, 2020. The Court has not as of the date of this Report acted on the FERC's August 5 motion.

[205] *Transcontinental Gas Pipe Line Co., LLC*, 159 FERC ¶ 62,181 (Feb. 3, 2017); *Transcontinental Gas Pipe Line Co., LLC*, 161 FERC ¶ 61,250 (Dec. 6, 2017).

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