

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

The following activity, as more fully described in the attached litigation report, has occurred since the report dated September 29, 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**

No Activity to Report

**I. Complaints/Section 206 Proceedings**

* 2	NECEC/Avangrid Complaint Against NextEra/Seabrook (EL21-6)	Oct 13 Oct 16-Nov 2 Nov 2	NECEC and Avangrid file complaint against NextEra Dominion, Eversource, Calpine, Exelon, HQ US, MA AG, MMWEC National Grid, NESCOE, NRG, Public Citizen intervene National Grid files comments;
* 3	NextEra Energy Seabrook Declaratory Order Petition re: NECEC Elective Upgrade Costs Dispute (EL21-3)	Oct 5 Oct 13-Nov 2 Nov 4	NextEra Energy Seabrook seeks declaratory order related to costs and requirements associated with the New England Clean Energy Connect project Elective Upgrade; comment date Nov 4, 2020 Avangrid, Dominion, Eversource, Calpine, Exelon, HQ US, National Grid, NESCOE, NRG, Public Citizen intervene Eversource, MMWEC file comments
5	Exelon PP-10 Complaint (EL20-52)	Oct 19	FERC issues notice of denial of rehearing by operation of law
6	206 Investigation Into ISO-NE Implementation of Order 1000 Exemptions for Immediate Need Reliability Projects (EL19-90)	Oct 28	LSP Power petitions DC Circuit Court of Appeals for review of the FERC’s <i>Order Terminating Proceeding</i> and <i>Order 1000 Exemptions Allegheny Order</i> (see Section XV)

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

* 9	2021 NESCOE Budget (ER21-113)	Oct 15 Oct 15-25 Oct 29	ISO-NE files budget for funding NESCOE’s 2020 operations; comment date Nov 5 NEPOOL, Exelon, National Grid, NESCOE intervene NEPOOL files comments supporting NESCOE 2020 Budget
* 9	2021 ISO-NE Administrative Costs and Capital Budgets (ER21-106)	Oct 15 Oct 16-27 Oct 28	ISO-NE files its 2021 administrative costs and capital budgets; comment date Nov 5 NEPOOL, MA AG, National Grid, NESCOE intervene NEPOOL files comments supporting ISO-NE 2021 Budgets
10	Mystic 8/9 Cost of Service Agreement (ER18-1639)	Oct 6	<b>Sep 2020 Compliance Filing:</b> CT Parties, ENECOS protest Mystic’s Sep 15 compliance filing
	<b>ROE Paper Hearing</b>	Oct 7 Oct 28	FERC Staff issues revised ROE initial brief CT Parties, EMCOS, MA AG, and FERC Trial Staff file responses to initial briefs addressing ROE methodology

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

11	Gross Load Forecast Reconstitution Revisions (ER20-2869)	Sep 30 Oct 2  Oct 30	NEPOOL submits supplemental comments EDF/NRDC/ Sustainable FERC Project/UCS/CLF/Acadia submit joint comments supporting revisions FERC accepts revisions, eff. Nov 10, 2020
11	ESI Alternatives (ER20-1567)	Oct 30	FERC rejects as unjust and unreasonable both the ISO-NE and NEPOOL ESI proposals
12	Waiver Request Dismissed as Moot: Vineyard Wind FCA13 Participation (ER19-570)	Oct 16	FERC dismisses as moot long-pending request for waiver

**V. OATT Amendments / TOAs / Coordination Agreements**

17	CIP IROL Cost Recovery Rules (ER20-739)	Oct 14	Cogentrix and Vistra submit amended petition to the DC Circuit Court of Appeals for review of the FERC's CIP IROL Orders (see Section XV)
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**V. Financial Assurance/Billing Policy Amendments**

No Activity to Report

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

17	Schedule 20A-VP: Renaming / Clean-Up (ER20-2783)	Oct 29	FERC accepts changes, eff. Nov 1, 2020
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**VII. NEPOOL Agreement/Participants Agreement Amendments**

No Activity to Report

**VIII. Regional Reports**

* 19	Capital Projects Report - 2020 Q3 (ER20-108)	Oct 15 Oct 23-27 Oct 28	ISO-NE files 2020 Q3 Report; comment date Nov 5 NEPOOL, National Grid intervene NEPOOL files comments supporting Q3 Report
* 19	Capital Projects Report - 2020 Q2 (ER20-2640)	Oct 2	FERC accepts 2020 Q2 Report
* 19	LFTR Implementation: 48th Quarterly Status Report (ER07-476)	Oct 15	ISO-NE files its 48th quarterly report
* 19	Reserve Market Compliance (29th) Semi-Annual Report (ER06-613)	Oct 1	ISO-NE submits 29th semi-annual report

**IX. Membership Filings**

* 20	November 2020 Membership Filing (ER21-260)	Oct 30	<b>New Member:</b> Nautilus Solar Energy Supply, LLC (AR Sector, RG Sub-Sector, Large RG Group Seat); comment date Nov 20
* 20	October 2020 Membership Filing (ER20-3031)	Sep 30	<b>New Member:</b> David Energy Supply, LLC (Supplier Sector)
20	September 2020 Membership Filing (ER20-2772)	Oct 13	FERC accepts (i) the memberships of: Acadia Renewable Energy, Sky View Ventures, and SYSO LLC; and (ii) the name change of ENGIE Power & Gas LLC (f/k/a Plymouth Rock Energy, LLC)
* 20	Suspension Notice – Curio Analytics (not docketed)	Oct 2	ISO-NE files notice of suspension of Curio Analytics, Inc. (an FTR-Only Participant) from the New England Markets

* 20	Suspension Notice – NS Power Energy Marketing, Inc. (not docketed)	Oct 20	ISO-NE files notice of suspension of NS Power Energy Marketing from the New England Markets
* 20	Suspension Notice – Manchester Methane, LLC (not docketed)	Oct 19	ISO-NE files notice of suspension of Manchester Methane, LLC from the New England Markets

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



21	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)	Oct 30	FERC accepts Revised Standards, eff. Apr 1, 2021
* 23	Amended and Restated NERC Bylaws (RR21-1)	Oct 14	NERC petitions FERC for approval of its Amended and Restated Bylaws; comment date Nov 4, 2020
24	2021 NERC/NPCC Business Plans and Budgets (RR20-6)	Nov 2	FERC accepts 2021 NERC and NPCC budgets

### XI. Misc. - of Regional Interest



* 24	203 Application: CPV Towantic (EC21-16)	Oct 29	CPV Towantic, among others, requests authorization for a transaction whereby CPV Group LP will indirectly acquire all of the indirect voting securities owned by GIP II CPV; comment date Nov 19, 2020
* 25	VTrasco Rate Schedule 2 Cancellation (ER21-256)	Oct 29	VTrasco files notice of cancellation of Rate Schedule 2 (Vermont Yankee Transmission Agreement); comment date Nov 19, 2020
* 25	D&E Agreement: NSTAR/Ocean State Power (ER21-192)	Oct 23	CL&P files D&E Agreement; comment date Nov 13, 2020
25	NECEC TSAs: NECEC Transmission Notice of Succession and CMP Notice of Cancellation (ER21-12 et al.)	Oct 2	NECEC Transmission files notices of succession to, and CMP files notice of cancellation of, TSAs with NSTAR, National Grid, Fitchburg and HQ US that are being transferred from CMP to NECEC Transmission
25	D&E Agreement: CL&P/UConn (ER20-2927)	Oct 26	FERC accepts D&E Agreement, eff. Sep 21, 2020
26	LGIA Cancellations: Superseded Great River Hydro LGIAs (Moore, Vernon, Comerford) (ER20-2897 et al.)	Oct 29-30	FERC accepts notices of cancellation of LGIAs between NEP and Great River Hydro governing the interconnection of the three hydro facilities: (i) Moore (ER20-2897) (eff. Dec 10, 2018); (ii) Vernon (ER20-2896) (eff. May 8, 2019); and (iii) Comerford (ER20-2815) (eff. Aug 7, 2020)
* 26	Use Rights Transfer Agreement: NSTAR/HQ US (MMWEC) (ER20-2776)	Oct 9	FERC accepts Transfer Agreement for the Nov 1, 2020 to Oct 31, 2025 period; eff. Oct 31, 2020
* 26	Use Rights Transfer Agreement: NSTAR/HQ US (CMEEC) (ER20-2774)	Oct 9	FERC accepts Transfer Agreement for the Nov 1, 2020 to Oct 31, 2025 period; eff. Oct 31, 2020
* 26	Use Rights Transfer Agreement: NSTAR/HQ US (ENE) (ER20-2773)	Oct 9	FERC accepts Agreement for the transfer of CMEEC's Phase I/II HVDC Use Rights to HQ US for the Nov 1, 2020 to Dec 31, 2023 period, eff. Sep 26, 2020
27	Use Rights Transfer Agreement: NSTAR/HQ US (ER20-2724)	Oct 9	FERC accepts Agreement, eff. Nov 1, 2020
27	TSAs: Second Amendments to New England Clean Energy Connect TSAs (ER20-2674 et al.)	Oct 9	FERC accepts second amendments, eff. Oct 14, 2020

27	VTransco Rate Schedule Cancellations (ER20-2507)	Oct 2	FERC accepts cancellations, eff. Jul 30, 2020
27	VTransco VTA Waiver Request Clarification (ER20-1823-001)	Oct 20	FERC grants clarification requested (waiver should be viewed as a request to defer and amortize <i>up to</i> \$10 million of the difference between the budgeted and actual ISO-NE RNS revenues over a 24-month period, beginning Jan 1, 2021)
27	Phase II VT DMNRC Support Agreement <i>Order 864</i> -Related Filing (ER20-1480)	Oct 23	FERC accepts filing, eff. Jan 27, 2020
* 28	FERC Enforcement Action: High Desert (IN20-6)	Oct 23	FERC approves Stipulation and Consent Agreement with High Desert, requiring High Desert to pay a <b>\$390,000 civil penalty</b> and to <b>disgorge \$176,000</b> , including interest, to resolve the FERC's investigation into violations, between Aug and Oct 2016, of the FERC's Anti-Manipulation Rules

## XII. Misc. - Administrative & Rulemaking Proceedings



* 29	Offshore Wind Integration in RTOs/ISOs (Oct 27, 2020) (AD20-18)	Oct 27 Oct 29	FERC convenes tech conf. Speaker comments posted in eLibrary
29	Carbon Pricing in RTO/ISO Markets Tech Conf (Sep 30, 2020) (AD20-14)	Sep 30 Oct 5 Oct 15	FERC convenes tech conf. Speaker opening remarks and comments posted in eLibrary FERC issues <b>Notice of Proposed Policy Statement</b> "to clarify FERC's jurisdiction over RTO/ISO market rules that incorporate a state-determined carbon price and to encourage RTO/ISO efforts to explore and consider the benefits of potential [] section 205 filings to establish such rules"; comment date Nov 16; reply comments due Dec 1
30	Hybrid Resources Tech Conf (Jul 23, 2020) (AD20-9)	Oct 1	Post-tech conf comments filed by <a href="#">EPRI</a> and <a href="#">PJM</a>
* 31	RTO/ISOs Common Performance Metrics (AD19-16)	Oct 30	ISO-NE files FERC Form-922 – RTO/ISO Common Performance Metrics
34	<i>Order 2222</i> : DER Participation in RTO/ISO Markets (RM18-9)	Oct 16-20 Oct 29	Excel Energy Services, Kansas Corp. Comm., AEE and AEMA, and Public Interest Organizations request rehearing of <i>Order 2222</i> ; FERC action required by Nov 16, 2020 FERC publishes notice of correction: deadline to submit <i>Order 2222</i> compliance filings is Jul 19, 2021
36	NOPR: NAESB WEQ Standards v. 003.3 - Incorporation by Reference into FERC Regs (RM05-5-029, -030)	Nov 3	BPA, EEI, the IRC, and Open Access Technology International file comments

## XIII. Natural Gas Proceedings



41	Iroquois ExC Project (CP20-48)	Sep 30 Oct 1 Oct 7 Oct 27-Nov 2	FERC issues Environmental Assessment ("EA") Report for ExC Project FERC issues data request regarding A&G Expenses Iroquois responds to Oct 1 data request Over 22 sets of comments filed in response to EA
41	Northern Access Project (CP15-115)	Nov 16 Oct 26-Nov 3	Applicants request an additional 2-year extension of time, until Dec 1, 2024, to complete construction of the Project and enter service; comment date Nov 6, 2020 Over 30 sets of comments filed on requested extension

<b>XIV. State Proceedings &amp; Federal Legislative Proceedings</b>	
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No Activity to Report

<b>XV. Federal Courts</b>	
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*	43 ISO-NE Implementation of Order 1000 Exemptions for Immediate Need Reliability Projects (20-1422)	Oct 16  Oct 20	LS Power petitions DC Circuit Court of Appeals for review of the FERC's orders addressing ISO-NE's implementation of the Order 1000 exemptions for immediate need reliability projects  Clerk issues order requiring appearances, docketing statements and statement of issues by Nov 19; dispositive motions, if any, and a Certified Index to the Record, by Dec 4, 2020
44	Mystic 8/9 Cost of Service Agreement (20-1343 et al. (consol.))	Oct 6-8 Oct 8, 16 Oct 16	Parties file appearances, statement of issues Petitioners file statements of issues and docketing statements FERC files unopposed motion to hold this appeal in abeyance until the earlier of Dec 15, 2020 (60 days) or the date of the issuance by the FERC of a further order on rehearing
44	CASPR (20-1333)	Oct 2 Oct 19  Oct 29	Petitioners file docketing statement and statement of issues FERC moves to dismiss case for lack of jurisdiction or, alternatively for a 60-day abeyance to allow for the FERC to issue an order on the rehearing requests filed in 2018 Petitioners oppose the FERC's Oct 19 motion
44	<i>Opinion 531-A</i> Compliance Filing Undo (20-1329)	Sep 30 Oct 2	Parties file appearances, docketing statement, statement of issues Court grants FERC request to hold this proceeding in abeyance for four months; directs parties to file motions to govern future proceedings in this case by Feb 2, 2021
45	2013/14 Winter Reliability Program Order on Compliance and Remand (20-1289, 20-1366 ) (consol.)	Oct 15 Oct 16 Oct 29	NEPGA intervenes TransCanada files docketing statement, statement of issues FERC files certified index to the record; motion for 60-day briefing interval
45	ISO-NE's Inventoried Energy Program (Chapter 2B) Proposal (19-1224)	Oct 19-20	Petitioners each file amended petitions for review in order to bring the FERC's <i>IEP Remand Order</i> and the post-remand record before the DC Circuit
45	<i>Order 872</i> (20-72728) (9th Cir.)	Oct 9  Oct 26	FERC files unopposed motion for the Court to hold this appeal in abeyance, suspend filing of the certified index to the record, and issue a new briefing schedule after Jan 4, 2021 Court grants FERC's motion, suspended briefing, and directed the FERC to file a status report on or before Jan 4, 2021
46	<i>Allegheny Defense Project v. FERC</i> (17-1098)	Oct 6	Mandate issued to the FERC
46	FERC orders on PG&E Bankruptcy (19-71615) (9th Cir.)	Oct 7	Court dismisses PG&E's petition for review (No. 19-71615) with instructions for the FERC to vacate its orders and dismissed FERC's consolidated appeal (Nos. 19-16833, 19-16834) with instructions for the bankruptcy court to vacate its order
48	<i>Opinion 569/569-A: FERC's Base ROE Methodology</i> (16-1325) (consol.)	Oct 27	Court consolidates cases and indicates that a schedule for the filing of briefs will be established by future order

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

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

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

**DATE:** November 4, 2020

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

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

<b>COVID-19</b>
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- **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.<sup>2</sup> The Presiding Judge in each remote hearing will ensure that the participants have access to an “IT Day” prior to the hearing to allow all participants, witnesses, and the public who will attend the hearing to learn more about the remote hearing software and to get their technical questions answered by the appropriate FERC staff. Uniform Hearing Rules for all Office of the ALJ hearings were adopted effective September 15, 2020.<sup>3</sup> The “Remote Hearing Guidance

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

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

<sup>3</sup> *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.<sup>4</sup> 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 waiver of FERC regulations that require that filings with the FERC be notarized or supported by sworn declarations is *in effect through January 29, 2021*.<sup>5</sup> The August 20 notice extended the waiver first noticed in May.<sup>6</sup> 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.<sup>7</sup>

- **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*<sup>8</sup> meeting and notarization requirements has similarly been *extended through January 29, 2021*.<sup>9</sup> The August 20, 2020 order extended the blanket waivers first granted in the FERC’s April 2, 2020 order.<sup>10</sup>

## I. Complaints/Section 206 Proceedings

- **NECEC/Avangrid Complaint Against NextEra/Seabrook (EL21-6)**

On October 13, 2020, NECEC Transmission LLC (“NECEC”) and Avangrid Inc. (together, “Avangrid”) filed a complaint against NextEra<sup>11</sup> requesting FERC action “to stop NextEra from unlawfully interfering with the interconnection of the New England Clean Energy Connect transmission project (“NECEC Project”).” The Complaint seeks, among other things, an initial, expedited order that grants certain relief<sup>12</sup> and directs NextEra to immediately commence engineering, design, planning and procurement activities that are necessary for NextEra to construct the generator owned transmission upgrades during Seabrook Station’s Planned 2021 Outage. Comments on the Complaint were due on or before November 2, 2020. On November 2, National Grid filed comments. Doc-less interventions were filed by Dominion, Eversource, Calpine, Exelon, HQ US, MA AG, MMWEC National Grid, NESCOE, NRG, Public Citizen. This matter is pending before the FERC. If you have any questions concerning this matter, please contact Eric Runge (617-345-4735; [ekrunge@daypitney.com](mailto:ekrunge@daypitney.com)).

<sup>4</sup> *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.”)

<sup>5</sup> See *Extension of Non-Statutory Deadlines*, Docket No. AD20-11-000 (Aug. 20, 2020).

<sup>6</sup> *Extension of Non-Statutory Deadlines*, Docket No. AD20-11-000 (May 8, 2020).

<sup>7</sup> *Extension of Non-Statutory Deadlines*, Docket No. AD20-11-000 (Apr. 2, 2020).

<sup>8</sup> 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).

<sup>9</sup> *Temporary Action to Facilitate Social Distancing*, 172 FERC ¶ 61,151 (Aug. 20, 2020).

<sup>10</sup> *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).

<sup>11</sup> For purposes of this Complaint proceeding, “NextEra” is short for NextEra Energy Resources, LLC (“NextEra Energy Resources”), NextEra Energy Seabrook, LLC (“NextEra Seabrook”), FPL Energy Wyman LLC (“Wyman”), and FPL Energy Wyman IV LLC (“Wyman IV”).

<sup>12</sup> directing NextEra to comply with the ISO-NE OATT, to comply with open access requirements, and to cease and desist unlawful interference with the NECEC Project; and to have the FERC temporarily revoke NextEra’s blanket waiver under Part 358 of the FERC’s regulations and to initiate an investigation and require NextEra to preserve and provide documents related to the interconnection of the NECEC Project.



- **NextEra Energy Seabrook Declaratory Order Petition re: NECEC Elective Upgrade Costs Dispute (EL21-3)**

In a related matter initiated a week earlier, NextEra Energy Seabrook, LLC (“Seabrook”) filed a Petition for a Declaratory Order (“Petition”) “by which it seeks to understand the scope of its FERC-jurisdictional regulatory obligations with respect to the project (“NECEC Elective Upgrade”), and to resolve its dispute with NECEC”. Specifically, Seabrook asked the FERC to declare that: (1) Seabrook is not required to incur a financial loss to upgrade, for NECEC’s sole benefit, a 24.5 kV generator circuit breaker and ancillary equipment (“Generation Breaker”) at Seabrook Station; (2) “Good Utility Practice” for replacement of the nuclear plant Generation Breaker is defined in terms of the practices of the nuclear power industry, such that Seabrook’s proposed definition of that term is appropriate for use in a facilities agreement with NECEC; and (3) Seabrook will not be liable for consequential damages for the service it provides to NECEC under a facilities agreement (collectively, the “Requested Declarations”). Alternatively, Seabrook asked that the FERC declare that nothing in ISO-NE’s Tariff requires Seabrook to enter into an agreement to replace the Generation Breaker, and therefore, Seabrook and the Joint Owners are entitled to bargain for appropriate terms and conditions to recover their costs, to define Good Utility Practice, and to limit liability associated with providing the service (“Alternative Declaration”). Comments on Seabrook’s Petition were due on or before November 4, 2020, and were, at least as of the issuance of this Report, filed by Eversource and MMWEC. Doc-less interventions were filed by Avangrid, Dominion, Eversource, Calpine, Exelon, HQ US, National Grid, NESCOE, NRG, and Public Citizen. If you have any questions concerning this matter, please contact Eric Runge (617-345-4735; [ekrunge@daypitney.com](mailto:ekrunge@daypitney.com)).

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

On August 25, 2020, New England Generators<sup>13</sup> filed a complaint against Exelon<sup>14</sup> 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); 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<sup>15</sup> and Connecticut Parties.<sup>16</sup> 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, remain pending before the FERC. If you have any questions concerning this proceeding, please contact Sebastian Lombardi (860-275-0663; [slobardi@daypitney.com](mailto:slobardi@daypitney.com)) or Rosendo Garza (860-275-0660; [rgarza@daypitney.com](mailto:rgarza@daypitney.com)).

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<sup>13</sup> “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.

<sup>14</sup> 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.”).

<sup>15</sup> “Public Systems” are Mass. Municipal Wholesale Elec. Co. (“MMWEC”) and New Hampshire Elec. Coop., Inc. (“NHEC”).

<sup>16</sup> “Connecticut Parties” are CT PURA, CT DEEP, and the CT OCC.



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

In response to the February 2, 2018 remand by the United States Court of Appeals for the District of Columbia Circuit (“DC Circuit”)<sup>17</sup> (where the DC Circuit found that the FERC did not adequately explain why it allowed ISO-NE to forego an offer floor for its seven-year price lock period despite previously rejecting PJM’s request to remove the offer floor for its three-year price lock period), the FERC instituted this proceeding, pursuant to section 206 of the FPA, finding preliminarily that ISO-NE’s new entrant rules may be unjust and unreasonable.<sup>18</sup> 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**:<sup>19</sup>

- 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?
- 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?
- 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, HQ US, LS Power, MA AG, MMWEC, National Grid, NESCOE, NHEC, NextEra, NRG, NTE Energy, Talen, Vistra, NEPGA, EPSA, CT AG, CT DEEP, CT PURA, MA DPU (out-of-time), PJM 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-

<sup>17</sup> *New England Power Generators Assoc. v FERC*, 881 F.3d 202 (DC Cir. 2018) (granting NEPGA’s and Exelon’s petitions for review of orders accepting the Forward Capacity Market’s (“FCM”) 7-year price lock-in (EL14-7) and capacity-carry-forward rules (EL15-23)).

<sup>18</sup> *ISO New England Inc.*, 172 FERC ¶ 61,005 (July 1, 2020) (“FCM Pricing Rules Complaints Remand Order”).

<sup>19</sup> Notice of the initiation of this proceeding was published in the *Fed. Reg.* on July 9, 2020 (Vol. 85, No. 132) p. 41,237. Aug. 24, 2020 was the first Business Day that was 45 days after publication.

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](mailto:slombardi@daypitney.com)) or Rosendo Garza (860-275-0660; [rgarza@daypitney.com](mailto:rgarza@daypitney.com)).

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

On October 19, 2020, the FERC issued a “Notice of Denial of Rehearing by Operation of Law”.<sup>20</sup> 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 Exelon’s September 16, 2020 request for rehearing of the FERC’s order denying Constellation Mystic Power, LLC’s (“Exelon”) June 10, 2020 complaint (“PP-10 Complaint”).<sup>21</sup>

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”),<sup>22</sup> 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.<sup>23</sup> 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,<sup>24</sup> 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.”<sup>25</sup> In addition, the FERC found that the PP-10 Revisions did not violate the Attachment K provisions related to the *Order 1000* RFP process,<sup>26</sup> that Mystic failed to demonstrate that ISO-NE violated its Tariff in conducting the Boston RFP process,<sup>27</sup> or that the PP-10 Revisions jeopardize reliability.<sup>28</sup>

If you have any questions concerning this matter, please contact Eric Runge (617-345-4735; [ekrunge@daypitney.com](mailto:ekrunge@daypitney.com)) or Sophia Browning (202-218-3904; [sbrowning@daypitney.com](mailto:sbrowning@daypitney.com)).

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<sup>20</sup> *Constellation Mystic Power, LLC v. ISO New England Inc.*, 173 FERC ¶ 62,034 (Oct. 19, 2020).

<sup>21</sup> *Constellation Mystic Power, LLC v. ISO New England Inc.*, 172 FERC ¶ 61,144 (Aug. 17, 2020) (“*Order Denying PP-10 Complaint*”), *reh’g denied by operation of law*, 173 FERC ¶ 62,034 (Oct. 19, 2020).

<sup>22</sup> The PP-10 Revisions were supported by the Participants Committee at its June 4 meeting by a vote of 99.12% in support (only Exelon opposing).

<sup>23</sup> *Id.* at P 29.

<sup>24</sup> *Id.* at P 31.

<sup>25</sup> *Id.* at P 42.

<sup>26</sup> *Id.* at P 57.

<sup>27</sup> *Id.* at P 58.

<sup>28</sup> *Id.* at PP 69-71.

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

On October 16, 2020, LSP Transmission Holdings I, LLC (“LS Power”) petitioned the DC Circuit Court of Appeals for review of the FERC’s orders in this proceeding.<sup>29</sup> Reporting on this matter will move to Section XV. If you have any questions concerning this proceeding, please contact Eric Runge (617-345-4735; [ekrunge@daypitney.com](mailto:ekrunge@daypitney.com)).

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

The uncontested Joint Offer of Settlement (“Settlement Agreement II”) filed by the Transmission Owners to resolve all issues in this proceeding,<sup>30</sup> certified by Presiding ALJ Coffman to the Commission,<sup>31</sup> remains pending before the Commission.<sup>32</sup> If you have any questions concerning this matter, please contact Eric Runge (617-345-4735; [ekrunge@daypitney.com](mailto:ekrunge@daypitney.com)).

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

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

- **Base ROE Complaint I (EL11-66).** In the first Base ROE Complaint proceeding, the FERC concluded that the TOs’ ROE had become unjust and unreasonable,<sup>33</sup> set the TOs’ Base ROE at 10.57% (reduced from 11.14%), capped the TOs’ total ROE (Base ROE *plus* transmission incentive adders) at 11.74%, and required implementation effective as of October 16, 2014 (the date of *Opinion 531-A*).<sup>34</sup> However, the FERC’s orders were challenged, and in *Emera Maine*,<sup>35</sup> the DC Circuit

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<sup>29</sup> *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); *ISO New England Inc.*, 172 FERC ¶ 61,096 (Aug. 20, 2020) (notice of denial of rehearings by operation of law); and *ISO New England Inc.*, 172 FERC ¶ 61,293 (Sep. 29, 2020) (“*Order 1000 Exemptions Allegheny Order*”).

<sup>30</sup> 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”).

<sup>31</sup> *ISO New England Inc. Participating Transmission Owners Admin. Comm.*, 172 FERC ¶ 63,017 (Aug. 18, 2020).

<sup>32</sup> 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.

<sup>33</sup> The TOs’ 11.14% pre-existing Base ROE was established in *Opinion 489. Bangor Hydro-Elec. Co.*, Opinion No. 489, 117 FERC ¶ 61,129 (2006), *order on reh’g*, 122 FERC ¶ 61,265 (2008), *order granting clarif.*, 124 FERC ¶ 61,136 (2008), *aff’d sub nom.*, Conn. Dep’t of Pub. Util. Control v. FERC, 593 F.3d 30 (D.C. Cir. 2010) (“*Opinion 489*”).

<sup>34</sup> *Coakley Mass. Att’y Gen. v. Bangor Hydro-Elec. Co.*, 147 FERC ¶ 61,234 (2014) (“*Opinion 531*”), *order on paper hearing*, 149 FERC ¶ 61,032 (2014) (“*Opinion 531-A*”), *order on reh’g*, 150 FERC ¶ 61,165 (2015) (“*Opinion 531-B*”).

<sup>35</sup> *Emera Maine v. FERC*, 854 F.3d 9 (D.C. Cir. 2017) (“*Emera Maine*”). *Emera Maine* vacated the FERC’s prior orders in the Base ROE Complaint I proceeding, and remanded the case for further proceedings consistent with its order. The Court agreed with both the TOs

vacated the FERC's prior orders, and remanded the case for further proceedings consistent with its order. The FERC's determinations in *Opinion 531* are thus no longer precedential, though the FERC remains free to re-adopt those determinations on remand as long as it provides a reasoned basis for doing so.

- **Base ROE Complaints II & III (EL13-33 and EL14-86) (consolidated).** The second (EL13-33)<sup>36</sup> and third (EL14-86)<sup>37</sup> ROE complaint proceedings were consolidated for purposes of hearing and decision, though the parties were permitted to litigate a separate ROE for each refund period. After hearings were completed, ALJ Sterner issued a 939-paragraph, 371-page *Initial Decision*, which lowered the base ROEs for the EL13-33 and EL14-86 refund periods from 11.14% to 9.59% and 10.90%, respectively.<sup>38</sup> The *Initial Decision* also lowered the ROE ceilings. Parties to these proceedings filed briefs on exception to the FERC, which has not yet issued an opinion on the ALJ's *Initial Decision*.
- **Base ROE Complaint IV (EL16-64).** The fourth and final ROE proceeding<sup>39</sup> also went to hearing before an ALJ, Judge Glazer, who issued his initial decision on March 27, 2017.<sup>40</sup> The *Base ROE IV Initial Decision* concluded that the currently-filed base ROE of 10.57%, which may reach a maximum ROE of 11.74% with incentive adders, was **not** unjust and unreasonable for the Complaint IV period, and hence was not unlawful under section 206 of the FPA.<sup>41</sup> Parties in this proceeding filed briefs on exception to the FERC, which has not yet issued an opinion on the *Base ROE IV Initial Decision*.

**October 16, 2018 Order Proposing Methodology for Addressing ROE Issues Remanded in Emera Maine and Directing Briefs.** On October 16, 2018, the FERC, addressing the issues that were remanded in *Emera Maine*, proposed a new methodology for determining whether an existing ROE remains just and reasonable.<sup>42</sup> The FERC indicated its intention that the methodology be its policy going forward, including in

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(that the FERC did not meet the Section 206 obligation to first find the existing rate unlawful before setting the new rate) and "Customers" (that the 10.57% ROE was not based on reasoned decision-making, and was a departure from past precedent of setting the ROE at the midpoint of the zone of reasonableness).

<sup>36</sup> The 2012 Base ROE Complaint, filed by Environment Northeast (now known as Acadia Center), Greater Boston Real Estate Board, National Consumer Law Center, and the NEPOOL Industrial Customer Coalition ("NICC", and together, the "2012 Complainants"), challenged the TOs' 11.14% ROE, and seeks a reduction of the Base ROE to 8.7%.

<sup>37</sup> The 2014 Base ROE Complaint, filed July 31, 2014 by the Massachusetts Attorney General ("MA AG"), together with a group of State Advocates, Publicly Owned Entities, End Users, and End User Organizations (together, the "2014 ROE Complainants"), seeks to reduce the current 11.14% Base ROE to 8.84% (but in any case no more than 9.44%) and to cap the Combined ROE for all rate base components at 12.54%. 2014 ROE Complainants state that they submitted this Complaint seeking refund protection against payments based on a pre-incentives Base ROE of 11.14%, and a reduction in the Combined ROE, relief as yet not afforded through the prior ROE proceedings.

<sup>38</sup> *Environment Northeast v. Bangor Hydro-Elec. Co. and Mass. Att'y Gen. v. Bangor Hydro-Elec. Co.*, 154 FERC ¶ 63,024 (Mar. 22, 2016) ("*2012/14 ROE Initial Decision*").

<sup>39</sup> The 4th ROE Complaint asked the FERC to reduce the TOs' current 10.57% return on equity ("Base ROE") to 8.93% and to determine that the upper end of the zone of reasonableness (which sets the incentives cap) is no higher than 11.24%. The FERC established hearing and settlement judge procedures (and set a refund effective date of April 29, 2016) for the 4th ROE Complaint on September 20, 2016. Settlement procedures did not lead to a settlement, were terminated, and hearings were held subsequently held December 11-15, 2017. The September 26, 2016 order was challenged on rehearing, but rehearing of that order was denied on January 16, 2018. *Belmont Mun. Light Dept. v. Central Me. Power Co.*, 156 FERC ¶ 61,198 (Sep. 20, 2016) ("*Base ROE Complaint IV Order*"), *reh'g denied*, 162 FERC ¶ 61,035 (Jan. 18, 2018) (together, the "*Base ROE Complaint IV Orders*"). The *Base ROE Complaint IV Orders*, as described in Section XV below, have been appealed to, and are pending before, the DC Circuit.

<sup>40</sup> *Belmont Mun. Light Dept. v. Central Me. Power Co.*, 162 FERC ¶ 63,026 (Mar. 27, 2018) ("*Base ROE Complaint IV Initial Decision*").

<sup>41</sup> *Id.* at P 2.; Finding of Fact (B).

<sup>42</sup> *Coakley v. Bangor Hydro-Elec. Co.*, 165 FERC ¶ 61,030 (Oct. 18, 2018) ("*Order Directing Briefs*" or "*Coakley*").

the four currently pending New England proceedings (*see, however, Opinion 569-A*<sup>43</sup> (EL14-12; EL15-45) in Section XI below). The FERC established a paper hearing on how its proposed methodology should apply to the four pending ROE proceedings.<sup>44</sup>

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

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

The FERC provided preliminary analysis of how it would apply the proposed methodology in the Base ROE I Complaint, suggesting that it would affirm its holding that an 11.14% Base ROE is unjust and unreasonable. The FERC suggested that it would adopt a 10.41% Base ROE and cap any preexisting incentive-based total ROE at 13.08%.<sup>45</sup> The new ROE would be effective as of the date of *Opinion 531-A*, or October 16, 2014. Accordingly, the issue to be addressed in the Base ROE Complaint II proceeding is whether the ROE established on remand in the first complaint proceeding remained just and reasonable based on financial data for the six-month period September 2013 through February 2014 addressed by the evidence presented by the participants in the second proceeding. Similarly, briefing in the third and fourth complaints will have to address whether whatever ROE is in effect as a result of the immediately preceding complaint proceeding continues to be just and reasonable.

The FERC directed participants in the four proceedings to submit briefs regarding the proposed approaches to the FPA section 206 inquiry and how to apply them to the complaints (separate briefs for each proceeding). Additional financial data or evidence concerning economic conditions in any proceeding must relate to periods before the conclusion of the hearings in the relevant complaint proceeding. Following a FERC notice granting a request by the TOs and Customers<sup>46</sup> for an extension of time to submit briefs, the latest date for filing initial and reply briefs was extended to January 11 and March 8, 2019, respectively. On January 11,

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<sup>43</sup> *Ass'n of Buss. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, Opinion No. 569-A, 171 FERC ¶ 61,154 (2020) (“*Opinion 569-A*”). 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 *Opinion 569*; and (iv) calculating the zone of reasonableness in equal thirds, instead of using the quartile approach that was applied in *Opinion 569*.

<sup>44</sup> *Id.* at P 19.

<sup>45</sup> *Id.* at P 59.

<sup>46</sup> For purposes of the motion seeking clarification, “Customers” are CT PURA, MA AG and EMCOS.

initial briefs were filed by EMCOS, Complainant-Aligned Parties, TOs, EEI, Louisiana PSC, Southern California Edison, and AEP. As part of their initial briefs, each of the Louisiana PSC, SEC and AEP also moved to intervene out-of-time. Those interventions were opposed by the TOs on January 24. The Louisiana PSC answered the TOs' January 24 motion on February 12. Reply briefs were due March 8, 2019 and were submitted by the TOs, Complainant-Aligned Parties, EMCOS, FERC Trial Staff.

***TOs Request to Re-Open Record and file Supplemental Paper Hearing Brief.*** On December 26, 2019, the TOs filed a Supplemental Brief that addresses the consequences of the November 21 *MISO ROE Order*<sup>47</sup> and requested that the FERC re-open the record to permit that additional testimony on the impacts of the *MISO ROE Order's* changes. On January 21, 2020, EMCOS and CAPs opposed the TOs' request and brief.

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

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

- **2021 NESCOE Budget (ER21-113)**

This proceeding was initiated by ISO-NE's October 15, 2020 filing of the budget for funding NESCOE's 2021 operations. The 2021 Operating Expense Budget for NESCOE is \$2,428,300. The amount to be recovered reflects true-ups from 2019 (over-collections of \$1,067,405). Accordingly, if accepted, the NESCOE budget will result in a charge of \$0.00626 per kilowatt ("kW") of Monthly Network Load. The 2021 NESCOE budget was supported by the Participants Committee at its October 1, 2020 meeting. Comments and any interventions are due on or before November 5. Thus far, NEPOOL intervened and filed comments supporting NESCOE's 2021 Budget, and NESCOE and National Grid submitted doc-les interventions. If there are any questions on this matter, please contact Pat Gerity (860-275-0533; [pmgerity@daypitney.com](mailto:pmgerity@daypitney.com)).

- **2021 ISO-NE Administrative Costs and Capital Budgets (ER21-106)**

On October 15, 2020, ISO-NE filed for recovery of its 2021 administrative costs (the "2021 Revenue Requirement") and submitted its capital budget and supporting materials for calendar year 2021 ("2021 Capital Budget", and together with the 2021 Revenue Requirement, the "2021 ISO Budgets"). The 2021 ISO-NE Budgets were filed together pursuant to the Settlement Agreement entered into to resolve challenges to the 2013 ISO-NE Budgets. In the October 15 filing, ISO-NE reported that the 2021 Revenue Requirement is \$205 million, which increases to \$205.1 million after the under-collection for 2019 is added. Of that total, ISO-NE's administrative costs (i.e., the 2021 Core Operating Budget) comprise \$178.6 million; depreciation and amortization of regulatory assets, \$26.3 million; and a \$151,000 true-up for 2019 under-collections.

ISO-NE further reported that the 2021 Capital Budget, like the 2020 Capital Budget, is \$28 million and is comprised of the following (with 2021 projected costs and target completion dates, if available, in parentheses):

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| <ul style="list-style-type: none"> <li>▸ nGem Market Clearing Engine Implementation (Mar 2023) (\$5.3 million)</li> </ul> | <ul style="list-style-type: none"> <li>▸ Energy Security Improvements (\$3.0 million)</li> </ul> |
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<sup>47</sup> *Ass'n of Buss. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, Opinion No. 569, 169 FERC ¶ 61,129 (2019) ("*MISO ROE Order*"), *order on reh'g*, Opinion No. 569-A, 171 FERC ¶ 61,154 (May 21, 2020).



▸ nGem Software Development Part II (Dec 2021)	(\$2.0 million)	▸ Forward Capacity Tracking System Infrastructure Conversation Part II (Dec 2020)	(\$2 million)
▸ 2021 Issue Resolution Projects (June 2021 and Dec 2021)	(\$1.5 million)	▸ 2020 Corrective Action Preventative Actions (Mar 2021)	(\$100,000)
▸ Enhanced Market Simulator	(\$1.5 million)	▸ CIP Electronic Security Perimeter Redesign	(\$1 million)
▸ Forward Capacity Tracking System Infrastructure Conversation Part II (Jun 2021)	(\$1 million)	▸ Cyber Security Improvements (Sep 2021)	(\$1 million)
▸ Identity and Access Management – Phase II (May 2021)	(\$700,000)	▸ Enterprise Application Integration Phase III (Nov 2021)	(\$500,000)
▸ Data Governance, Risk Management & Compliance Software Phase I (Jun 2021)	(\$400,000)	▸ Data Governance, Risk Management & Compliance Software Phase II (Nov 2021)	(\$500,000)
▸ IMM Data Analysis Phase III (Nov 2021)	(\$500,000)	▸ Human Resources Workflow & Document Management (Jun 2021)	(\$500,000)
▸ Sub-accounts for FTR Market (Aug 2021)	(\$500,000)	▸ Security Information and Event Management Log Monitoring	(\$500,000)
▸ TranSMART Technical Architecture Update (Dec 2021)	(\$500,000)	▸ PI Historian for Short-term PMU Data Repository (Jun 2021)	(\$300,000)
▸ FERC Form 1, 3-Q, 714 (Oct 2021)	(\$200,000)	▸ External Website Migration to Cloud (Mar 2021)	(\$100,000)
▸ Wireless Infrastructure Upgrade (Jun 2021)	(\$200,000)	▸ Non-Project Capital Expenditures	(\$3.5 million)
▸ 2020 Issue Resolution Projects (Mar 2021)	(\$100,000)	▸ Other Emerging Work	(\$1.9 million)
		▸ Capitalized Interest	(\$500,000)

The 2021 ISO-NE Budgets were supported by the Participants Committee at its October 1, 2020 meeting. Comments on this filing are due November 5, 2020. NEPOOL filed comments supporting the 2021 Budgets on October 28. Doc-less interventions only have thus far been filed by MA AG, National Grid and NESCOE. If there are any questions on this matter, please contact Paul Belval (860-275-0381; [pnbelval@daypitney.com](mailto:pnbelval@daypitney.com)).

- **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”)<sup>48</sup> among Constellation Mystic Power (“Mystic”), Exelon

<sup>48</sup> The COS Agreement, submitted on May 16, 2018, is between Mystic, Exelon Generation Company, LLC (“ExGen”) and ISO-NE. The COS Agreement is to provide cost-of-service compensation to Mystic for continued operation of Mystic 8 & 9, which ISO-NE has requested be retained to ensure fuel security for the New England region, for the period of June 1, 2022 to May 31, 2024. The COS Agreement provides for recovery of Mystic’s fixed and variable costs of operating Mystic 8 & 9 over the 2-year term of the Agreement, which is based on the pro forma cost-of-service agreement contained in Appendix I to Market Rule 1, modified and updated to address Mystic’s unique circumstances, including the value placed on continued sourcing of fuel from the Distrigas liquefied natural gas (“LNG”) facility, and on the continued provision of surplus LNG from Distrigas to third parties.

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. As noted in Section XV below, each of the *July 17 Orders*<sup>49</sup> (and the earlier, underlying orders) have been appealed to the DC Circuit.

**ROE Paper Hearings (-000).** The *Dec 2018 Order* established a paper hearing to determine the just and reasonable ROE to be used in setting charges under Mystic’s COS Agreement. On April 19, 2019, Mystic, Connecticut Parties, ENECOS, MA AG, and FERC Trial Staff filed initial briefs. On July 18, 2019, Constellation Mystic Power, CT Parties, ENECOS, MA AG, National Grid, FERC Trial Staff filed reply briefs. In a July 28, 2020 order,<sup>50</sup> the FERC reopened the record to allow parties an opportunity to present written evidence applying the FERC’s *Opinion 569-A* ROE methodology to the facts of this proceeding. 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 were due October 28, 2020 and were filed by Mystic, CT Parties, ENECOS, and FERC Trial Staff. The ROE issue is now pending before the Commission.

**Sep 2020 Compliance Filing (-007).** 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 were due on or before October 6, 2020. CT Parties and ENECOS protested the compliance filing. On October 21, Mystic answered the CT Parties’ and ENECOS’ protests. The compliance filing is pending before the FERC.

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

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

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

On October 30, the FERC accepted changes jointly filed by ISO-NE and NEPOOL (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”).<sup>51</sup> The Gross Load Forecast Reconstitution Revisions were accepted effective as of November 10, 2020, as requested. Unless the October 20 order is challenged, this proceeding will be concluded. If you have any questions concerning this proceeding, please contact Eric Runge (617-345-4735; [ekrunge@daypitney.com](mailto:ekrunge@daypitney.com)).

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

On October 30, 2020, the FERC rejected as unjust and unreasonable both the ISO-NE and NEPOOL “Energy Security Improvements” or “ESI” proposals.<sup>52</sup> Finding that ISO-NE failed to demonstrate that ESI will materially

<sup>49</sup> The “July 17 Orders” are the *July 2018 Rehearing Order*, *Dec 2018 Rehearing Order* and the *July 17 Compliance Order*. *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*”); *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*”); *Constellation Mystic Power, LLC*, 172 FERC ¶ 61,045 (July 17, 2020) (“*July 17 Compliance Order*”) (order on compliance and directing further compliance).

<sup>50</sup> *Constellation Mystic Power, LLC*, 172 FERC ¶ 61,093 (July 28, 2020).

<sup>51</sup> *ISO New England Inc. and the New England Power Pool Participants Comm.*, Docket No. ER20-2869 (Oct. 30, 2020) (unpublished letter order).

<sup>52</sup> *ISO New England Inc.*, 173 FERC ¶ 61,106 (Oct. 30, 2020) (“*Order Rejecting ESI Alternatives*”).

improve fuel security, and treating the filing as submitted under FPA section 205,<sup>53</sup> the FERC concluded that “ESI does not strike an appropriate balance between addressing fuel security in New England while protecting consumers from the significant cost of those fuel security benefits.”<sup>54</sup> And, although the FERC noted that the NEPOOL Alternative would result in lower costs to consumers than ISO-NE’s ESI proposal, they rejected the NEPOOL Alternative as unjust and unreasonable because it contained the “same deficiencies that render ISO-NE’s proposal unjust and unreasonable.”<sup>55</sup>

Because the FERC rejected both alternative ESI proposals, the FERC also rejected ISO-NE’s associated proposal to sunset one year earlier than currently provided for in the Tariff the Fuel Security Retention Mechanism and the Inventoried Energy Program (the Interim Programs).<sup>56</sup>

The FERC made no finding on whether ISO-NE faces a fuel security or energy security issue,<sup>57</sup> but said ISO-NE may propose “other steps it believes are warranted to address fuel security, such as submitting a revised long-term fuel security proposal or seeking to extend one or more of the Interim Programs.”<sup>58</sup> While the FERC did not direct ISO-NE to pursue any particular approach, if ISO-NE decides to pursue a solution to address their concerns, it encouraged ISO-NE:

“to explore a market-based reserve product that provides resources sufficient lead time and ability to acquire fuel or take other steps necessary to be able to deliver energy when needed. We expect that such a market solution would be designed to (1) coordinate procurement of forward reserves with co-optimization of energy and reserves in the day-ahead and real-time markets; (2) incentivize resources to offer into the forward, day-ahead and real-time energy and reserves markets based on their actual costs; (3) prevent the exercise of market power, including through mitigation measures, if necessary; and (4) include financial obligations or incentives sufficient to ensure resources can deliver energy and/or reserves in real-time.”<sup>59</sup>

The FERC noted that nothing in its order prohibits ISO-NE from proposing a Day-Ahead reserves market independent of any proposal to address the concerns at issue in the ESI proceeding.<sup>60</sup>

Challenges to the *Order Rejecting ESI Alternatives* are due on or before November 30, 2020. If you have any questions concerning this proceeding, please contact Sebastian Lombardi (860-275-0663; [slombardi@daypitney.com](mailto:slombardi@daypitney.com)) or Rosendo Garza (860-275-0660; [rgarza@daypitney.com](mailto:rgarza@daypitney.com)).

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

On October 16, 2020, the FERC formally dismissed as moot Vineyard Wind’s December 14, 2018 petition for a waiver of the ISO-NE Tariff provisions necessary to allow Vineyard Wind to participate in FCA13

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<sup>53</sup> *Id.* at n. 2. The April 15, 2020 ESI 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*”).

<sup>54</sup> *Id.* at P 55.

<sup>55</sup> *Id.* at P 56.

<sup>56</sup> *Id.* at P 63.

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

<sup>58</sup> *Id.* at P 63.

<sup>59</sup> *Id.* at P 57.

<sup>60</sup> *Id.*

as an RTR.<sup>61</sup> As previously reported, Vineyard Wind's request for RTR designation was rejected by ISO-NE on the basis that the resource is to be located in federal waters. Consistent with the discussion in the CASPR Conforming Changes filing, Vineyard Wind asked that the proration requirement that would be triggered by Vineyard Wind's participation in FCA13 as an RTR be limited for FCA13 to it and any other similarly-situated entities (i.e. new offshore wind resources located in federal waters seeking RTR treatment). Despite several last minute requests to do so, including a Vineyard Wind emergency motion for immediate stay of FCA13 or, in the alternative, a requirement that FCA13 be re-run following FERC action, the FERC took no action ahead of FCA13 and FCA13 was run without Vineyard Wind receiving RTR treatment. In the October 16, 2020 order, the FERC, finding that the "circumstances render Vineyard Wind's requested waiver moot", dismissed the request.<sup>62</sup> If you have any questions concerning this matter, please contact Pat Gerity ([pmgerity@daypitney.com](mailto:pmgerity@daypitney.com); 860-275-0533).

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

As previously reported, the FERC has now conditionally accepted both the November 22, 2019<sup>63</sup> and February 10, 2020<sup>64</sup> *Order 841*<sup>65</sup> 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; and (ii) applying transmission charges to electric storage resources when they are not being dispatched to provide one of those tariff-defined services.<sup>66</sup>
- ◆ **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

<sup>61</sup> *Vineyard Wind LLC*, 173 FERC ¶ 61,058 (Oct. 1, 2020) (order rejecting waiver request as moot).

<sup>62</sup> *Id.* at P 14.

<sup>63</sup> *ISO New England Inc.*, 169 FERC ¶ 61,140 (Nov. 22, 2019) ("*Order 841 Initial Compliance Filing Order*").

<sup>64</sup> *ISO New England Inc.*, 172 FERC ¶ 61,125 (Aug. 4, 2020) ("*Order 841 Compliance Filing II Order*").

<sup>65</sup> See *Elec. Storage Participation in Mkts. Operated by Regional Transmission Orgs. and Indep. Sys. Operators*, Order No. 841, 162 FERC ¶ 61,127 (Feb. 15, 2018) ("*Order 841*").

<sup>66</sup> *Order 841 Compliance Filing II Order* at P 52.

meeting (following completion of Markets Committee consideration; the Transmission Committee unanimously approved at its October 27 meeting Participants Committee support for the pieces of the further compliance filing under its purview). If you have any questions concerning this proceeding, please contact Sebastian Lombardi (860-275-0663; [slombardi@daypitney.com](mailto:slombardi@daypitney.com)).

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

Requests for rehearing and/or clarification of the *Fuel Security Retention Proposal Order*<sup>67</sup> remain pending before the FERC. As previously reported, the *Fuel Security Retention Proposal Order* accepted ISO-NE's Proposal<sup>68</sup> in all respects, despite the various protests and alternative proposals filed. There was a concurring decision from Commissioner Glick, and a partial dissent from Chairman Chatterjee on the FCA price treatment issue. Challenges to the *Fuel Security Retention Proposal Order* were filed by NEPGA, NRG, Verso, Vistra/Dynegy Marketing & Trade, MPUC, and PIOs.<sup>69</sup> On February 1, 2019, the FERC issued a tolling order to afford it additional time to consider the requests for rehearing, which remain pending. 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](mailto:slombardi@daypitney.com)).

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

On July 2, 2018, the FERC issued an order<sup>70</sup> that (i) denied ISO-NE's request for waiver of certain Tariff provisions that would have permitted ISO-NE to retain Mystic 8 & 9 for fuel security purposes (ER18-1509); and (ii) instituted an FPA Section 206 proceeding (EL18-182) (having preliminarily found that the ISO-NE Tariff may be unjust and unreasonable in that it fails to address specific regional fuel security concerns identified in the record that could result in reliability violations as soon as year 2022). The *Mystic Waiver Order* required ISO-NE, on or before August 31, 2018 to either: (a) submit interim Tariff revisions that provide for the filing of a short-term, cost-of-service agreement ("COS Agreement") to address demonstrated fuel security concerns (and to submit by July 1, 2019 permanent Tariff revisions reflecting improvements to its market design to better address regional fuel security concerns "Chapter 3 Proposal"); or (b) show cause as to why the Tariff remains just and reasonable in the short- and long-term such that one or both of Tariff revisions filings is not necessary.

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<sup>67</sup> *ISO New England Inc.*, 165 FERC ¶ 61,202 (Dec. 3, 2018), *reh'g requested* ("*Fuel Security Retention Proposal Order*"). In accepting the ISO-NE Proposal, the FERC, among other things: (i) found ISO-NE's trigger and assumptions for the fuel security reliability review for retention of resources be reasonable, but required ISO-NE at the end of each winter to "to submit an informational filing comparing the study assumptions and triggers from the modeling analysis to actual conditions experienced in the winter of 2018/19; (ii) found cost allocation on a regional basis to Real-Time Load Obligation just and reasonable and consistent with precedent regarding the past Winter Reliability Programs; (iii) found that entering retained resources into the FCAs as price takers would be just and reasonable to ensure that they clear and are counted towards resource adequacy so that customers do not pay twice for the resource; and (iv) found that it was appropriate to include FCAs 13, 14 and 15 in the term. The FERC agreed that it is necessary to implement a longer-term market solution as soon as possible, and required ISO-NE to file its longer-term market solution no later than June 1, 2019. The FERC declined to provide guidance on what the long-term solution(s) should be.

<sup>68</sup> As previously reported, ISO-NE filed, in response to the *Mystic Waiver Order*, "interim Tariff revisions that provide for the filing of a short-term, cost-of-service agreement to address demonstrated fuel security concerns". ISO-NE proposed three sets of provisions to expand its authority on a short-term basis to enter into out-of-market arrangements in order to provide greater assurance of fuel security during winter months in New England (collectively, the "Fuel Security Retention Proposal"). ISO-NE stated that the interim provisions would sunset after FCA15, with a longer-term market solution to be filed by July 1, 2019, as directed in the *Mystic Waiver Order*. In addition, the ISO-NE transmittal letter described (i) the generally-applicable fuel security reliability review standard that will be used to determine whether a retiring generating resource is needed for fuel security reliability reasons; (ii) the proposed cost allocation methodology (Real-Time Load Obligation, though ISO-NE indicated an ability to implement NEPOOL's alternative allocation methodology if determined appropriate by the FERC); and (iii) the proposed treatment in the FCA of a retiring generator needed for fuel security reasons that elects to remain in service. The ISO-NE Fuel Security Changes were considered but not supported by the Participants Committee at its August 24, 2018 meeting. There was, however, super-majority support for (1) the Appendix L Proposal with some important adjustments to make that proposal more responsive to the FERC's guidance in the *Mystic Waiver Order* and other FERC precedent, and (2) the PP-10 Revisions, also with important adjustments (together, the "NEPOOL Alternative").

<sup>69</sup> "PIOs" for purposes of this proceeding are Sierra Club, NRDC, Sustainable FERC Project, and Acadia Center.

<sup>70</sup> *ISO New England Inc.*, 164 FERC ¶ 61,003 (July 2, 2018), *reh'g requested* ("*Mystic Waiver Order*").

Addressing the waiver element, the FERC found the waiver request “an inappropriate vehicle for allowing Mystic 8 and 9 to submit a [COS Agreement] in response to the identified fuel security need” and further that the request “would not only suspend tariff provisions but also alter the existing conditions upon which a market participant could enter into a [COS Agreement] (for a transmission constraint that impacts reliability) and allow for an entirely new basis (for fuel security concerns that impact reliability) to enter into such an agreement.” The FERC concluded that “[s]uch new processes may not be effectuated by a waiver of the ISO-NE Tariff; they must be filed as proposed tariff provisions under FPA section 205(d).”<sup>71</sup> Even if it were inclined to apply its waiver criteria, the FERC stated that it would still have denied the waiver request as “not sufficiently limited in scope.”<sup>72</sup>

Although it denied the waiver request, the FERC was persuaded that the record supported “the conclusion that, due largely to fuel security concerns, the retirement of Mystic 8 and 9 may cause ISO-NE to violate NERC reliability criteria.” Finding ISO-NE’s methodology and assumptions in the Operational Fuel-Security Analysis (“OFSA”) and Mystic Retirement Studies reasonable, the FERC directed the filing of both interim and permanent Tariff revisions to address fuel security concerns (or a filing showing why such revisions are not necessary).<sup>73</sup> The FERC directed ISO-NE to consider the possibility that a resource owner may need to decide, prior to receiving approval of a COS Agreement, whether to unconditionally retire, and provided examples of how to address that possibility.<sup>74</sup> The FERC also directed ISO-NE include with any proposed Tariff revisions a mechanism that addresses how cost-of-service-retained resources would be treated in the FCM<sup>75</sup> and an *ex ante* cost allocation proposal that appropriately identifies beneficiaries and adheres to FERC cost causation precedent.<sup>76</sup>

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

- ◆ **NEPGA** (requesting that the FERC grant clarification that it directed, or on rehearing direct, ISO-NE to adopt a mechanism that prohibits the re-pricing of Fuel Security Resources in the FCA at \$0/kW-mo. or at any other uncompetitive offer price);
- ◆ **Connecticut Parties**<sup>77</sup> (requesting that the FERC clarify that (i) the discussion in the *Mystic Waiver Order* of pricing treatment in the FCM for fuel security reliability resources is not a final determination nor is it intended to establish FERC policy; (ii) the FERC did not intend to prejudge whether entering those resources in the FCM as price takers would be just and reasonable; and (iii) that ISO-NE may confirm its submitted position that price taking treatment for these resources would, in fact, be a just and reasonable outcome. Failing such clarification, Connecticut Parties request rehearing, asserting that the record fails to support a determination that resources retained for reliability to address fuel security concerns must be entered into the FCM at a price greater than zero);
- ◆ **ENECOS** (asserting that the *Mystic Waiver Order* (i) misplaces reliance on ISO-NE “assertions concerning ‘fuel security,’ which do not in fact establish a basis in evidence or logic for initiating” a Section 206(a) proceeding; (ii) impermissibly relies on extra-record material that the FERC did not actually review and that intervenors were afforded no meaningful opportunity to challenge; and (iii) speculation concerning potential future modifications to the FCM bidding rules as to retiring generation retained for fuel security misunderstands the problem it seeks to address, and prejudices the already truncated opportunities for stakeholder input in this proceeding), ENECOS suggest that the FERC should grant rehearing, vacate its show cause directive, strike its dictum concerning potential

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<sup>71</sup> *Id.* at P 47.

<sup>72</sup> *Id.* at P 48.

<sup>73</sup> *Id.* at P 55.

<sup>74</sup> *Id.* at PP 56-57.

<sup>75</sup> *Id.* at P 57.

<sup>76</sup> *Id.* at P 58.

<sup>77</sup> “Connecticut Parties” are CT PURA and CT DEEP.



treatment of FCM bidding for retiring generation retained for “fuel security,” and direct ISO-NE to proceed either in accordance with its Tariff or under FPA Section 205 to address, with appropriate evidentiary support, whatever concerns it believes to exist concerning “fuel security”);

- ◆ **MA AG** (asserting that the decision to institute a Section 206 proceeding was insufficiently supported by sole reliance on highly contested OFSA and Mystic Retirement Studies; and the FERC should reconsider the timeline for the permanent tariff solution and set the deadline for implementation no later than February 2020);
- ◆ **MPUC** (challenging the Order’s (i) adoption of ISO-NE’s methodology and assumptions in the OFSA and Mystic Retirement Studies without undertaking any independent analysis; (ii) failure to address arguments and analysis challenging assumptions in the OFSA and Mystic Retirement Studies; (iii) failure to address the MPUC argument that the Mystic Retirement Studies adopted a completely new standard for determining a reliability problem three years in advance; (iv) unreasonably discounting of the ability of Pay-for-Performance to provide sufficient incentives to Market Participants to ensure their performance under stressed system conditions; and (v) failure to direct ISO-NE to undertake a Transmission Security Analysis consistent with the provisions in the Tariff);
- ◆ **New England EDCs**<sup>78</sup> (requesting clarification that (i) the central purpose of ISO-NE’s July 1, 2019 filing is to assure that New England adds needed new infrastructure to address the fuel supply shortfalls and associated threats to electric reliability that ISO-NE identified in its OFSA and (ii) that, in developing the July 1, 2019 filing, ISO-NE is to evaluate Tariff revisions (such as those the EDCs described in their request), through which ISO-NE customers would pay for the costs of natural gas pipeline capacity additions via rates under the ISO-NE Tariff);
- ◆ **PIOs**<sup>79</sup> (asserting that (i) the FERC failed to respond to or provide a reasoned explanation for rejecting the arguments submitted by numerous parties that key assumptions underlying and the results of the ISO-NE analyses were flawed; and (ii) the FERC’s determination that ISO-NE’s analyses were reasonable is not supported by substantial evidence in the record); and
- ◆ **AWEA/NGSA** (asserting that the FERC erred (i) in finding that ISO-NE’s OFSA and subsequent impact analysis of fuel security was reasonable without further examination and (ii) in its preliminary finding that a short-term out-of-market solution to keep Mystic 8 & 9 in operation is needed to address fuel security issues).

On August 13, 2018, CT Parties opposed the NEPGA motion for clarification. On August 14, 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] refile their proposal, if appropriate, following its full consideration in the stakeholder process.” Answers to the Indicated New England EDCs were also filed by the MA AG, NEPGA, NextEra, and CLF/NRDC/Sierra Club/Sustainable FERC Project. On August 29, 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; [dtodot@daypitney.com](mailto:dtodot@daypitney.com)) or Sebastian Lombardi (860-275-0663; [slombardi@daypitney.com](mailto:slombardi@daypitney.com)).

<sup>78</sup> The “EDCs” are the National Grid companies (Mass. Elec. Co., Nantucket Elec. Co., and Narragansett Elec. Co.) and Eversource Energy Service Co. (on behalf of its electric distribution companies – CL&P, NSTAR and PSNH).

<sup>79</sup> “PIOs” are the Sierra Club, Natural Resources Defense Council (“NRDC”), and Sustainable FERC Project.

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

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

On September 25, 2020, as amended on October 14, 2020, Cogentrix Energy Power Management, LLC (“Cogentrix”) and Vistra Corp. (Dynegy) petitioned the DC Circuit Court of Appeals for review of the FERC’s *CIP IROL Orders*.<sup>80</sup> Reporting on this matter will move to Section XV. If you have any questions concerning this proceeding, please contact Eric Runge (617-345-4735; [ekrunge@daypitney.com](mailto:ekrunge@daypitney.com)).

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

- **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.<sup>81</sup> Among other things, those changes included: (i) updates and enhancements to the credit insurance provisions; (ii) updates to the form letter of credit and related provisions; and (iii) miscellaneous revisions, including a change to the retention period for financial assurance after membership termination and a conforming change in the FCM Charge Rate calculation (collectively, the “FAP Changes”). 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](mailto:pnbelval@daypitney.com); 860-275-0381).

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

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

On October 29, 2020, the FERC accepted an amended version of Schedule 20A-VP reflecting the renaming of Emera Maine as Versant Power and correcting certain typographical errors.<sup>82</sup> The filing was accepted effective as of November 1, 2020, as requested. Unless the October 29 order is challenged, this proceeding will be concluded. If you have any questions concerning this matter, please contact Pat Gerity ([pmgerity@daypitney.com](mailto:pmgerity@daypitney.com); 860-275-0533).

- **Schedule 21-VP: 2019 Annual Update Settlement Agreement (ER15-1434-004)**

On March 19, 2020, Emera Maine submitted a joint offer of settlement between itself and the MPUC to resolve all issues raised by the MPUC in response to Emera Maine’s 2019 annual charges update filed, as previously reported, on June 10, 2019 (the “Emera 2019 Annual Update Settlement Agreement”). Under Part V of Attachment P, “Interested Parties shall have the opportunity to conduct discovery seeking any information relevant to implementation of the [Attachment P] Rate Formula. . . .” and follow a dispute resolution procedure set forth there. In accordance with those provisions, the MPUC identified certain disputes with the 2019 Annual Update, all of which are resolved by the Emera 2019 Annual Update Settlement Agreement. Comments on the Emera 2019 Annual Update Settlement Agreement were due on or before April 9, 2020; none were filed. This matter is pending before the FERC. If you have any questions concerning this proceeding, please contact Pat Gerity (860-275-0533; [pmgerity@daypitney.com](mailto:pmgerity@daypitney.com)).

<sup>80</sup> *ISO New England Inc.*, 171 FERC ¶ 61,160 (May 26, 2020) (“*CIP IROL Cost Recovery Order*”) and *ISO New England Inc.*, 172 FERC ¶ 61,251 (Sep. 17, 2020) (“*CIP IROL Allegheny Order*”), and together with the *CIP IROL Cost Recover Order*, the “*CIP IROL Orders*”).

<sup>81</sup> *ISO New England Inc.*, Docket No. ER20-2145 (Sep. 2, 2020) (unpublished letter order).

<sup>82</sup> *ISO New England Inc. and Versant Power*, Docket No. ER20-2783 (Oct. 29, 2020) (unpublished letter order).

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

The MPS Merger Cost Recovery Settlement, filed by Emera Maine on May 8, 2018 to resolve all issues pending before the FERC in the consolidated proceedings set for hearing in the *MPS Merger-Related Costs Order*,<sup>83</sup> and certified by Settlement Judge Dring<sup>84</sup> to the Commission,<sup>85</sup> remains pending before the FERC. As previously reported, under the Settlement, permitted cost recovery over a period from June 1, 2018 to May 31, 2021 will be \$390,000 under Attachment P of the BHD OATT and \$260,000 under the MPD OATT. If you have any questions concerning these matters, please contact Pat Gerity (860-275-0533; [pmgerity@daypitney.com](mailto:pmgerity@daypitney.com)).

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

No Activity to Report

**VIII. Regional Reports**

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

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

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

The TOs’ November 2, 2015 refund report documenting resettlements of regional transmission charges by ISO-NE in compliance with *Opinions No. 531-A*<sup>86</sup> and *531-B*<sup>87</sup> also remains pending. If there are questions on this matter, please contact Pat Gerity (860-275-0533; [pmgerity@daypitney.com](mailto:pmgerity@daypitney.com)).

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

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

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

<sup>83</sup> *Emera Maine and BHE Holdings*, 155 FERC ¶ 61,230 (June 2, 2016) (“*MPS Merger-Related Costs Order*”). In the *MPS Merger-Related Costs Order*, the FERC accepted, but established hearing and settlement judge procedures for, filings by Emera Maine seeking authorization to recover certain merger-related costs viewed by the FERC’s Office of Enforcement’s Division of Audits and Accounting (“DAA”) to be subject to the conditions of the orders authorizing Emera Maine’s acquisition of, and ultimate merger with, Maine Public Service (“Merger Conditions”). The Merger Conditions imposed a hold harmless requirement, and required a compliance filing demonstrating fulfillment of that requirement, should Emera Maine seek to recover transaction-related costs through any transmission rate. Following an audit of Emera Maine, DAA found that Emera Maine “inappropriately included the costs of four merger-related capital initiatives in its formula rate recovery mechanisms” and “did not properly record certain merger-related expenses incurred to consummate the merger transaction to appropriate non-operating expense accounts as required by [FERC] regulations [and] inappropriately included costs of merger-related activities through its formula rate recovery mechanisms” without first making a compliance filing as required by the merger orders. The *MPS Merger-Related Costs Order* set resolution of the issues of material fact for hearing and settlement judge procedures, consolidating the separate compliance filing dockets.

<sup>84</sup> ALJ John Dring was the settlement judge for these proceedings. There were five settlement conferences -- three in 2016 and two in 2017. With the Settlement pending before the FERC, settlement judge procedures, for now, have not been terminated.

<sup>85</sup> *Emera Maine and BHE Holdings*, 163 FERC ¶ 63,018 (June 11, 2018).

<sup>86</sup> *Martha Coakley, Mass. Att’y Gen.*, 149 FERC ¶ 61,032 (Oct. 16, 2014) (“*Opinion 531-A*”).

<sup>87</sup> *Martha Coakley, Mass. Att’y Gen.*, *Opinion No. 531-B*, 150 FERC ¶ 61,165 (Mar. 3, 2015) (“*Opinion 531-B*”).

- ◆ Eversource
- ◆ NSTAR

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

- **Capital Projects Report - 2020 Q3 (ER21-108)**

On October 15, 2020, ISO-NE filed its Capital Projects Report and Unamortized Cost Schedule covering the third quarter (“Q3”) 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 include the following new projects: (i) nGEM Market Clearing Engine Implementation (\$13,900,500); and (ii) CELT Report Automation Phase I (\$155,500). The following three projects had significant changes: (i) ESI (2020 Budget decrease of \$1 million); (ii) 2020 Issue Resolution Project Part II (2020 Budget decrease of \$540,000); (iii) Energy Management Platform 3.2 Upgrade Part II (2020 Budget increase of \$250,000); and (iv) Enterprise Application Integration Replacement Phase I (2020 Budget increase of \$100,000). Comments on this filing are due on or before November 5. Thus far, NEPOOL filed comments on October 30 supporting the filing and National Grid submitted a doc-less intervention. If you have any questions concerning this matter, please contact Paul Belval (860-275-0381; [pnbelval@daypitney.com](mailto:pnbelval@daypitney.com)).

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

On October 2, 2020, the FERC accepted ISO-NE’s Capital Projects Report and Unamortized Cost Schedule covering the second quarter of calendar year 2020 (the “Report”).<sup>88</sup> 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 (“CAPA”) (\$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). Unless the October 2 order is challenged, this proceeding will be concluded. If you have any questions concerning this matter, please contact Paul Belval (860-275-0381; [pnbelval@daypitney.com](mailto:pnbelval@daypitney.com)).

- **LFTR Implementation: 48<sup>th</sup> Quarterly Status Report (ER07-476; RM06-08)**

ISO-NE filed the 48<sup>th</sup> of its quarterly status reports regarding LFTR implementation on October 15, 2020. ISO-NE reported that it implemented monthly reconfiguration auctions (accepted in ER12-2122) beginning with the month of October 2019. ISO-NE further reported that, while it will continue to evaluate its as-filed LFTR design and financial assurance issues, including an ongoing evaluation of the FTR market and risk associated with FTRs and LFTRs, it is currently focused on higher priority market-design initiatives. These status reports are not noticed for public comment.

- **Reserve Market Compliance (29<sup>th</sup>) Semi-Annual Report (ER06-613)**

As directed by the original ASM II Order,<sup>89</sup> as modified,<sup>90</sup> ISO-NE submitted its 29<sup>th</sup> semi-annual reserve market compliance report on October 1, 2020. In the 29<sup>th</sup> report, ISO-NE explained that it is focused on efforts to address energy security, and is engaged in regional discussions with stakeholders to evaluate wholesale market responses to the region’s focus on rapid decarbonization. ISO-NE committed to address in

<sup>88</sup> *ISO New England Inc.*, Docket No. ER20-2640 (Oct. 2, 2020) (unpublished letter order).

<sup>89</sup> See *NEPOOL and ISO New England Inc.*, 115 FERC ¶ 61,175 (2006) (“ASM II Order”) (directing the ISO to provide updates on the implementation of a forward TMSR market), *reh’g denied* 117 FERC ¶ 61,106 (2006).

<sup>90</sup> See *NEPOOL and ISO New England Inc.*, 123 FERC ¶ 61,298 (2008) (continuing the semi-annual reporting requirement with respect to the consideration and implementation of a forward market for Ten-Minute Spinning Reserve (“TMSR”).

future reports how the objectives of a forward TMSR market might be achieved or impacted by those efforts. The October 1 report was not noticed for public comment. If there are questions on this matter, please contact Dave Doot (860-275-0102; [dt\\_doot@daypitney.com](mailto:dt_doot@daypitney.com)).

**IX. Membership Filings**

- **November 2020 Membership Filing (ER21-260)**

On October 30, 2020, NEPOOL requested that the FERC accept the membership of Nautilus Solar Energy, LLC (AR Sector, RG Sub-Sector, Large AR RG Group Seat). Comments on this filing are due on or before November 20, 2020.

- **October 2020 Membership Filing (ER20-3031)**

On September 30, 2020, NEPOOL requested that the FERC accept the membership of David Energy Supply, LLC (Supplier Sector). Comments on this filing were due on or before October 21; none were filed. This matter is pending before the FERC.

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

On October 13, 2020, the FERC accepted (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).<sup>91</sup> Unless the October 13 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, 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.

- **Suspension Notices (not docketed)**

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

<i><b>Date of Suspension/ FERC Notice</b></i>	<i><b>Participant Name</b></i>	<i><b>Default Type</b></i>	<i><b>Date Reinstated</b></i>
Sep 30/Oct 2	Curio Analytics, Inc. (FTR-Only)	Financial Assurance	Oct 9, 2020
Oct 15/19	Manchester Methane, LLC	Financial Assurance	Nov 2, 2020
Oct 16/20	NS Power Energy Marketing	Financial Assurance	Oct 20, 2020

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

<sup>91</sup> *New England Power Pool Participants Comm.*, Docket No. ER20-2772 (Oct. 13, 2020) (unpublished letter order).



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

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

- **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,<sup>92</sup> 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<sup>93</sup> 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)**

On October 30, 2020, the FERC accepted changes 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").<sup>94</sup> As previously reported, the changes remove references to Load Serving Entity (which is no longer an applicable entity), add Underfrequency Load Shedding ("UFLS")-Only

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<sup>92</sup> 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").

<sup>93</sup> Non-compliance submissions include Notices of Penalty ("NOPs"), Spreadsheet NOPs ("SNOPs"), Find, Fix and Track submissions ("FFTs") and Compliance Exceptions ("CEs").

<sup>94</sup> *N. Amer. Elec. Rel. Corp.*, Docket No. RD20-4 (Oct. 30, 2020) (unpublished letter order).



Distribution Provider to PRC-006-3 as an applicable entity, and make consistent across the Standards the use of the term “Planning Coordinator”. The Revised Standards will become effective (and the currently effective versions be retired) on April 1, 2021 (the first day of the first calendar quarter that is three months following FERC approval). Unless the October 30 order is challenged, this proceeding will be concluded.

- **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,<sup>95</sup> 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 still 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/EPISA, 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 (“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

<sup>95</sup> *N. Am. Elec. Rel. Corp.*, 170 FERC ¶ 61,109 (Feb. 20, 2020).

or cloud computing services.<sup>96</sup> On March 25, 2020, Joint Associations<sup>97</sup> requested an extension of time to submit comments and reply comments. On April 2, the FERC granted Joint Associations' request and extended the deadline for initial comments on the NOI to July 1, 2020; the deadline for reply comments, July 31, 2020. Comments were filed by NERC, the 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,<sup>98</sup> 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."<sup>99</sup> 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.<sup>100</sup>

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*<sup>101</sup> (the "MOD A Reliability Standards"). The FERC intends to coordinate the effective dates for the retirement of the MOD A Reliability Standards with successor 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).<sup>102</sup>

- **Amended and Restated NERC Bylaws (RR21-1)**

On October 14, 2020, NERC petitioned the FERC for approval of its amended and restated Bylaws. NERC stated that the amendments (i) address governance matters relating to the composition of NERC's membership

<sup>96</sup> *Virtualization and Cloud Computing Services*, 170 FERC ¶ 61,110 (Feb. 20, 2020).

<sup>97</sup> "Joint Associations" are for purposes of this proceeding: EEI, APPA, NRECA, and LPPC.

<sup>98</sup> *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).

<sup>99</sup> *Order 873* at P 2.

<sup>100</sup> *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.

<sup>101</sup> *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.

<sup>102</sup> *Standards for Business Practices and Communication Protocols for Public Utilities*, 85 Fed. Reg. 55201 (September 4, 2020).

Sectors, certain rules relating to the Member Representatives Committee, as well as the qualification of independent trustees for the Board; (ii) update certain provisions to conform with applicable state law; and (iii) improve internal consistency and introduce ministerial changes within the Bylaws with respect to capitalizing defined terms consistently and removing inoperative provisions. Comments, if any, on the Amended and Restated Bylaws are due on or before November 4, 2020.

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

On November 2, 2020, the FERC accepted NERC's proposed 2021 Business Plan and Budget, as well as the 2021 Business Plans and Budgets for NERC's Regional Entities, including NPCC.<sup>103</sup> The FERC also granted an exception to NERC's Rules of Procedure to permit certain of the Regional Entities, including NPCC, to deposit penalty monies into their assessment stabilization reserves.<sup>104</sup> As previously reported, NERC's 2021 funding requirement represents an overall decrease of approximately 1.0% over its 2020 funding requirement, and the NPCC U.S. allocation of NERC's net funding requirement is \$4.44 million. Unless the November 2 order is challenged, this proceeding will be concluded.

- **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: CPV Towantic (EC21-16)**

On October 29, 2020, CPV Towantic, LLC ("CPV Towantic"), among others, requested authorization for a transaction whereby CPV Group LP will indirectly acquire all of the indirect voting securities owned by GIP II CPV Intermediate Holdings Partnership, L.P., ("GIP II CPV"). Upon consummation, Clearway Power Marketing and GenConn Energy will no longer be CPV Related Persons. A FERC order approving the transaction on or before December 28, 2020 was requested. Comments on this application are due on or before November 19, 2020.

- **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 were due on or before October 9, 2020; none were filed. Public Citizen filed a doc-less intervention. This matter is pending before the FERC.

- **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

<sup>103</sup> *N. Amer. Elec. Rel. Corp.*, 173 FERC ¶ 61,120 (Nov 2, 2020).

<sup>104</sup> *Id.* at PP 16-17; Ordering Paragraph (C).

construction of the Line.<sup>105</sup> Pursuant to the March 13 order, notice must be filed within 10 days of consummation of the transaction, which as of the date of this Report has not yet occurred.

- **VTransco Rate Schedule 2 Cancellation (ER21-256)**

On October 29, 2020, Vermont Transco filed a notice of cancellation of the Vermont Yankee Transmission Agreement, which is no longer in use. A December 28, 2020 effective date was requested. Comments on the notice of cancellation are due on or before November 19, 2020. If you have any questions concerning this matter, please contact Pat Gerity ([pmgerity@daypitney.com](mailto:pmgerity@daypitney.com); 860-275-0533).

- **D&E Agreement: NSTAR/Ocean State Power (ER21-192)**

On October 23, 2020, NSTAR filed a Preliminary Agreement for Design, Engineering and Construction services (the “D&E Agreement”) between itself and Ocean State Power. The D&E Agreement sets forth the terms and conditions under which NSTAR will undertake preliminary design and engineering activities to increase the real power capacity of Ocean State Power’s large generating facility. NSTAR requested that the D&E Agreement be accepted for filing as of the date of filing, or October 23, 2020. Comments on this filing are due on or before November 13, 2020. This matter is pending before the FERC. If you have any questions concerning this matter, please contact Pat Gerity ([pmgerity@daypitney.com](mailto:pmgerity@daypitney.com); 860-275-0533).

- **NECEC TSAs: NECEC Transmission Notices of Succession and CMP Notice of Cancellation (ER21-12 et al.)**

On October 2, 2020, NECEC and CMP filed concurrently notices addressing the transfer of the 7 transmission service agreements (“TSAs”) with the participants that will fund the construction, operation and maintenance of the NECEC Transmission Line. Once the transfer of the TSAs from CMP to NECEC Transmission is consummated (see EC20-24 above), NECEC will succeed to CMP’s position in the TSAs and CMP will no longer be a party to the TSAs. As a result, NECEC filed notices of succession to the TSAs<sup>106</sup> and CMP filed a notice cancelling the TSAs as CMP Rate Schedules in the FERC’s eTariff database. The notices are to be effective as of the date the transaction is consummated. Comments on the notices were due on or before October 23, 2020; none were filed. Like the notice that must be filed in EC20-24, NECEC and CMP committed to file notices of the effective date of the notices filed in these proceedings. These matters are pending before the FERC. If you have any questions concerning these matters, please contact Pat Gerity ([pmgerity@daypitney.com](mailto:pmgerity@daypitney.com); 860-275-0533).

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

On October 26, 2020, the FERC accepted a Preliminary Agreement for Design, Engineering and Construction services (the “D&E Agreement”) between CL&P and The University of Connecticut (“UConn”).<sup>107</sup> The D&E Agreement sets forth the terms and conditions under which CL&P will undertake preliminary design and engineering activities to increase the real power capacity of the transmission interconnection service to UConn’s large generating facility. The D&E Agreement was accepted for filing as of September 21, 2020, as requested. Unless the October 26, 2020 order is challenged, this proceeding will be concluded. If you have any questions concerning this matter, please contact Pat Gerity ([pmgerity@daypitney.com](mailto:pmgerity@daypitney.com); 860-275-0533).

- **D&E Agreement 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. The D&E Agreement terminated by its terms as of the effective date of the

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<sup>105</sup> *Central Maine Power Co.*, 170 FERC 62,145 (Mar. 13, 2020).

<sup>106</sup> The NECEC Transmission succession notices to the 7 TSAs were separately docketed as follows: Eversource (ER21-12); National Grid (ER20-13); Unitil (ER21-14); HQ US/Eversource (ER21-15); HQ US/National Grid (ER21-17); HQ US/Unitil (ER21-18); and HQ US Additional (ER21-19).

<sup>107</sup> *The Conn. Light & Power Co.*, Docket No. ER20-2927 (Oct. 26, 2020) (unpublished letter order).

LGIA. A July 10, 2020 effective date to coincide with the effective date of the LGIA was requested. Comments on this filing were due on or before October 9; none were filed. This matter is pending before the FERC. If you have any questions concerning this matter, please contact Pat Gerity ([pmgerity@daypitney.com](mailto:pmgerity@daypitney.com); 860-275-0533).

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

Since the last Report, the FERC accepted notices of cancellation of LGIAs between New England Power Company (“NEP”) and Great River Hydro (f/k/a TransCanada Hydro Northeast) governing the interconnection of the following three hydroelectric facilities: (i) Moore (ER20-2897);<sup>108</sup> (ii) Vernon (ER20-2896);<sup>109</sup> and (iii) Comerford (ER20-2815).<sup>110</sup> As previously reported, NEP, ISO-NE and Great River Hydro entered into a fully conforming, standard LGIAs superseding the LGIAs to be cancelled. The cancellation notices were 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). Unless the orders accepting the notices are challenged, these proceedings will be concluded. If you have any questions concerning these matters, please contact Pat Gerity ([pmgerity@daypitney.com](mailto:pmgerity@daypitney.com); 860-275-0533).

- **Use Rights Transfer Agreement: NSTAR/HQ US (MMWEC) (ER20-2776)**

On October 9, 2020, the FERC accepted the agreement by which NSTAR will transfer MMWEC’s use rights over the Phase I/II HVDC facilities to HQ US (MMWEC itself does not have a mechanism to effectuate the transfer) for the November 1, 2020 through October 31, 2025 period.<sup>111</sup> The Transfer Agreement was accepted effective as of October 31, 2020, as requested. Unless the October 9 order is challenged, this proceeding will be concluded. If there are questions on this matter, please contact Eric Runge (617-345-4735; [ekrunge@daypitney.com](mailto:ekrunge@daypitney.com)).

- **Use Rights Transfer Agreement: NSTAR/HQ US (CMEEC) (ER20-2774)**

On October 9, the FERC accepted an Agreement that transfers CMEEC’s Use Rights on the Phase I/II HVDC Transmission Facilities, ultimately, to HQ US, for the November 1, 2020 through October 31, 2025 period (“Transfer Agreement”).<sup>112</sup> Because CMEEC, as a non-jurisdictional entity, does not have a mechanism to directly transfer its Use Rights to HQ US, CMEEC is transferring its Use Rights to NSTAR who, in turn, as a Schedule 20A Service Provider under the ISO-NE OATT, is transferring those Use Rights to HQ US. CMEEC’s IRH management committee voting rights, financial obligations and all other rights and responsibilities provided for in the Support Agreements and the Restated Use Agreement that are not directly related to the Use Rights and the exercise thereof by HQ US are not being transferred to HQ US. The Transfer Agreement was accepted for filing effective as of October 31, 2020, as requested. Unless the October 9 order is challenged, this proceeding will be concluded. If you have any questions concerning this matter, please contact Pat Gerity ([pmgerity@daypitney.com](mailto:pmgerity@daypitney.com); 860-275-0533).

- **Use Rights Transfer Agreement: NSTAR/HQ US (ENE) (ER20-2773)**

On October 9, the FERC accepted the agreement by which NSTAR will transfer ENE’s use rights over the Phase I/II HVDC facilities to HQ US (ENE itself does not have a mechanism to effectuate the transfer) for the period commencing November 1, 2020 through December 31, 2023.<sup>113</sup> The Agreement was accepted effective September 26, 2020, as requested. Unless the October 9 order is challenged, this proceeding will be

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<sup>108</sup> *New England Power Co.*, Docket No. ER20-2897 (Oct. 29, 2020) (unpublished letter order).

<sup>109</sup> *New England Power Co.*, Docket No. ER20-2896 (Oct. 29, 2020) (unpublished letter order).

<sup>110</sup> *New England Power Co.*, Docket No. ER20-2815 (Oct. 30, 2020) (unpublished letter order).

<sup>111</sup> *NSTAR Electric Co.*, Docket No. ER20-2776 (Oct. 9, 2020) (unpublished letter order).

<sup>112</sup> *NSTAR Electric Co.*, Docket No. ER20-2774 (Oct. 9, 2020) (unpublished letter order).

<sup>113</sup> *NSTAR Electric Co.*, Docket No. ER20-2773 (Oct. 9, 2020) (unpublished letter order).

concluded. If there are questions on this matter, please contact Eric Runge (617-345-4735; [ekrunge@daypitney.com](mailto:ekrunge@daypitney.com)).

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

On October 9, 2020, the FERC accepted an Agreement between NSTAR and H.Q. Energy Services (U.S.), Inc. (“HQ US”) for the continued reassignment (through May 31, 2021) of NSTAR’s Use Rights on the Phase I/II HVDC Transmission Facilities (“Transfer Agreement”) to HQ US.<sup>114</sup> The Agreement was accepted effective November 1, 2020, as requested. Unless the October 9 order is challenged, this proceeding will be concluded. If you have any questions concerning this matter, please contact Pat Gerity ([pmgerity@daypitney.com](mailto:pmgerity@daypitney.com); 860-275-0533).

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

On October 9, 2020, the FERC accepted executed second amendments to 7 cost-based transmission service agreements (“TSAs”) between CMP and the participants that will fund the construction, operation and maintenance of CMP’s portion of a the NECEC Transmission Line.<sup>115</sup> As previously reported, 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. The amendments were accepted, effective as of October 14, 2020, as requested. Unless the October 9 orders are challenged, these proceedings will be concluded. If you have any questions concerning this matter, please contact Pat Gerity ([pmgerity@daypitney.com](mailto:pmgerity@daypitney.com); 860-275-0533).

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

On October 2, 2020, the FERC accepted a notice of cancellation of two agreements,<sup>116</sup> both entered into in 2006, among Vermont Electric Power Company, Inc. (“VELCO”), Central Vermont Public Service Corporation (“CVPS”), Green Mountain Power Corporation (“GMP”), and VTransco, which are no longer in use.<sup>117</sup> The notice of cancellation was accepted for filing as of July 30, 2020. Unless the October 2 order is challenged, this proceeding will be concluded. If you have any questions concerning this matter, please contact Pat Gerity ([pmgerity@daypitney.com](mailto:pmgerity@daypitney.com); 860-275-0533).

- **VTransco VTA Waiver Request Clarification (ER20-1823-001)**

On October 20, 2020, the FERC granted the clarification requested by VTransco, namely that the waiver previously granted<sup>118</sup> should be viewed as a request to defer and amortize *up to* \$10 million of the difference between the budgeted and actual ISO-NE RNS revenues over a 24-month period, beginning Jan 1, 2021.<sup>119</sup> Unless the October 20 order is challenged, this proceeding will be concluded. If you have any questions concerning this matter, please contact Pat Gerity ([pmgerity@daypitney.com](mailto:pmgerity@daypitney.com); 860-275-0533).

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

On October 23, 2020, the FERC accepted VELCO’s filing, as an agent of the Joint Owners, that described why no changes were required to the Phase II Vermont Dedicated Metallic Neutral Return

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<sup>114</sup> *NSTAR Electric Co.*, Docket No. ER20-2724 (Oct. 9, 2020) (unpublished letter order).

<sup>115</sup> *Central Maine Power Co.*, Docket Nos. ER20-2674; ER20-2675; ER20-2676; ER20-2677; ER20-2678; ER20-2679; ER20-2680 (Oct. 9, 2020) (unpublished letter order). The second amendments to the 7 TSAs were separately docketed as follows: Eversource (ER20-2674); National Grid (ER20-2675); Unitil (ER20-2676); HQ US/Eversource (ER20-2677); HQ US/National Grid (ER20-2678); HQ US/Unitil (ER20-2679); and HQ US Additional (ER20-2680).

<sup>116</sup> The Agreements are an Amended and Restated Three Party Transmission Agreement and an Amended and Restated Three Party Agreement.

<sup>117</sup> *Vermont Transco LLC*, Docket No. ER20-2507 (Oct. 2, 2020) (unpublished letter order).

<sup>118</sup> *Vermont Transco LLC*, Docket No. ER20-1823 (May 22, 2020) (unpublished letter order).

<sup>119</sup> *Vermont Transco LLC*, 173 FERC ¶ 61,079 (Oct. 20, 2020).



Conductor (“DMNRC”) Support Agreement<sup>120</sup> as a result of *Order 864*.<sup>121</sup> VELCO’s filing was accepted effective January 27, 2020, as requested. If you have any questions concerning this matter, please contact Eric Runge (617-345-4735; [ekrunge@daypitney.com](mailto:ekrunge@daypitney.com)).

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

In accordance with *Order 864*<sup>122</sup> and *Order 864-A*,<sup>123</sup> 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 (all remain pending):

Date Filed	Docket	Transmission Provider	Date Accepted
Oct 30, 2020	ER21-311	Green Mountain Power	pending
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
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

- **FERC Enforcement Action: High Desert (IN20-6)**

On October 23, the FERC approved a Stipulation and Consent Agreement with High Desert Power Project, LLC and Middle River Power LLC (collectively “High Desert”)<sup>124</sup> that resolved OE’s investigation into whether High Desert violated FERC rules, including the Anti-Manipulation Rule, related to High Desert’s receipt of Residual Unit Commitment (“RUC”) awards and corresponding Bid Cost Recovery (“BCR”) payments in the California Independent System Operator (“CAISO”) market. OE determined that High Desert, through its

<sup>120</sup> The DMNRC was installed on VETCO’s Phase I facilities to provide a neutral return for Phase I and Phase II at a total construction cost of approximately \$2.6 million. Pursuant to the Agreement, the Joint Owners recover their total cost of service by making the DMNRC available to NHH who in turn makes the DMNRC available to the Participants pursuant to, and for the term of, the Phase II New Hampshire Transmission Facilities Support Agreement.

<sup>121</sup> *Vermont Elec. Power Co., Inc.*, Docket No. ER20-1480 (Oct. 23, 2020) (unpublished letter order).

<sup>122</sup> *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*”). *Order 864* requires 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.

<sup>123</sup> *Public Util. Trans. Rate Changes to Address Accumulated Deferred Income Taxes*, 171 FERC ¶ 61,033, Order No. 864-A (Apr. 16, 2020) (“*Order 864-A*”).

<sup>124</sup> *High Desert Power Project, LLC and Middle River Power LLC*, 173 FERC ¶ 61,087 (Oct. 23, 2020).

Scheduling Coordinator EDF Trading North America, LLC (“EDF”), “knew or should have known that High Desert’s potential BCR payments were based upon RUC awards that CAISO was awarding by mistake – due to a software issue and that, despite those circumstances, rather than continue to submit RUC offers based upon supply and demand fundamentals, High Desert submitted RUC offers in a manner that sought to maximize any BCR that might be awarded in violation of the FERC’s Anti-Manipulation Rule.” Under the Settlement, in which High Desert neither admits nor denies the alleged violations, High Desert must **disgorge \$176,000** plus interest to CAISO, to be allocated by CAISO in its discretion for the benefit of CAISO customers and upon approval by OE’s of CAISO’s plan for doing so, and **pay a \$390,000 civil penalty** to the United States Treasury. If you have any questions concerning this matter, please contact Pat Gerity (860-275-0533; [pmgerity@daypitney.com](mailto:pmgerity@daypitney.com)).

## XII. Misc. - Administrative & Rulemaking Proceedings

- **Offshore Wind Integration in RTOs/ISOs Tech Conf (Oct 27, 2020) (AD20-18)**

On October 27, 2020, the FERC convened a staff-led technical conference to consider whether and how existing RTO and ISO interconnection, merchant transmission and transmission planning frameworks can accommodate anticipated growth in offshore wind generation in an efficient or cost-effective manner that safeguards open access transmission principles. The conference also provided an opportunity for participants to discuss possible changes or improvements to the current regulatory frameworks that may accommodate such growth. Speaker materials are posted in eLibrary.

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

On September 30, 2020, the FERC convened a Commissioner-led technical conference 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 was a response to (i) the April 14, 2020 request by Interest Parties,<sup>125</sup> who asserted that a technical conference “would be helpful to the Commission and stakeholders in the electric energy industry in deciding how best to move forward at the state and regional levels on these issues and in the relevant 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. Speaker opening remarks (including those of [Gordon van Welie](#), [Matt White](#), and other New England stakeholders), and comments are posted in eLibrary, as is a [transcript of the conference](#).

**Notice of Proposed Policy Statement.** Following the technical conference, on October 15, the FERC issued a Notice of Proposed Policy Statement.<sup>126</sup> The FERC stated that the *Proposed Policy Statement* is “to clarify the Commission’s jurisdiction over RTO/ISO market rules that incorporate a state-determined carbon price and to encourage RTO/ISO efforts to explore and consider the benefits of potential [FPA] section 205 filings to establish such rules.” Specifically, the FERC proposed “to make it the policy of this Commission to encourage efforts by RTOs/ISOs and their stakeholders—including States, market participants, and consumers—to explore establishing wholesale market rules that incorporate state-determined carbon prices in RTO/ISO markets.”<sup>127</sup> The FERC solicited comment on whether the following information and considerations it identified are “germane to the Commission’s evaluation of a section 205 filing to determine whether an RTO/ISO’s market rules that incorporate a state-determined carbon price in RTO/ISO markets are just, reasonable and not unduly discriminatory or preferential” or whether different or additional considerations may be or must be taken into account:

<sup>125</sup> “Interested Parties” are AEE, the American Council on Renewable Energy, the American Wind Energy Association, Brookfield Renewable, Calpine, CPV, EPSA, the Independent Power Producers of New York (“IPPNY”), LS Power Associates (“LS Power”), the Natural Gas Supply Association (“NGSA”), NextEra, PJM Power Providers Group, R Street Institute, and Vistra Energy Corp.

<sup>126</sup> *Carbon Pricing in Organized Wholesale Electricity Markets*, 173 FERC ¶ 61,062 (Oct. 15, 2020) (“*Proposed Policy Statement*”).

<sup>127</sup> *Id.* at P 15.

- a. How, if at all, do the relevant market design considerations change depending on the manner in which the state or states determine the carbon price (e.g., price-based or quantity-based methods)? How will that price be updated?
- b. How does the FPA section 205 proposal ensure price transparency and enhance price formation?
- c. How will the carbon price or prices be reflected in LMP?
- d. How will the incorporation of the state-determined carbon price into the RTO/ISO market affect dispatch? Will the state-determined carbon price affect how the RTO/ISO co-optimizes energy and ancillary services? Are any reforms to the co-optimization rules necessary in light of the state-determined carbon price?
- e. Does the proposal result in economic or environmental leakage? How does the proposal address any such leakage?

Comments on the *Proposed Policy Statement* are due by November 16, 2020; reply comments, by December 1, 2020.

- **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. Since the last Report, EPRI and PJM filed comments. This matter is pending before the FERC.

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

Energy Trading Institute’s<sup>128</sup> December 16, 2019 request that the FERC hold a technical conference and conduct a rulemaking to update the requirements adopted in *Order 741*<sup>129</sup> and Section 35.47 of the FERC’s regulations addressing credit and risk management in the markets operated by RTO/ISOs remains pending. As previously reported, ETI, citing a recent filing by NYISO (which it protested),<sup>130</sup> and stating that several expedited initiatives related to RTO/ISO credit policies are underway, suggested that it would be helpful for the FERC to consolidate any “filings with this proceeding and hold the technical conference ETI is requesting by March 30,

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<sup>128</sup> In its request, The Energy Trading Institute (“ETI”) describes itself generally as “represent[ing] a diverse group of energy market participants, all with substantial interests in wholesale electricity transactions in Commission-jurisdictional markets. ETI members provide important services to a wide variety of wholesale energy market participants. They act as intermediaries between producers and consumers of electric energy that have mismatched quantity, timing, and contract type needs. In addition, they provide liquidity by engaging in energy related commercial transactions with a variety of market entities including, but not limited to, generation owners, project developers, load-serving entities, and investors. ETI members advocate for markets that are open, transparent, competitive and fair - all necessary attributes for markets ultimately to benefit electricity consumers.”

<sup>129</sup> *Credit Reforms in Organized Wholesale Elec. Mkts.*, 75 Fed. Reg. 65942 (2010), FERC Stats. & Regs. ¶ 31,317 (2010) (“*Order 741*”); *order on reh’g*, 76 Fed. Reg. 10492 (2011), FERC Stats. & Regs. ¶ 31,320 (2011) (“*Order 741-A*”); *order on reh’g*, 135 FERC ¶ 61,242 (2011) (“*Order 741-B*”); 18 C.F.R. § 35.47.

<sup>130</sup> See Proposed Tariff Amendments to Enhance Credit Reporting Requirements and Remedies, *New York Indep. Sys. Operator, Inc.*, Docket No. ER20-483 (filed Nov. 26, 2019).

2020 so the ISOs, RTOs and their stakeholders consider those discussions in any initiatives they have underway.” ETI suggested in its request that RTO/ISO credit support requirements be standardized, and that the requested technical conference and rulemaking explore various ways to identify and mitigate counterparty risk (including know-you-customer (“KYC”) tools and participant suspensions or bans) and enhance risk management infrastructure/processes within the organized markets. Doc-less interventions have been filed by, among others, PJM, the PJM IMM, SPP, CAISO, Tenaska, Avangrid, and Roscommon Analytics. On January 24, the IRC, including ISO-NE, submitted comments and proposed, as an alternative approach to the one suggested by ETI, that the FERC not commence a rulemaking or schedule a technical conference at this time and instead allow individual RTO/ISOs to address their respective credit and risk management issues, permit sufficient time for experience with the evolving rules to be gained, and then consider the best path forward to facilitate a dialogue on best practices and potential points of alignment among the RTO/ISO. ETI responded to those comments on February 10, 2020.

The FERC issued a notice of ETI’s request for technical conference and petition for rulemaking on February 11, 2020, setting March 12, 2020 as the deadline for comments thereon. Comments were submitted by a number of parties, including APPA, CAISO, the Committee of Chief Risk Officers (“CCRO”), DC Energy, EEI, EPSA, Indicated PJM Transmission Owners,<sup>131</sup> and an independent consultant.<sup>132</sup> This matter remains pending before the FERC.

- **RTO/ISOs Common Performance Metrics (AD19-16)**

With Office of Management and Budget (“OMB”) approval, FERC staff has reinstated and revised its information collection form, FERC-922, on the Performance Metrics for ISOs, RTOs, and Regions Outside ISOs and RTOs. FERC staff expects to collect Common Metrics information every two years. The revised data collection, after additions and deletions, consists of twenty-nine Common Metrics.<sup>133</sup> RTO/ISOs were encouraged to submit responsive information by October 30, 2020. ISO-NE submitted its information on October 30, 2020. The ISO-NE submittal will not be noticed for public comment.

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

On January 8, 2018, the FERC initiated a Grid Resilience in RTO/ISOs proceeding (AD18-7)<sup>134</sup> and terminated the DOE NOPR rulemaking proceeding (RM18-1).<sup>135</sup> In terminating the DOE NOPR proceeding, the

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

<sup>132</sup> W. Scott Miller, III, Whitehall Bay Energy Services, LLC.

<sup>133</sup> There are seven **Group 1 metrics**: Reserve Margins, Average Heat Rates, Fuel Diversity, Capacity Factor by Technology Type, Energy Emergency Alerts (“EEA”) Level 1 or Higher, Performance by Technology Type during EEA Level 1 or Higher, and Resource Availability (Equivalent Forced Outage Rate Demand (“EFORD”). There are 12 **Group 2 metrics**: Number and Capacity of Reliability Must-Run Units, Reliability Must-Run Contract Usage, Demand Response Capability, Unit Hours Mitigated, Wholesale Power Costs by Charge Type, Price Cost Markup, Fuel Adjusted Wholesale Energy Price, Energy Market Price Convergence, Congestion Management, Administrative Costs, New Entrant Net Revenues, and Order No. 825 Shortage Intervals and Reserve Price Impacts; There are 10 **Group 3 metrics**: Net Cost of New Entry (“Net CONE”) Value, Resource Deliverability, New Capacity (Entry), Capacity Retirement (Exit), Forecasted Demand, Capacity Market Procurement and Prices, Capacity Obligations and Performance Assessment Events, Capacity Over-Performance, Capacity Under-Performance, and Total Capacity Bonus Payments and Penalties. The update metrics eliminate previously-collected metrics on reliability, RTO/ISO billing controls and customer satisfaction, interconnection and transmission processes, and system lambda.

<sup>134</sup> *Grid Rel. and Resilience Pricing*, 162 FERC ¶ 61,012 (Jan. 8, 2018), *reh’g requested*.

<sup>135</sup> As previously reported, the FERC opened the DOE NOPR proceeding in response to a September 28, 2017 proposal by Energy Secretary Rick Perry, issued under a rarely-used authority under §403(a) of the Department of Energy (“DOE”) Organization Act, that would have required RTO/ISOs to develop and implement market rules for the full recovery of costs and a fair rate of return for “eligible units” that (i) are able to provide essential energy and ancillary reliability services, (ii) have a 90-day fuel supply on site in the event of supply disruptions caused by emergencies, extreme weather, or natural or man-made disasters, (iii) are compliant with all applicable environmental regulations, and (iv) are not subject to cost-of-service rate regulation by any State or local authority. More than 450 comments were submitted in response to the DOE NOPR, raising and discussing an exceptionally broad spectrum of process, legal, and substantive arguments. A summary of those initial comments was circulated under separate cover and can be found with the posted

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

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

**ISO-NE Response.** In its response, ISO-NE identified fuel security<sup>136</sup> as the most significant resilience challenge facing the New England region. ISO-NE reported that it has established a process to discuss market-based solutions to address this risk, and indicated that it believed it will need through the second quarter of 2019 to develop a solution and test its robustness through the stakeholder process. In the meantime, ISO-NE indicated that it would continue to independently assess the level of fuel-security risk to reliable system operation and, if circumstances dictate, would take, with FERC approval when required, actions it determines to be necessary to address near-term reliability risks. ISO-NE’s response was broken into three parts: (i) an introduction to fuel-security risk; (ii) background on how ISO-NE’s work in transmission planning, markets, and operations support the New England bulk power system’s resilience; and (iii) answers to the specific questions posed in the January 8 order.

**Industry Comments.** Following a 30-day extension issued on March 20, 2018, reply comments were due on or before May 9, 2018. NEPOOL’s comments, which were approved at the May 4 meeting, were filed May 7, and were among over 100 sets of initial comments filed. A summary of the comments that seemed most relevant to New England and NEPOOL was circulated to the Participants Committee on May 15 and is posted on the [NEPOOL website](#). On May 23, NEPOOL submitted a limited response to four sets of comments, opposing the suggestions made in those pleadings to the extent that the suggestions would not permit full use of the Participant Processes. Supplemental comments and answers were also filed by FirstEnergy, MISO South Regulators, NEI, and EDF. Exelon and American Petroleum Institute filed reply comments. FirstEnergy included in this proceeding its motion for emergency action also filed in ER18-1509 (ISO-NE Waiver Filing: Mystic 8 & 9), which Eversource answered (in both proceedings). Reply comments were filed by APPA and AMP and the Nuclear Energy Institute (“NEI”) moved to lodge presentations by the National Infrastructure Advisory Council. On December 6, the 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”<sup>137</sup> requested Commissioner McNamee recuse himself from these proceedings. These matters remain pending before the FERC.

**FirstEnergy DOE Application for Section 202(c) Order.** In a related but separate matter, FirstEnergy Solutions (“FirstEnergy”) asked the Department of Energy (“DOE”) in late March to issue an emergency order to provide cost recovery to coal and nuclear plants in PJM, saying market conditions there are a “threat to energy security and reliability”. FirstEnergy made the appeal under Section 202(c) of the FPA, which allows the DOE to

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

<sup>136</sup> ISO-NE defined fuel security as “the assurance that power plants will have or be able to obtain the fuel they need to run, particularly in winter – especially against the backdrop of coal, oil, and nuclear unit retirements, constrained fuel infrastructure, and the difficulty in permitting and operating dual-fuel generating capability.”

<sup>137</sup> 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<sup>138</sup> proposing to revise its existing transmission incentives policy and corresponding regulations.<sup>139</sup> The proposed revisions include the following:

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

A more detailed summary of the NOPR was distributed to the Transmission Committee and discussed at its March 25, 2020 meeting. Over 80 sets of comments on the proposed revisions were filed on or before the July 1, 2020<sup>140</sup> comment date, including comments by: Avangrid, EDF Renewables, EMCOS, Eversource, Exelon, LS Power, MMWEC/NHEC/CMEEC, National Grid, NESOCE, NextEra, UCS, CT PURA, and Potomac Economics. Reply comments were filed by AEP, ITC Holding, the N. California Transmission Agency, and WIRES. The NOPR is now pending before the FERC. If you have any questions concerning this matter, please contact Eric Runge (617-345-4735; [ekrunge@daypitney.com](mailto:ekrunge@daypitney.com)).

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<sup>138</sup> *Electric Transmission Incentives Policy Under Section 219 of the Federal Power Act*, 170 FERC ¶ 61,204 (Mar. 20, 2020) (“*Electric Transmission Incentives NOPR*”).

<sup>139</sup> 18 CFR 35.35 (2020).

<sup>140</sup> The *Electric Transmission Incentives NOPR* was published in the *Fed. Reg.* on Apr. 2, 2020 (Vol. 85, No. 64) pp. 18,784-18,810. Requests for extension of time to file comments were filed by American Manufacturers, APPA/TAPS, and State Entities; WIRES and EEI each opposed the requested extensions. No extension of time to file comments was granted.



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

On September 17, the FERC issued a final rule (“*Order 2222*”)<sup>141</sup> adopting reforms to remove what it found were barriers to the participation of distributed energy resource (“DER”)<sup>142</sup> 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;
- (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* on or before July 19, 2021.<sup>143</sup> 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.

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<sup>141</sup> *Participation of Distributed Energy Resource Aggregations in Markets Operated by Regional Transmission Organizations and Independent System Operators*, 172 FERC ¶ 61,247 (Sep. 17, 2020).

<sup>142</sup> 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.”

<sup>143</sup> *Order 2222* was published in the *Fed. Reg.* on Oct. 21, 2020 (Vol. 85, No. 204) pp. 67,094-6,158.

**Requests for Rehearing.** Requests for clarification and/or rehearing of *Order 2222* were filed by Excel Energy Services, the Kansas Corporation Commission, AEE and AEMA, and Public Interest Organizations.<sup>144</sup> Those requests for rehearing are pending, with FERC action required on or before November 16, 2020, or the requests will be deemed denied by operation of law.

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

As previously reported, *Order 860*,<sup>145</sup> issued three years after the FERC's *Data Collection NOPR*,<sup>146</sup> (i) revises the FERC's MBR regulations by establishing a relational database of ownership and affiliate information for MBR Sellers (which, among other uses, will be used to create asset appendices and indicative screens), (ii) reduces the scope of information that must be provided in MBR filings, modifies the information required in, and format of, a MBR Seller's asset appendix, (iii) changes the process and timing of the requirements to advise the FERC of changes in status and affiliate information, and (iv) eliminates the requirement adopted in *Order 816* that MBR Sellers submit corporate organization charts. In addition, the FERC stated that it will *not* adopt the *Data Collection NOPR* proposal to collect Connected Entity data from MBR Sellers and entities trading virtuals or holding FTRs. The FERC will post on its website high-level instructions that describe the mechanics of the relational database submission process and how to prepare filings that incorporate information that is submitted to the relational database. As recently extended (*see below*), *Order 860* will become effective April 1, 2021, and submitters will have until close of business on August 2, 2021 to make their initial baseline submissions. Submitters will be required to obtain in Spring 2021 FERC-generated IDs for reportable entities that do not have CIDs or LEIs, as well as Asset IDs for reportable generation assets without an EIA code so that every ultimate upstream affiliate or other reportable entity has a FERC-assigned company identifiers ("CID"), Legal Entity Identifier,<sup>147</sup> or FERC-generated ID and that all reportable generation assets have an code from the Energy Information Agency ("EIA") Form EIA-860 database or a FERC-assigned Asset ID. Requests for rehearing and/or clarification of *Order 860* were denied,<sup>148</sup> other than TAPS' request that the FERC clarify that the public will be able to access the relational database. On that point, the FERC clarified "that we will make available services through which the public will be able to access organizational charts, asset appendices, and other reports, as well as have access to the same historical data as Sellers, including all market-based rate information submitted into the database. We also clarify that the database will retain information submitted by Sellers and that historical data can be accessed by the public."

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

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

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<sup>144</sup> For purposes of this proceeding, "Public Interest Organizations" are Sierra Club, Sustainable FERC Project and NRDC.

<sup>145</sup> *Data Collection for Analytics and Surveillance and Market-Based Rate Purposes*, 168 FERC ¶ 61,039 (July 18, 2019) ("*Order 860*"), *order on reh'g and clarif.*, 170 FERC ¶ 61,129 (Feb. 20, 2020).

<sup>146</sup> *Data Collection for Analytics and Surveillance and Market-Based Rate Purposes*, 156 FERC ¶ 61,045 (July 21, 2016) ("*Data Collection NOPR*").

<sup>147</sup> An LEI is a unique 20-digit alpha-numeric code assigned to a single entity. They are issued by the Local Operating Units of the Global LEI System.

<sup>148</sup> *Data Collection for Analytics and Surveillance and Market-Based Rate Purposes*, Order No. 860-A, 170 FERC ¶ 61,129 (Feb. 20, 2020) ("*Order 860-A*").

- **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”).<sup>149</sup> 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.”<sup>150</sup> Comments on the *NAESB WEQ v. 003.3 Standards NOPR* were due on or before November 3, 2020<sup>151</sup> and were filed by Bonneville Power Administration (“BPA”), EEI, the IRC, and Open Access Technology International. The *NAESB WEQ v. 003.3 Standards NOPR* is pending before the FERC.

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

On February 4, 2020, the FERC issued Order 676-I,<sup>152</sup> which incorporates by reference into its regulations, with certain enumerated exceptions, the latest version (Version 003.2) of certain Standards for Business Practices and Communication Protocols for Public Utilities adopted by the NAESB Wholesale Electric Quadrant.<sup>153</sup> The Version 003.2 Standards included NAESB’s Version 003.1 revisions, which were the subject of an earlier NOPR.<sup>154</sup> The FERC declined to adopt the proposal to remove the incorporation by reference of the WEQ-006 Manual Time Error Correction Business Practice Standards as adopted by NAESB. Order 676-I will become effective April 27, 2020.<sup>155</sup> 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.<sup>156</sup> The *Proposed Policy Statement* sets forth the approach the FERC would take going forward to ensure compliance with the filed rate doctrine and the rule against retroactive making. The proposed policy will both clarify and modify waiver standards, and in some instances, make it harder to obtain waivers.

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<sup>149</sup> *Standards for Business Practices and Communication Protocols for Public Utilities*, 172 FERC ¶ 61,047 (July 16, 2020) (“*NAESB WEQ v. 003.3 Standards NOPR*”).

<sup>150</sup> The *NAESB WEQ v. 003.3 NOPR* at P .

<sup>151</sup> 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.

<sup>152</sup> *Standards for Business Practices and Communication Protocols for Public Utilities*, Order No. 676-I, 170 FERC ¶ 61,062 (Feb. 4, 2020) (“*Order 676-I*”), *reh’g and/or clarif. pending*.

<sup>153</sup> *Standards for Business Practices and Communication Protocols for Public Utilities*, 167 FERC ¶ 61,127 (May 16, 2019) (“*NAESB WEQ v. 003.2 Standards NOPR*”).

<sup>154</sup> *Standards for Business Practices and Communication Protocols for Public Utilities*, 156 FERC ¶ 61,055 (July 21, 2016), (“*WEQ v. 003.1 NOPR*”).

<sup>155</sup> Order 676-I was published *Fed. Reg.* on Feb. 25, 2020 (Vol. 85, No. 37) pp. 10,571-10,586.

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

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

The FERC proposed to incorporate its current four-part analysis<sup>157</sup> in considering both requests for prospective waiver and petitions for remedial relief, but cautioned that it would apply that analysis only in those limited circumstances where the request for remedial relief would not violate the filed rate doctrine or the rule against retroactive ratemaking due to adequate prior notice, or the requested relief is within the FERC’s authority to grant under FPA section 309 or NGA section 16.

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

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<sup>157</sup> Under current practice, the FERC grants tariff provision waivers where: (1) the underlying error was made in good faith; (2) the waiver is of limited scope; (3) the waiver addresses a concrete problem; and (4) the waiver does not have undesirable consequences, such as harming third parties.

With respect to prospective requests to waive the 60-day prior notice requirement under FPA section 205(d) (or the 30-day prior notice requirement under NGA section 4(d)), which the FERC has discretion to waive “for good cause shown,” the FERC proposes to leave in effect its policy of generally granting such waivers,<sup>158</sup> to the extent that entities seek an effective date no earlier than the day *after* the date a rate change is submitted to the FERC.

Comments on the Proposed Policy Statement were due on or before June 18, 2020 and were filed by the IRC, AEE, APPA, AWEA/SEIA, EEI, EPSA, Indicated Generators,<sup>159</sup> INGAA, Kansas Electric Power Coop. (“KEPC”), NGA, NGS, NRECA, Public Citizen, Sunflower Electric Power, and TAPS. Reply comments were filed by APPA, Joint Trade Associations,<sup>160</sup> KEPC, and the Sustainable FERC Project. The proposed Policy Statement is pending before the FERC.

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

On May 21, 2020, the FERC issued a Policy Statement that applies to natural gas and oil pipelines, with certain exceptions to account for the statutory, operational, organizational and competitive differences among the electric, natural gas and oil pipeline industries, the FERC’s ROE methodology adopted in *Opinion No. 569-A*.<sup>161</sup> Specifically, the FERC revised its policy and will determine natural gas and oil pipeline ROEs by averaging the results of the DCF and CAPM, but will not use the risk premium model discussed in *Opinion 569/569-A* (“Risk Premium”).<sup>162</sup> In addition, the FERC clarified its policies governing the formation of proxy groups and the treatment of outliers in proceedings addressing natural gas and oil pipeline ROEs. Finally, the FERC encouraged oil pipelines to file revised FERC Form No. 6, page 700s for 2019 reflecting the revised ROE policy. This Policy Statement became effective May 27, 2020.<sup>163</sup> On July 7, the FERC issued a notice that pipelines choosing to file updated FERC Form No. 6, page 700 data consistent with the ROE Policy Statement should file such data on or before July 21, 2020.

Complainant-Aligned Parties<sup>164</sup> answered the New England TO’s May 10 supplemental comments. On June 15, 2020, Joint Parties<sup>165</sup> submitted supplemental comments arguing that the FERC should use the midpoint, rather than the median, as the measure of central tendency for public utilities that file individually to establish a ROE. Joint Parties’ comments were opposed by Six Cities.<sup>166</sup> WIRES submitted supplemental

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<sup>158</sup> See *Cent. Hudson Gas & Elec. Corp.*, 60 FERC ¶ 61,106, order on reh’g, 61 FERC ¶ 61,089 (1992) (“*Central Hudson*”). Factors that will generally support a waiver of prior notice include: (1) uncontested filings that do not change rates; (2) filings that reduce rates and charges; and (3) filings that increase rates as prescribed by a previously accepted contract or settlement on file with the FERC.

<sup>159</sup> “Indicated Generators” are Vistra, NRG, FirstLight, Cogentrix, and LS Power.

<sup>160</sup> “Joint Trade Associations” are AEE, AWEA, EEI, EPSA, INGAA, NGS, NRECA and SEIA.

<sup>161</sup> *Inquiry Regarding the Commission’s Policy for Determining Return on Equity*, 171 FERC ¶ 61,155 (May 21, 2020) (“*Natural Gas and Oil Pipeline ROE Policy Statement*”).

<sup>162</sup> As previously reported, the FERC issued a notice of inquiry on March 21, 2019 seeking information and views to help the FERC explore whether, and if so how, it should modify its policies concerning the determination of ROE to be used in designing jurisdictional rates charged by public utilities.<sup>162</sup> The FERC also sought comment on whether any changes to its policies concerning public utility ROEs should be applied to interstate natural gas and oil pipelines. This NOI followed *Emera Maine*, which reversed *Opinion 531*, and seeks to engage interests beyond those represented in the *Emera Maine* proceeding (see EL11-66 *et al.* in Section I above).

<sup>163</sup> The *Natural Gas and Oil Pipeline ROE Policy Statement* was published *Fed. Reg.* on May 27, 2020 (Vol. 85, No. 102) pp. 31,760-31,773.

<sup>164</sup> For this purpose, “Complainant-Aligned Parties” are: Connecticut Public Utilities Regulatory Authority, Connecticut Office of the Attorney General, Connecticut Department of Energy and Environmental Protection, Connecticut Office of Consumer Counsel, Massachusetts Office of the Attorney General, Massachusetts Department of Public Utilities, Massachusetts Municipal Wholesale Electric Company, and New Hampshire Electric Cooperative.

<sup>165</sup> “Joint Parties” are: AEP, Avista, Evergy Companies, Entergy Services, Exelon, FirstEnergy, Portland Gen. Elec., PG&E, Corporation, Puget Sound Energy, PacifiCorp, Idaho Power, PSEG, So. Cal. Edison, and San Diego Gas & Elec.

<sup>166</sup> “Six Cities” are the Cities of Anaheim, Azusa, Banning, Colton, Pasadena, and Riverside, California.

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<sup>167</sup> seeks comments from interested parties on four broad issue categories: (1) project need, including whether precedent agreements are still the best demonstration of need; (2) exercise of eminent domain; (3) environmental impact evaluation (including climate change and upstream and downstream greenhouse gas emissions); and (4) the efficiency and effectiveness of the FERC certificate process. Pursuant to a May 23 order extending the comment deadline by 30 days,<sup>168</sup> comments were due on or before July 25, 2018. Literally thousands of individual and mass-mailed comments were filed. This matter remains pending before the FERC.

### XIII. Natural Gas Proceedings

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

- **Natural Gas-Related Enforcement Actions**

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

**BP (IN13-15).** On July 11, 2016, the FERC issued *Opinion 549*<sup>169</sup> affirming Judge Cintron’s August 13, 2015 Initial Decision finding that BP America Inc., BP Corporation North America Inc., BP America Production Company, and BP Energy Company (collectively, “BP”) violated Section 1c.1 of the Commission’s regulations (“Anti-Manipulation Rule”) and NGA Section 4A.<sup>170</sup> Specifically, after extensive discovery and hearing procedures, Judge Cintron found that BP’s Texas team engaged in market manipulation by changing their trading patterns, between September 18, 2008 through the end of November 2008, in order to suppress next-day natural gas prices at the Houston Ship Channel (“HSC”) trading point in order to benefit correspondingly long position at the Henry Hub trading point. The FERC agreed, finding that the “record shows that BP’s trading practices during the Investigative Period were fraudulent or deceptive, undertaken with the requisite scienter, and carried out in connection with Commission-jurisdictional transactions.”<sup>171</sup> Accordingly, the FERC assessed a **\$20.16 million civil penalty** and required BP to **disgorge \$207,169** in “unjust profits it received as a result of its manipulation of the Houston Ship Channel Gas Daily index.” The \$20.16 million civil penalty was at the top of the FERC’s Penalty Guidelines range, reflecting increases for having had a prior adjudication within 5 years of the violation, and for BP’s violation of a

<sup>167</sup> The NOI was published in the *Fed. Reg.* on Apr. 26, 2018 (Vol. 83, No. 80) pp. 18,020-18,032.

<sup>168</sup> *Certification of New Interstate Natural Gas Facilities*, 163 FERC ¶ 61,138 (May 23, 2018).

<sup>169</sup> *BP America Inc.*, Opinion No. 549, 156 FERC ¶ 61,031 (July 11, 2016) (“*BP Penalties Order*”).

<sup>170</sup> *BP America Inc.*, 152 FERC ¶ 63,016 (Aug. 13, 2015) (“*BP Initial Decision*”).

<sup>171</sup> *BP Penalties Order* at P 3.



FERC order within 5 years of the scheme. BP's penalty was mitigated because it cooperated during the investigation, but BP received no deduction for its compliance program, or for self-reporting. The *BP Penalties Order* also denied BP's request for rehearing of the order establishing a hearing in this proceeding.<sup>172</sup> BP was directed to pay the civil penalty and disgorgement amount within 60 days of the *BP Penalties Order*. On August 10, 2016 BP requested rehearing of the *BP Penalties Order*. On September 8, 2018, the FERC issued a tolling order to afford it additional time to consider BP's request for rehearing of the *BP Penalties Order*, which remains pending.

On September 7, 2016, BP submitted a motion for modification of the *BP Penalties Order's* disgorgement directive because it cannot comply with the disgorgement directive as ordered. BP explained that the entity to which disgorgement was to be directed, the Texas Low Income Home Energy Assistance Program ("LIHEAP"), is not set up to receive or disburse amounts received from any person other than the Texas Legislature. In response, on September 12, 2016, the FERC stayed the disgorgement directive (until an order on BP's pending request for rehearing is issued), but indicated that interest will continue to accrue on unpaid monies during the pendency of the stay.<sup>173</sup>

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

***Total Gas & Power North America, Inc. et al. (IN12-17)***. On April 28, 2016, the FERC issued a show cause order<sup>174</sup> in which it directed Total Gas & Power North America, Inc. ("TGPNA") and its West Desk traders and supervisors, Therese Tran f/k/a Nguyen ("Tran") and Aaron Hall (collectively, "Respondents") to show cause why Respondents should not be found to have violated NGA Section 4A and the FERC's Anti-Manipulation Rule through a scheme to manipulate the price of natural gas at four locations in the southwest United States between June 2009 and June 2012.<sup>175</sup>

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

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<sup>172</sup> *BP America Inc.*, 147 FERC ¶ 61,130 (May 15, 2014) ("*BP Hearing Order*"), *reh'g denied*, 156 FERC ¶ 61,031 (July 11, 2016).

<sup>173</sup> *BP America Inc.*, 156 FERC ¶ 61,174 (Sep. 12, 2016) ("*Order Staying BP Disgorgement*").

<sup>174</sup> *Total Gas & Power North America, Inc.*, 155 FERC ¶ 61,105 (Apr. 28, 2016) ("*TGPNA Show Cause Order*").

<sup>175</sup> The allegations giving rise to the Total Show Cause Order were laid out in a September 21, 2015 FERC Staff Notice of Alleged Violations which summarized OE's case against the Respondents. Staff determined that the Respondents violated section 4A of the Natural Gas Act and the Commission's Anti-Manipulation Rule by devising and executing a scheme to manipulate the price of natural gas in the southwest United States between June 2009 and June 2012. Specifically, Staff alleged that the scheme involved making largely uneconomic trades for physical natural gas during bid-week designed to move indexed market prices in a way that benefited the company's related positions. Staff alleged that the West Desk implemented the bid-week scheme on at least 38 occasions during the period of interest, and that Tran and Hall each implemented the scheme and supervised and directed other traders in implementing the scheme.

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 on September 30 its Environmental Assessment Report for the ExC Project ("EA"), Iroquois responded to a October 1 data request regarding Administrative and General (A&G) Expenses, and 22 sets of comments were filed in response to the EA.

- **Non-New England Pipeline Proceedings**

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

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

- ▶ The New York State Department of Environmental Conservation ("NY DEC") and the Sierra Club requested rehearing of the *Northern Access Certificate Rehearing Order* on August 14 and September 5, 2018, respectively. On August 29, National Fuel Gas Supply Corporation and Empire Pipeline ("Applicants") answered the NY DEC's August 14 rehearing request and request for stay. On April 2, 2019, the FERC denied the NY DEC and Sierra Club requests for rehearing.<sup>176</sup> Those orders have been challenged on appeal to the US Court of Appeals for the Second Circuit (19-1610).
- ▶ As previously reported, the August 6, 2018 *Northern Access Certificate Rehearing Order* dismissed or denied the requests for rehearing of the *Northern Access Certificate Order*.<sup>177</sup> Further, in an interesting twist, the FERC found that a December 5, 2017 "Renewed Motion for Expedited Action" filed by National Fuel Gas Supply Corporation and Empire Pipeline, Inc. (the "Companies"), in which the Companies asserted a separate basis for their claim that the NY DEC waived its authority under section 401 of the Clean Water Act ("CWA") to issue or deny a water quality certification for the Northern Access Project, served as a motion requesting a waiver determination by the FERC,<sup>178</sup> and proceeded to find that the NY DEC was obligated to act on the application within one year, failed to do so, and so waived its authority under section 401 of the CWA.
- ▶ The FERC authorized the Companies to construct and operate pipeline, compression, and ancillary facilities in McKean County, Pennsylvania, and Allegany, Cattaraugus, Erie, and Niagara Counties, New York ("Northern Access Project") in an order issued February 3,

<sup>176</sup> *Nat'l Fuel Gas Supply Corp. and Empire Pipeline, Inc.*, 167 FERC ¶ 61,007 (Apr. 2, 2019).

<sup>177</sup> *Nat'l Fuel Gas Supply Corp. and Empire Pipeline, Inc.*, 164 FERC ¶ 61,084 (Aug. 6, 2018) ("*Northern Access Rehearing & Waiver Determination Order*"), *reh'g denied*, 167 FERC ¶ 61,007 (Apr. 2, 2019).

<sup>178</sup> The DC Circuit has indicated that project applicants who believe that a state certifying agency has waived its authority under CWA section 401 to act on an application for a water quality certification must present evidence of waiver to the FERC. *Millennium Pipeline Co., L.L.C. v. Seggos*, 860 F.3d 696, 701 (D.C. Cir. 2017).

2017.<sup>179</sup> The Allegheny Defense Project and Sierra Club (collectively, “Allegheny”) requested rehearing of the *Northern Access Certificate Order*.

- ▶ Despite the FERC’s *Northern Access Certificate Order*, the project remained halted pending the outcome of National Fuel’s fight with the NY DEC’s April denial of a Clean Water Act permit. NY DEC found National Fuel’s application for a water quality certification under Section 401 of the Clean Water Act, as well as for stream and wetlands disturbance permits, failed to comply with water regulations aimed at protecting wetlands and wildlife and that the pipeline failed to explore construction alternatives. National Fuel appealed the NY DEC’s decision to the 2nd Circuit on the grounds that the denial was improper.<sup>180</sup> On February 2, 2019, the 2nd Circuit vacated the decision of the NY DEC and remanded the case with instructions for the NY DEC to more clearly articulate its basis for the denial and how that basis is connected to information in the existing administrative record. The matter is again before the NY DEC.
- ▶ On November 26, 2018, the Applicants filed a request at FERC for a 3-year extension of time, until February 3, 2022, to complete construction and to place the certificated facilities into service. The Applicants cited the fact that they “do not anticipate commencement of Project construction until early 2021 due to New York’s continued legal actions and to time lines required for procurement of necessary pipe and compressor facility materials.” The extension request was granted on January 31, 2019.
- ▶ On August 8, 2019, the NY DEC again denied Applicants request for a Water Quality Certification, and as directed by the Second Circuit,<sup>181</sup> provided a “more clearly articulate[d] basis for denial.”
- ▶ On August 27, 2019, Applicants requested an additional order finding on additional grounds that the NY DEC waived its authority over the Northern Access 2016 Project under Section 401 of the CWA, even if the NY DEC and Sierra Club prevail in their currently pending court petitions challenging the basis for the Commission’s Waiver Order.<sup>182</sup>
- ▶ Since the last Report, Applicants requested, due to ongoing legal and regulatory delays, an additional 2-year extension of time, until December 1, 2024, to complete construction of the Project and enter service. Comments on the request are due on or before November 6, 2020. Thus far, over 30 sets of comments on the requested extension have been filed.

#### 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

<sup>179</sup> *Nat’l Fuel Gas Supply Corp.*, 158 FERC ¶ 61,145 (2017) (“*Northern Access Certificate Order*”), *reh’g denied*, 164 FERC ¶ 61,084 (Aug 6, 2018) (“*Northern Access Certificate Rehearing Order*”).

<sup>180</sup> *Nat’l Fuel Gas Supply Corp. v. NYSDEC et al.* (2d Cir., Case No. 17-1164).

<sup>181</sup> Summary Order, *Nat’l Fuel Gas Supply Corp. v. N.Y. State Dep’t of Env’tl. Conservation*, Case 17-1164 (2d Cir, issued Feb. 5, 2019).

<sup>182</sup> See *Sierra Club v. FERC*, No. 19-01618 (2d Cir. filed May 30, 2019); *NYSDEC v. FERC*, No. 19-1610 (2d. Cir. filed May 28, 2019) (consolidated).

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

- **ISO-NE Implementation of Order 1000 Exemptions for Immediate Need Reliability Projects (20-1422); Underlying FERC Proceeding: ER19-90<sup>183</sup>**  
**Petitioner: LS Power**

On October 16, 2020, LSP Transmission Holdings II, LLC (“LS Power”) petitioned the DC Circuit Court of Appeals for review of the FERC’s orders addressing ISO-NE’s implementation of the *Order 1000* exemptions for immediate need reliability projects. Appearances are due November 19, 2020. Parties must file docketing statements and statement of issues to be raised also by November 19. Dispositive motions, if any, and a Certified Index to the Record must be filed by December 4, 2020.

- **CIP IROL Cost Recovery Rules (20-1389); Underlying FERC Proceeding: ER20-739<sup>184</sup>**  
**Petitioner: Cogentrix, Vistra**

On September 25, 2020, Cogentrix and Vistra petitioned the DC Circuit Court of Appeals for review of the FERC’s orders allowing for recovery of expenditures to comply with the IROL-CIP requirements, but only those costs incurred on or after the effective date of the relevant individual FPA section 205 filing, including undepreciated costs of any such past capital expenditures to comply with the IROL-CIP requirements. Appearances are due November 19, 2020. Parties must file docketing statements and statement of issues to be raised also by November 19. Dispositive motions, if any, and a Certified Index to the Record must be filed by December 4, 2020.

<sup>183</sup> *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); and *ISO New England Inc.*, 172 FERC ¶ 61,293 (Sep. 29, 2020) (“*Order 1000 Exemptions Allegheny Order*”) (addressing arguments raised by request for rehearing denied b operation of law, modifying discussion in *Order Terminating Proceeding*, but reaching same result).

<sup>184</sup> *ISO New England Inc.*, 171 FERC ¶ 61,160 (May 26, 2020) (“*CIP IROL Cost Recovery Order*”) and *ISO New England Inc.*, 172 FERC ¶ 61,251 (Sep. 17, 2020) (“*CIP IROL Allegheny Order*”, and together with the CIP IROL Cost Recover Order, the “*CIP IROL Orders*”).

- **Mystic 8/9 Cost of Service Agreement (20-1343; 20-1361, 20-1362; 20-1365, 20-1368)(consolidated); Underlying FERC Proceeding: EL18-1639<sup>185</sup>**  
**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.<sup>186</sup> The cases have been consolidated into Case No. 20-1343. Appearances were filed October 8, 2020. On October 8 (in the case of Mystic) and October 16 (in the case of the remaining Petitioners), statements of issues and docketing statements were filed. Also on October 16, the FERC filed an unopposed motion to hold this appeal in abeyance until the earlier of December 15, 2020 (60 days) or the date of the issuance by the FERC of a further order on rehearing. In addition, the FERC asked for 21 days from that day for the parties to file motions to govern further proceedings. The FERC motion is pending before the Court.

- **CASPR (20-1333)**  
**Underlying FERC Proceeding: ER18-619<sup>187</sup>**  
**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). On October 2, 2020, appearances, docketing statements, a statement of issues to be raised, and a statement of intent to utilize deferred joint appendix were filed. On October 19, 2020, the FERC moved to dismiss the case for a lack of jurisdiction (arguing that Petitioners missed their opportunity to timely file their Petition for review in 2018, and filing within 60 days of *Allegheny* did not make their Petition timely). Alternatively, the FERC asked that the case be held in abeyance for 60 days pending issuance of a further FERC order on this matter. On October 29, Petitioners opposed the FERC's motion. The FERC's motion is pending before the Court.

- **Opinion 531-A Compliance Filing Undo (20-1329)**  
**Underlying FERC Proceeding: ER15-414<sup>188</sup>**  
**Petitioners: TOs' (CMP et al.)**

On August 28, 2020, the TOs<sup>189</sup> 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*<sup>190</sup> decision. On September 22, 2020, the FERC submitted an unopposed motion to hold this proceeding in abeyance for four months to allow for the Commission to "a future order on petitioners' request for rehearing of the order challenged in this appeal, and the rate proceeding in which the challenged order was issued remains ongoing before the Commission." On October 2, 2020, the FERC granted that motion, and directed the parties to file motions to govern future proceedings in this case by February 2, 2021.

<sup>185</sup> July 2018 Order; July 2018 Rehearing Order; Dec 2018 Order; Dec 2018 Rehearing Order; Jul 17 Compliance Order.

<sup>186</sup> 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.

<sup>187</sup> *ISO New England Inc.*, 162 FERC ¶ 61,205 (Mar. 9, 2018) ("*CASPR Order*").

<sup>188</sup> *ISO New England Inc.*, 161 FERC ¶ 61,031 (Oct. 6, 2017) ("*Order Rejecting Filing*").

<sup>189</sup> 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.

<sup>190</sup> *Emera Maine v. FERC*, 854 F.3d 9 (D.C. Cir. 2017) ("*Emera Maine*").

- **2013/14 Winter Reliability Program Order on Compliance and Remand (20-1289, 20-1366 ) (consol.)**  
**Underlying FERC Proceeding: ER13-2266<sup>191</sup>**  
**Petitioner: TransCanada**

On July 30, 2020, TransCanada Power Marketing (“Petitioner” or “TransCanada”) again petitioned the DC Circuit Court of Appeals for review of the FERC’s action on the 2013/2014 Winter Reliability Program, this time in the FERC’s April 1, 2020 *2013/14 Winter Reliability Program Order on Compliance and Remand*.<sup>192</sup> NEPGA intervened on October 15, 2020 (and its intervention granted on October 28). On October 16, TransCanada filed a docketing statement and statement of issues. On October 29, the FERC filed a certified index to the record and an unopposed motion for a 60-day briefing schedule.

- **ISO-NE’s Inventoried Energy Program (Chapter 2B) Proposal (19-1224\*\*\*; 19-1247; 19-1252; 19-1253)(consolidated); Underlying FERC Proceeding: ER19-1428<sup>193</sup>**  
**Petitioners: ENECOS (Belmont et al.) (19-1224); MA AG (19-1247); NH PUC/NH OCA (19-1252); Sierra Club/UCS (19-1253)**

As previously reported, at the unopposed request of the FERC, the Court issued an order suspending the previous briefing schedule and remanding the record back to the FERC. Subsequently, the FERC issued its *IEP Remand Order* (June 18, 2020) and its Notice of Denial by Operation of Law of the requests for rehearing of its *IEP Remand Order* (August 20, 2020). With the remand proceedings concluded, Petitions filed on September 18, 2020, as directed, a motion to govern further proceedings in these consolidated cases. The proposed briefing schedule includes the following: Petitioners’ Opening Briefs (December 11, 2020); Respondent Brief of FERC (February 9, 2021); Intervenors’ Joint Brief in Support of Respondent (February 18, 2021); Petitioners’ Reply Briefs (April 1, 2021); Deferred Appendix (April 22, 2021); and Final Briefs (May 6, 2021). Since the last Report, each of the Petitioners filed amended petitions for review in the consolidated proceeding in order to bring the FERC’s *IEP Remand Order* and the post-remand FERC record before the DC Circuit (MA AG, NH PUC/NH OCA and Sierra Club/UCS on October 19; ENECOS, October 20). As noted, Opening Briefs are due December 11, 2020.

#### Other Federal Court Activity of Interest

- **Order 872 (20-72788) (9<sup>th</sup> Cir.)**  
**Underlying FERC Proceeding: RM19-15<sup>194</sup>**  
**Petitioner: SEIA**

On September 17, 2020, SEIA petitioned the 9<sup>th</sup> Circuit Court of Appeals for review of *Order 872*.<sup>195</sup> On October 9, the FERC filed an unopposed motion for the Court to hold this appeal in abeyance, suspend filing of the certified index to the record, and issue a new briefing schedule after January 4, 2021. The abeyance will permit the FERC to address the pending rehearing requests in a future order. On October 26, 2020, the Court granted the FERC’s motion, suspended briefing, and directed the FERC to file a status report, or a motion for appropriate relief

<sup>191</sup> 171 FERC ¶ 61,003 (Apr. 1, 2020) (“*2013/14 Winter Reliability Program Order on Compliance and Remand*”) (accepting ISO-NE’s January 23, 2017 compliance filing, finding that the bid results from the 2013/14 Winter Reliability Program were just and reasonable, and providing for this finding the further reasoning requested by the DC Circuit in *TransCanada Power Mktg. Ltd. v. FERC*, 811 F.3d 1 (DC Cir. 2015) (“*TransCanada*”).)

<sup>192</sup> In *TransCanada*, the DC Circuit granted *TransCanada*’s prior petition in part, and directed the FERC to either better justify its determination or revise its disposition to ensure that the rates under the Program are just and reasonable. *TransCanada* at 1.

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

<sup>194</sup> *Transcontinental Gas Pipe Line Co., LLC*, 159 FERC ¶ 62,181 (Feb. 3, 2017); *Transcontinental Gas Pipe Line Co., LLC*, 161 FERC ¶ 61,250 (Dec. 6, 2017).

<sup>195</sup> *Order 872* approved pricing and eligibility revisions to the FERC’s long-standing regulations implementing sections 201 and 210 of the Public Utility Regulatory Policies Act of 1978 (“PURPA”), including: state flexibility in setting QF rates; a decrease (to 5 MW) to the threshold for a rebuttable presumption of access to nondiscriminatory, competitive markets; updates to the “One-Mile Rule”; clarifications to when a QF establishes its entitlement to a purchase obligation; and provision for certification challenges.



on or before that date, with a failure to timely do so potentially resulting in the termination of the stay of proceedings.

- **Allegheny Defense Project v. FERC (17-1098)**

**Underlying FERC Proceeding: CP15-138<sup>196</sup>**

**Petitioner: Allegheny Defense Project**

On June 30, in a decision<sup>197</sup> that will likely have a profound effect on current and future proceedings before the FERC, the DC Circuit ruled that the Natural Gas Act (“NGA”) does not allow FERC to delay appellate review of its substantive orders through its common practice of issuing tolling<sup>198</sup> orders. The decision at the very least modifies—if not wholly overrules—a long-unbroken line of cases that rejected as premature appeals from FERC orders while applications for rehearing were pending. While the case was decided under the NGA,<sup>199</sup> there is 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. On October 6, 2020, the Mandate was issued to the FERC. Reporting on this proceeding has now concluded.

- **FERC orders on PG&E Bankruptcy (19-71615) (9<sup>th</sup> Cir.)**

**Underlying FERC Proceeding: EL19-35, EL19-36<sup>200</sup>**

**Petitioner: PG&E**

On June 26, PG&E appealed the FERC’s orders finding that it has concurrent jurisdiction with the bankruptcy courts to review and address the disposition of wholesale power contracts sought to be rejected through its bankruptcy. On July 11, PG&E moved to suspend the briefing schedule pending the Court’s decision on whether to authorize direct appeal of a decision by the Bankruptcy Court in the Northern District of California. In

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

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

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

<sup>199</sup> In this case, the Petitioners challenged the FERC's use of a tolling order in response to their applications for rehearing of a FERC order that issued a certificate of public convenience and necessity to the Atlantic Sunrise Project. Those rehearing applications were pending for nine months before the FERC ruled on them. When the appeals were filed, the FERC and others sought to use the pending rehearing requests as the basis for dismissing the petitions as “incurably premature.” Since the applications for rehearing did not stay the FERC's issuance of the certificate, the petitioners also sought a stay from the FERC, which FERC did not act on for almost seven months. While the rehearings and requests for stay were still before the FERC, the pipeline sponsors of the Atlantic Sunrise Project proceeded to condemn land and begin construction activities. By the time the first panel of the court heard oral arguments on the petitions for review, the project had been built and in service for two months.

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

a declaratory judgment, the Bankruptcy Court came to a completely different conclusion than the FERC and held that it has “original and exclusive jurisdiction over . . . [PG&E’s] rights to assume or reject executory contracts under 11 U.S.C. § 365” and that the FERC “does not have concurrent jurisdiction, or any jurisdiction, over the determination of whether any rejections of power purchase contracts by [PG&E] should be authorized.”<sup>201</sup> Because of the opposite conclusions, PG&E suggested that, should the Ninth Circuit allow the direct appeal of the Bankruptcy Court decision, the two appeals should proceed together. The PG&E motion was granted on August 1.

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.

In an unpublished memorandum issued on October 7, 2020, the Court stated that it “need not - and cannot - reach the merits of this dispute, because the cases became moot when the bankruptcy court confirmed a reorganization plan requiring PG&E to assume, rather than reject, the contracts at issue.” The Court then dismissed PG&E’s petition for review (No. 19-71615) with instructions for the FERC to vacate its orders. The Court likewise dismissed FERC’s consolidated appeal (Nos. 19-16833, 19-16834) with instructions for the bankruptcy court to vacate its order. In taking these actions including vacating the orders, the Court expressed no opinion on the merits of the dispute, which it left for future courts to evaluate. Reporting on this matter is concluded.

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

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

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

Abeyance continues of the appeal before the DC Circuit of the FERC’s orders granting certificates of public convenience and necessity to PennEast Pipeline Company, LLC (“PennEast”)<sup>203</sup> for the construction and operation of a new 116-mile natural gas pipeline from Luzerne County, Pennsylvania, to Mercer County, New Jersey, along with three laterals extending off the mainline, a compression station, and appurtenant above ground facilities (“PennEast Project”). The cases are being held in abeyance “pending final disposition of any post-dispositional proceedings [ ] before the United States Supreme Court resulting from the Third Circuit’s decision in No. 19-1191 (In re: PennEast Pipeline Company, LLC (3rd Cir. Sep. 10, 2019)), or other action that resolves the obstacle PennEast poses”. That decision held that the Eleventh Amendment barred condemnation cases brought by PennEast in federal district court in New Jersey to gain access to property owned by the State or its agencies, thus calling into question the viability of PennEast’s proposed project route, and the certificates issued in the underlying case. Until the Third Circuit case is resolved, which is in the midst of proceedings before the Supreme Court, the DC Circuit will not take up this case. The last Joint Status Report was filed on September 28, 2020, noting developments since the June 29, 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.”

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

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

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

- **Opinion 569/569-A: FERC's Base ROE Methodology (16-1325, 20-1182, 20-1227, 20-1240, 20-1241, 20-1248, 20-1251, 20-1267, 20-1275)**

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

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

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

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. Since the last Report, however, the Court consolidated a number of cases and indicated that a schedule for the filing of briefs will be established by future order.

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

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