

**EXECUTIVE SUMMARY**  
**Status Report of Current Regulatory and Legal Proceedings**  
**as of September 12, 2018**

The following activity, as more fully described in the attached litigation report, has occurred since the report dated August 6, 2018 was circulated. New matters/proceedings since the last Report are preceded by an asterisk '\*'. Page numbers precede the matter description.

**I. Complaints/Section 206 Proceedings**

* 1	RTO Insider Complaint (EL18-196)	Aug 31 Sep 4-5 Sep 6 Sep 7	RTO Insider files Complaint challenging NEPOOL's Press policies Reporters Comm. for Freedom of Press, Pub. Citizen, NH OCA intervene NEPOOL requests extension of time, to Oct 1, to respond to Complaint RTO Insider submits pleading stating that it does not oppose extension
3	206 Proceeding: RNS/LNS Rates and Rate Protocols (EL16-19; ER18-2235)	Aug 17 Aug 21-Sep 6 Sep 6  Sep 7 Sep 10	TOs submit Settlement Agreement NEPOOL, MA AG, NESCOE, CT PURA, MPUC intervene Municipal PTF Owners, FERC Trial Staff oppose Settlement Agreement; NESCOE supports Settlement Agreement TOs request extension of time to answer oppositions Municipal PTF Owners oppose TOs' request for extension of time; Chief Judge Cintron grants extension of time, to Sep 28, for TOs' answer to oppositions

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

6	Mystic 8/9 Cost of Service Agreement (ER18-1639)	Aug 9, 13  Aug 21 Aug-Sep Sep 5 Sep 10	NESCOE, ENECOS, MA AG, NH PUC file challenges to the <i>Mystic COS Agreement Order</i> Constellation answers NESCOE Aug 9 request for reconsideration Parties file testimony, conduct discovery Chief Judge Cintron designates dispute resolution facilitator FERC issues tolling order affording it additional time to consider the requests for rehearing
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**III. Market Rule and Information Policy Changes, Interpretations and Waiver Requests**

* 9	Order 844 Compliance Filing (ER18-2394)	Sep 7 Sep 10	ISO-NE and NEPOOL submit compliance filing; comment date Sep 28 Eversource intervenes
* 9	Fuel Security Retention Proposal (ER18-2364)	Aug 31 Sep 4-10	ISO-NE files Tariff revisions; comment date Sep 21 NEPOOL, Avangrid, Calpine, CLF, ConEd, ENE, Eversource, Exelon, Invenergy, MA AG, NESCOE, NRG, Vistra, NH PUC, EPSA, Public Citizen, RENEW Northeast intervene
10	FCM Cost Allocation Improvements (ER18-2125)	Aug 16	NRG/GenOn intervenes
10	Rationing Limit Revisions (ER18-2078)	Aug 16-20 Aug 17	NRG/GenOn, Calpine intervene NEPGA submits comments supporting filing
10	Economic Life Determination Revisions (ER18-1770)	Aug 9 Sep 10	FERC issues deficiency letter ISO-NE files responses to deficiency letter; comment date Oct 1

11	ISO-NE Waiver Filing: Mystic 8 & 9 (ER18-1509; EL18-182)	Aug 13	CT Parties opposed NEPGA motion for clarification
		Aug 14	NEPOOL files limited response to Indicated New England EDCs
		Aug 16	MA AG, NEPGA, NextERA, CLF/NRDC/Sierra Club/Sustainable FERC
		Aug 27	Project file answers to Indicated New England EDCs
		Aug 29	FERC issues tolling order affording it additional time to consider the requests for rehearing Indicated New England EDCs answer Aug 14/16 answers

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

No Activity to Report

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

* 15	FAP FTR FA Changes (ER18-2293)	Aug 24 Sep 5	ISO-NE and NEPOOL changes; comment date Sep 14 NRG intervenes
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#### VI. Schedule 20/21/22/23 Changes

* 15	Schedule 21-UI: LCSA: UI/ CPV Towantic (ER18-2302)	Aug 24	UI files LCSA with CPV Towantic to recover Towantic's Category B Load Ratio Share of the revenue requirement for UI's Localized Facilities under Schedule 21-UI; comment date Sep 14
16	Schedule 21-NEP: IA Cancellation: Superseded NEP/Wheelabrator Millbury IA (ER18-1861)	Aug 21	FERC accepts notice of cancellation of superseded 2012 Interconnection Agreement between NEP and Wheelabrator Millbury, eff. Aug 27
16	Schedule 21-EM: BHD Tax Law & Settlement Changes (ER18-1213)	Aug 10 Sep 10	FERC issues second deficiency letter Emera Maine submits response to second deficiency letter; comment date Oct 1

#### VII. NEPOOL Agreement/Participants Agreement Amendments

* 17	132nd Agreement (Press Membership Provisions) (ER18-2208)	Aug 13	NEPOOL files 132nd Agreement; comment date Sep 14
		Aug 15-Sep 4	Avangrid, ConEd, NH OCA, Public Citizen, Reporters Committee for Freedom of Press, RTO Insider intervene
		Aug 16	Public Citizen requests 30-day extension of time to submit comments
		Aug 20	NEPOOL submits limited response to Public Citizen request
		Aug 22	FERC grants 10-day extension of time for comments (to Sep 14) UCS, NE SPJ submit protests
		Sep 5	RTO Insider submits copy of Complaint in EL18-196 as protest
		Sep 6	NEPOOL files preliminary response to UCS, NE SPJ comments
		Sep 11	Bill Short files protest

#### VIII. Regional Reports

* 18	Capital Projects Report - 2018 Q2 (ER18-2204)	Aug 10 Aug 20 Aug 24	ISO-NE files Q2 Report; comment date Aug 31 NEPOOL intervenes NEPOOL files comments supporting Q1 Report
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#### IX. Membership Filings

* 19	September 2018 Membership Filing (ER18-2371)	Aug 31	<b>New Members:</b> Able Grid Infrastructure Holdings; BioUrja Power; Interconnect Energy Storage; Marathon Power; MP2 Energy NE; New England Battery Storage; NN8; Stonepeak Kestrel Energy Marketing; Tidal Energy Marketing; Vineyard Wind; and Woods Hill Solar; <b>Termination:</b> Bloom Energy; <b>Name Change:</b> Palmco Power MA, LLC d/b/a Indra Energy
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19	August 2018 Membership Filing (ER18-2116)	Sep 11	FERC accepts AM Trading Solutions, Clear River, EDP Renewables North America; Empire Generating; and Village of Hyde Park memberships; Entrust Energy East and Torofino Trading terminations
19	July 2018 Membership Filing (ER18-1910)	Aug 20	FERC accepts Grid Power Direct and Sperian Energy memberships; Central Rivers Power MA, LLC (f/k/a Nautilus Hydro, LLC) name change

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



* 19	Revised Reliability Standard: BAL-002-2 (RD18-7)	Aug 17	NERC files changes to BAL-002-2
19	NOPR: Revised Reliability Standards: CIP-005-6, CIP-010-3, CIP-013-1 (RM17-13)	Sep 7	NERC submits informational filing containing an interim report related to supply chain risk management issues

### XI. Misc. - of Regional Interest



* 20	203 Application: BED/Stowe Highgate Share (EC18-137)	Aug 10	VTransco requests authorization for its acquisition of the ownership shares of the Burlington and Stowe Electric Depts. in the Highgate Transmission Facility (which will make it the sole owner)
21	203 Application: National Grid Green Homes (Sunrun)(EC18-120)	Aug 17 Aug 22	FERC authorizes National Grid participation in "grid services" activities of certain rooftop solar facilities owned by Sunrun National Grid files notice of consummation of transaction
21	203 Application: NRG/GIP III Zephyr Acquisition Partners (EC18-61)	Aug 31 Sep 10	Transaction consummated Clearway Energy Group files notice of consummation of transaction
21	203 Application: PSNH/HSE Hydro NH (EC18-42)	Aug 26 Aug 27	HSE Hydro NH acquires PSNH hydro assets HSE Hydro NH files consummation notice
22	PJM MOPR-Related Proceedings (EL18-178; ER18-1314; EL16-49)	Aug 22 Aug 29	FERC issues notice of extension of time; initial testimony, evidence, and/or argument due Oct 2; reply testimony, evidence, and/or argument due Nov 6 FERC issues tolling order affording it addition time to consider requests for rehearing of Jun 29 <i>PJM Order</i>
* 24	UI/HQUS Phase I/II HVDC-TF Service Agreement (ER18-2286)	Aug 23	UI files Agreement; comment date Sep 13
* 24	New England Clean Energy Connect TSAs (ER18-2261 <i>et al.</i> )	Aug 20 Aug 27- Sep 11	CMP files 7 TSAs with Participants that will fund the New England Clean Energy Connect HVDC transmission line and requests incentive rate treatment for its investment in the Project National Grid, NSTAR, HQUS intervene
25	TSAs: Emera Maine - ReEnergy Fort Fairfield (ER18-2124) and ReEnergy Ashland (ER18-2123)	Aug 20-21 Aug 30	MPUC and NMISA intervene Maine Governor LePage opposes filings
25	MPD OATT Changes (ER18-1244)	Aug 10 Sep 10	FERC issues second deficiency letter Emera Maine submits response to second deficiency letter; comment date Oct 1
26	FERC Enforcement Action: Show Cause Order – Footprint Power (IN18-7)	Aug 17 Aug 23	Office of Enforcement requests extension of time to answer Footprint's Aug 2 answer FERC grants requested extension of time, to Sep 19, for Enforcement Staff's response to Footprint's Aug 2 answer

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

27	BPS Reliability Tech. Conf. (AD18-11)	Aug 9 Aug 13 - Sep 10	FERC issues notice inviting post- tech. conf. comments AEP, API, APPA, EEI, ELCON, FRS, PG&E, Public Citizen, SoCal Edison, Utils. Technology Council file comments
29	<i>Order 849</i> : Pipeline Rates (RM18-11)	Aug 17	Enable Miss. River Trans. and Enable Gas Trans., Natural Gas Pipeline Co. of America, and Process Gas Consumers Group and American Forest and Paper Assoc. request rehearing of <i>Order 849</i>
31	<i>Order 844</i> : Uplift Transparency in RTO/ISO Markets (RM17-2)	Aug 10	FERC grants PJM extension of time, to Nov 9, for compliance filing
32	<i>Order 842</i> : Primary Frequency Response (RM16-6)	Aug 24	FERC grants PJM's request for clarification and denies APS' and AES' requests for rehearing
33	NOI: Certification of New Interstate Natural Gas Facilities (PL18-1)	Aug 10-27 Aug 24 Sep 4	FERC responds individually to each of the members of the US Congress that submitted comments Spectra Energy Partners answers comments New Jersey State Agriculture Development Comm. submits comments
33	NOI: Policies for Income Tax Cost & ROE Recovery (PL17-1)	Aug 17 Sep 4	MLPA requests clarif. and/or reconsid. of Jul 18 <i>Order on Rehearing</i> R. Gordon Gooch answers MLPA's August 17 pleading

**XIII. Natural Gas Proceedings**

38	Non-NE Pipeline Proceedings		
	• Southeast Market Pipelines Project (CP14-554, CP15-16, CP15-17)	Aug 10	FERC denies reh'g of Mar 14 order
	• Northern Access (CP15-115)	Aug 14	NY DEC requests rehearing of the <i>Northern Access Certificate</i> <i>Rehearing Order</i> and stay
		Aug 29	National Fuel Gas Supply Corp. and Empire Pipeline answer NY DEC's August 14 requests
		Sep 5	Sierra Club requests rehearing of the <i>Northern Access Certificate</i> <i>Rehearing Order</i>

**XIV. State Proceedings & Federal Legislative Proceedings****No Activity to Report****XV. Federal Courts**

42	Base ROE Complaint IV (2016) (18-1077)	Aug 14	DC Circuit issues order denying TOs' request to hold this appeal in abeyance and granting EMCOS motion to dismiss, without prejudice to submission of another petition for review at the conclusion of the FERC proceedings
42	FCM Resource Retirement Reforms (17-1275)	Aug 13 Aug 17, 20	Deferred Appendix filed FERC, Exelon file Final Briefs
42	Base ROE Complaints II & III (2012 & 2014) (15-1212)	Aug 13	Parties file 12th status report indicating that proceedings upon which request for abeyance was requested remain ongoing

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

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

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

**DATE:** September 13, 2018

**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 September 12, 2018. If you have questions, please contact us.

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

On August 31, RTO Insider LLC filed a Complaint pursuant to Section 206 of the Federal Power Act (“FPA”) against NEPOOL requesting that the FERC either (i) find that NEPOOL’s press policy “unlawful, unjust and unreasonable, unduly discriminatory and contrary to the public interest, and direct NEPOOL to cease and desist” from implementing its policy; or (ii) “if the [FERC] finds that NEPOOL can sustain such a ban as a “private” entity, [] direct that NEPOOL’s special powers, privileges and subsidies be terminated and that an open stakeholder process be used by [ISO-NE]” (“Press Policy Complaint”). The Press Policy Complaint, which was also filed as a “protest” to NEPOOL’s filing of the 132nd Agreement (see ER18-2208 in Section VIII below), broadens RTO Insider’s efforts to “be in the room” and on terms it prefers. On September 6, NEPOOL moved for an extension of the standard and noticed 20-day response deadline by seven business days, to October 1, 2018, to respond to the Complaint. On September 7, RTO Insider submitted a notice that it does not oppose NEPOOL’s extension request. That request is, as of the date of this Report, pending before the FERC. Doc-less interventions have thus far been submitted by the Reporters Committee for Freedom of Press, Public Citizen, and the New Hampshire Office of Consumer Advocate (“NH OCA”). If you have any questions concerning this matter, please contact Pat Gerity (860-275-0533; [pmgerity@daypitney.com](mailto:pmgerity@daypitney.com)) or Sebastian Lombardi (860-275-0663; [slombardi@daypitney.com](mailto:slombardi@daypitney.com)).

- **PER Settlement Agreement (ER17-2153; EL16-120)**

NESCOE’s request for clarification of the FERC’s February 20 order<sup>2</sup> approving the PER Settlement remains pending. The PER Settlement filed by the Settling Parties<sup>3</sup> to resolve the issue set for hearing and settlement judge procedures by the FERC in this proceeding.<sup>4</sup> Under the FERC-approved PER Settlement, ISO-

<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> *New England Power Generators Assoc. v. ISO New England Inc.*, 162 FERC ¶ 61,144 (Feb 20, 2018), *clarif. requested* (“PER Settlement Order”).

<sup>3</sup> PER “Settling Parties” are: NEPGA, NESCOE, the Retail Energy Supply Assoc. (“RESA”), NEPOOL, Exelon, H.Q. Energy Services (U.S.) (“HQUS”), Eversource, Dominion, Entergy, NRG, and Cogentrix. Intervenor in the proceeding not opposing the Settlement (“Non-Opposing Intervenor”) are: ISO-NE, PSEG, Consolidated Edison Energy, Inc. (“ConEd”), Verso Corp., GenOn Energy Management LLC (“GenOn”), National Grid, NextEra, the New Hampshire Electric Coop. (“NHEC”), and Calpine.

<sup>4</sup> See *New England Power Generators Assoc., Inc. v. ISO New England Inc.*, 158 FERC ¶ 61,034 (Jan. 19, 2017) (“PER Complaint Order”), *reh’g and clarif. denied*, 161 FERC ¶ 61,193 (Nov. 16, 2017) (“PER Complaint Rehearing Order”). The PER Complaint Order (i) granted in part NEPGA’s complaint and (ii) set in part for hearing and settlement judge procedures the question of the appropriate method

NE will calculate Adjusted Hourly Strike Price as the sum of the daily Strike Price (as calculated under the existing Tariff) and a newly-defined Hourly PER Adjustment. The Hourly PER Adjustment will be equal to the average over each hour of a newly-defined Five-Minute PER Strike Price Adjustment. The Five-Minute Strike Price Adjustment<sup>5</sup> will be equal to any positive difference between a five-minute Thirty-Minute Operating Reserves Clearing Price or Ten-Minute Non-Spinning Reserves Clearing Price that exceeds the maximum allowable reserves clearing prices for those reserves products (i.e., the Reserve Constraint Penalty Factors) in effect before December 2014.

**Clarification of PER Settlement Order Requested.** As previously reported, the PER Settlement did not resolve the issues of the applicability of the Strike Price methodology to FCA9.<sup>6</sup> In the *PER Settlement Order*, the FERC found the issues of the applicability of the Strike Price methodology to FCA9 beyond the scope of the settlement agreement proceeding.<sup>7</sup> On March 1, NESCOE requested clarification of the *PER Settlement Order* on this issue. On March 16, NEPGA answered NESCOE's request, which remains pending.

**Compliance Filing** (see ER18-1153 below). ISO-NE was directed to make a compliance filing in eTariff format to reflect the FERC's action in the *PER Settlement Order*.<sup>8</sup> That compliance filing was submitted on March 22, 2018 and also remains pending.

If you have any questions concerning this matter, please contact Joe Fagan (202-218-3901; [jfagan@daypitney.com](mailto:jfagan@daypitney.com)), Jamie Blackburn (202-218-3905; [jblackburn@daypitney.com](mailto:jblackburn@daypitney.com)), or Sebastian Lombardi (860-275-0663; [slombardi@daypitney.com](mailto:slombardi@daypitney.com)).

- **Base ROE Complaint IV (2016) (EL16-64)**

As previously reported, Judge Glazer issued on March 27, 2017 his initial decision<sup>9</sup> addressing Eastern Massachusetts Consumer-Owned Systems' ("EMCOS") Complaint<sup>10</sup> that the TOs' return on equity ("ROE")

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of calculating the PER Strike Price under Market Rule 1 Section III.13.7.2.7.1.1.1. The FERC found that "for the period at issue in NEPGA's complaint (September 30, 2016 – May 31, 2018), the PER mechanism has become unjust and unreasonable as a result of the interaction between the PER mechanism and the higher Reserve Constraint Penalty Factors." Accordingly, the FERC required ISO-NE to revise the method by which it calculates the PER Strike Price as set forth in Tariff section III.13.7.2.7.1.1.1. But, finding NEPGA's request that the PER Strike Price be increased by \$250 per MWh "raises issues of material fact that cannot be resolved based upon the record before us and that are more appropriately addressed in the hearing and settlement judge procedures", the FERC set the question of for hearing and settlement judge procedures under section 206 of the FPA. The FERC established a refund effective date of September 30, 2016 (the date of the complaint). In establishing a September 30, 2016 effective date, the FERC clarified that "any changes to the calculation of the PER Strike Price under ISO-NE Tariff section III.13.7.2.7.1.1.1 would be prospective only from September 30, 2016, as required by FPA section 206, and would not impact the application of any PER Adjustment occurring before September 30, 2016."

<sup>5</sup> Five-Minute PER Strike Price Adjustment will be calculated according to the following formula: Five-Minute PER Strike Price Adjustment = MAX (Thirty-Minute Operating Reserves Clearing Price - \$500/MWh, 0) + MAX (Ten-Minute Non-Spinning Reserves Clearing Price - Thirty-Minute Operating Reserves Clearing Price - \$850/MWh, 0).

<sup>6</sup> In its *PER Complaint Rehearing Order*, the FERC clarified that it "intended for ISO-NE to use the difference between the former strike price and the LMP for event hours that occurred prior to September 30, 2016, and for ISO-NE to use the new strike price only for event hours that occur after September 30, 2016 ... [t]he Commission's order is clear in that it addresses a change to the calculation of the PER strike price as set forth in section 111.13.7.2.7.1.1.1 and such change is prospective only."

<sup>7</sup> *PER Settlement Order* at P 3.

<sup>8</sup> While the *PER Settlement Order* acknowledged NEPOOL's request that, "in order to accommodate participation in the stakeholder process for modifying the market rules, the Commission allow at least sixty days following any Settlement approval for ISO-NE to file tariff revisions to implement the Settlement," the *PER Settlement Order* is silent on the timing for the compliance filing directed. Pursuant to Rule 1907 of the FERC's Rules of Practice and Procedure, unless otherwise provided, "when any ... person subject to the jurisdiction of the Commission is required to do or perform any act by Commission order, ... there must be filed with the Commission within 30 days following the date when such requirement became effective, a notice, under oath, stating that such requirement has been met or complied with." 18 CFR § 385.1907.

<sup>9</sup> *Belmont Mun. Light Dept. v. Central Me. Power Co.*, 162 FERC ¶ 63,026 (Mar. 27, 2018) ("*Base ROE Complaint IV Initial Decision*").

used in the Tariff's formula rate revenue requirement is too high on. The *Base ROE IV Initial Decision* concluded instead that the currently-filed base ROE of 10.57 %, which may reach a maximum ROE of 11.74 % with incentive adders, is **not** unjust and unreasonable, and hence is not unlawful under section 206 of the FPA.<sup>11</sup> The *Base ROE IV Initial Decision* found that "Neither the Complainants nor Staff has met their burden to produce a properly-specified [Discounted Cash Flow ("DCF")] analysis that demonstrates the [TOs'] existing base ROE is unjust and unreasonable."<sup>12</sup> In light of those conclusions, the *Base ROE IV Initial Decision* finds it unnecessary to reach the issue of what a just and reasonable alternative base ROE ought to be. Briefs on exceptions to the *Base ROE IV Initial Decision* were filed on April 26, 2018 by EMCOS, CAPs, TOs, and FERC Trial Staff. In addition, CAPs requested on April 26 that the record be re-opened to receive three documents that CAPs assert demonstrate that there has been a significant factual change since the close of the record that calls into question the *Initial Decision's* reliance on one DCF in establishing the Base ROE. On April 27, TOs requested that answers to the CAPs motion to re-open the record and briefs opposing exceptions be extended to May 23, 2018, which the FERC granted on May 7.

On May 23, Briefs Opposing Exceptions were filed by TOs, EMCOS, CAPs, and FERC Trial Staff. The TOs also opposed CAPs' motion for limited reopening of record. The *Base ROE IV Initial Decision*, as well as all of the related briefs and motions, are 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)) or Jamie Blackburn (202-218-3905; [jblackburn@daypitney.com](mailto:jblackburn@daypitney.com)).

- **Base ROE Complaints I-IV: TOs' Motion to Dismiss or Consolidate Complaints I-IV (EL16-64; EL14-86; EL13-33; EL11-66)**

The TOs' October 5, 2017 motion to dismiss all four ROE complaints (captioned above) in light of the DC Circuit's *Emera Maine*<sup>13</sup> decision remains pending. The October 5 motion alternatively requested that the FERC consolidate the four ROE complaints for decision and use expedited procedures to resolve them. The TOs stated that this motion was motivated in part by *Emera Maine*, but also by what they describe as the "enormous investment uncertainty" resulting from the various litigation proceedings. On October 20, Complainant-Aligned Parties and EMCOS submitted answers opposing TOs' requests. The TOs' motion and the motions filed in response remain pending before the FERC.

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

On August 17, the Settling Parties<sup>14</sup> filed in ER18-2235 a Joint Offer of Settlement (the "Settlement") to resolve all issues in the Section 206 proceeding instituted by the FERC on December 28, 2015.<sup>15</sup> The Settlement

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<sup>10</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>11</sup> *Id.* at P 2.; Finding of Fact (B).

<sup>12</sup> *Id.* Finding of Fact (A).

<sup>13</sup> *Emera Maine v. FERC*, 854 F.3d 9 (D.C. Cir. 2017) ("*Emera Maine*"). *Emera Maine* vacated the FERC's prior orders in the Base ROE Complaint I proceeding, and remanded the case for further proceedings consistent with its order. The Court agreed with both the TOs (that the FERC did not meet the Section 206 obligation to first find the existing rate unlawful before setting the new rate) and "Customers" (that the 10.57% ROE was not based on reasoned decision-making, and was a departure from past precedent of setting the ROE at the midpoint of the zone of reasonableness).

<sup>14</sup> "Settling Parties" are identified as: CMP; CMEEC/CTMEEC; CT OCC; CT PURA; Emera Maine; Eversource (CL&P, PSNH, NSTAR); Fitchburg and Unutil; Green Mountain Power; Maine Electric Power Co.; ME OPA; MPUC, MA AG, MA AG, MA DPU, MMWEC, National Grid; NESCOE; NHEC; NH PUC; New Hampshire Transmission; RI DPUC; UI; VT DPS; VEC; VELCO; and Vermont Transco, LLC ("VTransco").

proposes changes to Section II.25, Schedules 8 and 9, Attachment F (including the addition of Interim Formula Rate Protocols (“Interim Protocols”)), and the Schedule 21s to the ISO-NE OATT. If approved, the changes to Attachment F are to be effective mid-June, 2019, with the remaining changes to be effective January 1, 2020. The Interim Protocols, as well as the changes to Section II.25 and Schedules 8 and 9 were supported by the Participants Committee at its July 24 meeting.

On September 6, **NESCOE** filed comments supporting the Settlement. Comments opposing the Settlement were filed by Municipal PTF Owners<sup>16</sup> and FERC Trial Staff. The **Municipal PTF Owners** assert that the Settlement worsens, rather than improves, the issues of “lack of transparency, clarity and specificity that led the Commission [to] find the existing Attachment F formula unjust and unreasonable”, discriminates against load directly connected to PTF and exempted by Section II.12(c) of the ISO-NE Tariff from paying costs associated with service across non-PTF facilities, contravenes numerous settled rate principles without explanation or justification,<sup>17</sup> and imposes an unacceptable moratorium and burden on parties inclined to challenge Attachment F. **FERC Trial Staff** asserts that the Settlement, as filed, is not fair and reasonable nor is it in the public interest “because it would result in unreasonable rates and contains fundamental defects”,<sup>18</sup> and opposes the Settlement terms which would bind non-settling parties to the terms of the Settlement and establish a standard of review for changes to the Settlement. FERC Trial Staff suggests that these defects could be corrected in a comprehensive compliance filing, and requests that the FERC either (i) conditionally approve the Settlement subject to the submission of such a corrective compliance filing, or (ii) reject the Settlement in its entirety and set the entire matter for hearing.

By September 10 order of Chief Judge Cintron, the date for reply comments is now September 28, 2018.<sup>19</sup> If you have any questions concerning this matter, please contact Eric Runge (617-345-4735; [ekrunge@daypitney.com](mailto:ekrunge@daypitney.com)) or Jamie Blackburn (202-218-3905; [jblackburn@daypitney.com](mailto:jblackburn@daypitney.com)).

- **Base ROE Complaints II & III (2012 & 2014) (EL13-33 and EL14-86) (consolidated)**

Judge Sterner’s findings and the *2012/2014 ROE Initial Decision*, and pleadings in response thereto, remain pending before the FERC. As previously reported, the FERC, in response to second (EL13-33)<sup>20</sup> and

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<sup>15</sup> *ISO New England Inc. Participating Transmission Owners Admin. Comm.*, 153 FERC ¶ 61,343 (Dec. 28, 2015), *reh’g denied*, 154 FERC ¶ 61,230 (Mar. 22, 2016) (“*RNS/LNS Rates and Rate Protocols Order*”). The *RNS/LNS Rates and Rate Protocols Order* found the ISO-NE Tariff unjust, unreasonable, and unduly discriminatory or preferential because the Tariff “lacks adequate transparency and challenge procedures with regard to the formula rates” for Regional Network Service (“RNS”) and Local Network Service (“LNS”). The FERC also found that the RNS and LNS rates themselves “appear to be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful” because (i) “the formula rates appear to lack sufficient detail in order to determine how certain costs are derived and recovered in the formula rates” and “could result in an over-recovery of costs” due to the “the timing and synchronization of the RNS and LNS rates”. The FERC encouraged the parties to make every effort to settle this matter before hearing procedures are commenced. The FERC-established refund date is January 4, 2016.

<sup>16</sup> “Municipal PTF Owners” are: Braintree, Chicopee, Middleborough, Norwood, Reading, Taunton, and Wallingford.

<sup>17</sup> The elements of the Settlement that Municipal PTF Owners assert contravene settled rate principles include: provision for a fixed accrual for Post-Employment Benefits Other than Pension (“PBOPs”); continued TO use of net proceeds of debt, rather than gross proceeds of debt, in establishing capital structures under their proposed revenue requirement formula; inappropriate allocation of rental revenues from secondary uses of transmission facilities; the addition of miscellaneous intangible plant (Account 303), and depreciation and amortization of intangibles, to rate base; and the creation of a Regulatory Asset for an unspecified Massachusetts state tax rate change (without explanation).

<sup>18</sup> Included in the “fundamental defects” of the Settlement identified by FERC Trial Staff are that it: (1) enables the TOs to conduct extra-formulaic, ad hoc ratemaking for all externally-sourced inputs every year; (2) enables certain PTOs to over-recover certain plant costs; (3) enables certain PTOs to recover greater than 50% of Construction Work in Progress (“CWIP”) in rate base (4) violates prior FERC orders about which customer groups can be made to pay incentive returns; (5) fails to appropriately calculate federal and state income taxes and, in particular, fails to account for excess Accumulated Deferred Income Taxes (“ADIT”) created by the Tax Cuts and Jobs Act; (6) does not contain a fixed and stated ROE; and (7) does not contain a fixed and stated PBOPs expense.

<sup>19</sup> Order of Chief Judge Extending Time to File Reply Comments, Docket No. ER18-2235 (issued Sep. 10, 2018). The TOs asked for an 11-day extension of time, to Sep. 28, 2018, to file reply comments, indicating that FERC Trial Staff did not oppose the request. Municipal PTF Owners opposed the TOs’ motion.



third (EL14-86)<sup>21</sup> complaints regarding the TOs' 11.14% Base ROE, issued orders establishing trial-type, evidentiary hearings and separate refund periods. The first, in EL13-33, was issued on June 19, 2014 and established a 15-month refund period of December 27, 2012 through March 27, 2014;<sup>22</sup> the second, in EL14-86, was issued on November 24, 2014, established a 15-month refund period beginning July 31, 2014,<sup>23</sup> and, because of "common issues of law and fact", consolidated the two proceedings for purposes of hearing and decision, with the FERC finding it "appropriate for the parties to litigate a separate ROE for each refund period."<sup>24</sup> The TOs requested rehearing of both orders. On May 14, 2015, the FERC denied rehearing of both orders.<sup>25</sup> On July 13, 2015, the TOs appealed those orders to the DC Circuit Court of Appeals (*see* Section XIV below), and that appeal continues to be held in abeyance.

**Hearings and Trial Judge Initial Decision.** Initial hearings on these matters were completed on July 2, 2015. In mid-December 2015, Judge Sterner reopened the record for the limited purpose of having the DCF calculations re-run in accordance with the FERC's preferred approach and re-submitted. A limited hearing on that supplemental information was held on February 1, 2016. On March 22, 2016, Judge Sterner issued his 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>26</sup> The *Initial Decision* also lowered the ROE ceilings. Judge Sterner's decision, if upheld by the FERC, would result in refunds totaling as much as \$100 million, largely concentrated in the EL13-33 refund period. Briefs on exceptions were filed by the TOs, Complainant-Aligned Parties ("CAPs"), EMCOS, and FERC Trial Staff on April 21, 2016; briefs opposing exceptions, on May 20, 2016. Judge Sterner's findings and *Initial Decision*, and pleadings in response thereto, remain pending, and will be subject to challenge, before the FERC. The *2012/14 ROE Initial Decision* and its findings can be approved or rejected, in whole or in part.

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

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

- **FCA13 De-List Bids Filing (ER18-2047)**

Pursuant to Market Rule 1 § 13.8.1(a), ISO-NE submitted on July 20 a filing describing the Permanent De-List Bids and Retirement De-List Bids that were submitted on or prior to the FCA13 Existing Capacity Retirement Deadline. ISO-NE reported that the Existing Capacity Retirement Deadline for FCA13 was March 23, 2018 and it

<sup>20</sup> The 2012 Base ROE Complaint, filed by Environment Northeast (now known as Acadia Center), Greater Boston Real Estate Board, National Consumer Law Center, and the NEPOOL Industrial Customer Coalition ("NICC", and together, the "2012 Complainants"), challenged the TOs' 11.14% return on equity, and seeks a reduction of the Base ROE to 8.7%.

<sup>21</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>22</sup> *Environment Northeast v. Bangor Hydro-Elec. Co.*, 147 FERC ¶ 61,235 (June 19, 2014) ("*2012 Base ROE Initial Order*"), *reh'g denied*, 151 FERC ¶ 61,125 (May 14, 2015).

<sup>23</sup> *Mass. Att'y Gen. v. Bangor Hydro*, 149 FERC ¶ 61,156 (Nov. 24, 2014), *reh'g denied*, 151 FERC ¶ 61,125 (May 14, 2015).

<sup>24</sup> *Id.* at P 27 (for the refund period covered by EL13-33 (i.e., Dec. 27, 2012 through Mar. 27, 2014), the ROE for that particular 15-month refund period should be based on the last six months of that period; the refund period in EL14-86 and for the prospective period, on the most recent financial data in the record).

<sup>25</sup> *Environment Northeast, et al. v. Bangor Hydro-Elec. Co., et al. and Mass. Att'y Gen. et al. -v- Bangor Hydro et al.*, 151 FERC ¶ 61,125 (May 14, 2015).

<sup>26</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*").

received three Permanent De-List and 11 Retirement De-List Bids for resources located in three Load Zones (New England, SEMASS, and Vermont and NEMA-Boston), with an aggregate MWs of capacity of 2,048.799 MWs. Nine of the Bids were for resources under 20 MW that did not meet the affiliation requirements that would have required IMM review. The IMM did review the remaining two suppliers' 5 Bids for 2,026.615 MWs of capacity. The IMM's determination regarding those 5 bids is described in the version of the filing that was filed confidentially as required under §13.8.1(a) of Market Rule 1.

Because the Economic Life Determination Revisions described in Section III below (ER18-1770) potentially produce a different IMM-determined De-list Bid value, the IMM evaluated each De-list Bid twice, once with and once without the Economic Life Determination Revisions. The Economic Life Determination Revisions produced a different value in two instances. In those instances, the IMM provided a separate IMM-determined price, which it will use in FCA13 if the Economic Life Determination Revisions are accepted.

Comments on this filing are due on or before August 10; none were filed. Doc-less interventions were filed by Dominion, Exelon, NESCOE and NRG. This matter is pending before the FERC. If you have any questions concerning this matter, please contact Pat Gerity (860-275-0533; [pmgerity@daypitney.com](mailto:pmgerity@daypitney.com)).

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

On July 13, the FERC issued an order ("*Mystic COS Agreement Order*")<sup>27</sup> regarding the Mystic 8 & 9 Cost-of-Service Agreement ("*COS Agreement*"),<sup>28</sup> accepting the COS Agreement but suspending its effectiveness and setting it for accelerated hearings and settlement discussions. The *Mystic COS Agreement Order* was approved by a 3-2 vote, with dissents by Commissioners Powelson and Glick.

The following summarizes the relevant findings in the *Mystic COS Agreement Order*:

- ◆ **Capital Expenditures.**<sup>29</sup> The FERC determined that that the record provided by Mystic is insufficient for determining the justness and reasonableness of the amount of reported capital expenditures, and thus directed the participants to submit evidence regarding that issue at the hearing. The FERC also directed the participants to present evidence regarding the appropriate design of the true-up mechanism (to ensure that the rates established reflect actual costs incurred) in the COS Agreement. Regarding a related clawback provision proposed by parties to address "toggling" concerns (i.e., the return of the Mystic units to the market after the term of the Agreement), the FERC noted that ISO-NE may choose to address such a provision in its filing in Docket No. EL18-182 (see Section III below).
- ◆ **Fuel Supply Charge.**<sup>30</sup> The FERC rejected arguments that the FPA prohibits any recovery of the Fuel Supply Charge for the Distrigas Facility. According to the FERC, the extremely close relationship between the Distrigas Facility and Mystic 8 & 9 places costs related to operation of the Distrigas Facility within its general practice of considering, when reviewing cost-of-service rates, a generator's purported costs of fuel. However, the *Mystic COS Agreement Order* clarified, the finding as to jurisdiction does not mean that Mystic is entitled to recover all costs that it claims

<sup>27</sup> *Constellation Mystic Power*, 164 FERC ¶ 61,022 (July 13, 2018), *reh'g requested*.

<sup>28</sup> The COS Agreement, submitted on May 16, 2018, is between Mystic, Exelon Generation Company, LLC ("ExGen") and ISO-NE. The COS Agreement is to provide cost-of-service compensation to Mystic for continued operation of Mystic 8 & 9, which ISO-NE has requested be retained to ensure fuel security for the New England region, for the period of June 1, 2022 to May 31, 2024. The COS Agreement provides for recovery of Mystic's fixed and variable costs of operating Mystic 8 & 9 over the 2-year term of the Agreement, which is based on the pro forma cost-of-service agreement contained in Appendix I to Market Rule 1, modified and updated to address Mystic's unique circumstances, including the value placed on continued sourcing of fuel from the Distrigas liquefied natural gas ("LNG") facility, and on the continued provision of surplus LNG from Distrigas to third parties.

<sup>29</sup> *Mystic COS Agreement Order* at PP 19-20.

<sup>30</sup> *Id.* at PP 34-37.

in connection with the Distrigas Facility. The FERC found that the record provided by Mystic is insufficient for determining the justness and reasonableness of the Fuel Supply Charge, and directed the participants to address this issue at hearing.

- ◆ **Third-Party Sales Revenues.**<sup>31</sup> As to the question of sharing revenues from third-party sales of LNG to the LDC or one of the two interstate natural gas pipelines, the FERC agreed with ISO-NE that, absent some sort of partial credit, the Distrigas Facility has little incentive to make LNG sales to third parties. However, it found that allowing Mystic to keep 50% of the margin on third-party sales appeared to be excessive. Accordingly, the FERC directed the parties to address at hearing the appropriate amount of the margin on third-party sales to be retained by Mystic.
- ◆ **Cost Allocation.**<sup>32</sup> The FERC ruled that participants need not present evidence at the hearing in this case regarding cost allocation. Parties may instead submit comments, as necessary or relevant, in EL18-182.
- ◆ **Other Hearing Issues.**<sup>33</sup> With the exception of those issues in the *Mystic COS Agreement Order* as to which the FERC made specific findings, the FERC determined that protestors had raised issues of material fact regarding the proposed expenditures that are best resolved in a hearing. Therefore, among other issues, the FERC set for hearing the amount and rate treatment of the proposed capital expenditures, O&M expenses, and administrative and general expenses for the Mystic Generating Station and the Distrigas Facility.

Challenges to the *Mystic COS Agreement Order* were filed by NESCOE, ENECOS, MA AG, and the NH PUC. On August 21, Constellation answered the NESCOE request for reconsideration. On September 10, the FERC issued a tolling order affording it additional time to consider the requests for rehearing, which remain pending.

**Hearings.** Chief Judge Cintron designated Judge Steven L. Sterner as the Presiding Judge for the hearings. Judge Sterner held a prehearing conference on July 26 and on July 27 established a procedural schedule that calls for discovery and depositions to be concluded by September 24, hearings to commence on September 27, hearings completed and a complete hearings record certified to the Commission for final action by October 12, and post-hearing briefing by the parties to be completed before Thanksgiving. Since the last report, a flurry of depositions have been taken and testimony submitted.

**Dispute Resolution Facilitator.** On September 5, Chief Judge Cintron designated Office of Administrative Law Judges dispute resolution specialist Joshua M. Hurwitz as a settlement facilitator in this proceeding. Mr. Hurwitz is to assist the participants with efforts to achieve a consensual resolution of the case. The procedural schedule for the proceeding noted above remains in effect.

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

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

On June 28, VTransco requested clarification and/or rehearing of the FERC's May 29 order rejecting, without prejudice, VTransco's request for authorization to recover in transmission rates property transfer taxes, closing fees, and advisory fees related to its acquisition of ownership shares in the Highgate Transmission Facility.<sup>34</sup> In rejecting the request,<sup>35</sup> the FERC found that "VTransco has not made a showing ...

<sup>31</sup> *Id.* at P 38.

<sup>32</sup> *Id.* at P 41.

<sup>33</sup> *Id.* at P 42.

<sup>34</sup> *Vermont Transco, LLC*, 163 FERC ¶ 61,152 (May 29, 2018) ("*Highgate Acquisition Cost Recovery Order*").

that these transaction-related costs have ‘specific, measurable, and substantial benefits to ratepayers.’ Accordingly, we reject VTransco’s filing, without prejudice to it making a future filing that makes this showing.”<sup>36</sup> The FERC also rejected “the pass-through of transaction-related costs to ratepayers in any Commission-jurisdictional rate, without prejudice to VTransco submitting a request with the required showing of ‘specific, measurable, and substantial benefits’ to ratepayers.”<sup>37</sup>

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

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

Rehearing remains pending of the FERC’s October 6, 2017 order rejecting the TOs’ June 5, 2017 filing in this proceeding.<sup>38</sup> As previously reported, the June 5 filing was designed to reinstate TOs’ transmission rates to those in place prior to the FERC’s orders later vacated by the DC Circuit’s *Emera Maine*<sup>39</sup> decision. In its *Order Rejecting Filing*, the FERC required the TOs to continue collecting their ROEs currently on file, subject to a future FERC order.<sup>40</sup> The FERC explained that it will “order such refunds or surcharges as necessary to replace the rates set in the now-vacated order with the rates that the Commission ultimately determines to be just and reasonable in its order on remand” so as to “put the parties in the position that they would have been in but for [its] error.” For the time being, so as not to “significantly complicate the process of putting into effect whatever ROEs the Commission establishes on remand” or create “unnecessary and detrimental variability in rates,” the FERC has temporarily left in place the ROEs set in *Opinion 531-A*, pending an order on remand.<sup>41</sup> On November 6, the TOs requested rehearing of the *Order Rejecting Filing*. On December 4, 2017, the FERC issued a tolling order providing it additional time to consider the TOs’ request for rehearing of the *Order Rejecting Filing*, which remains pending. If you have any questions concerning this matter, please contact Joe Fagan (202-218-3901; [jfagan@daypitney.com](mailto:jfagan@daypitney.com)) or Eric Runge (617-345-4735; [ekrunge@daypitney.com](mailto:ekrunge@daypitney.com)).

- **2018/19 Power Year Transmission Rate Filing (ER09-1532; RT04-2)**

On July 31, 2018, the Participating Transmission Owners (“PTOs”) Administrative Committee (“PTO AC”) submitted a filing identifying adjustments to regional transmission service charges under Section II of the

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<sup>35</sup> VTransco requested (and the MA AG challenged its request for) authorization to recover, under the regional formula rate, \$639,780 in costs, including property transfer taxes, closing fees, and advisory fees, related to its acquisition recent of Highgate Transmission Facility ownership shares. VTransco stated that, absent FERC action, it would recover the expenses solely from Vermont customers (under its grandfathered 1991 Vermont Transmission Agreement (“VTA”). VTransco asserted that, because the costs are related to VTransco’s acquisition of ownership shares in the Highgate Transmission Facility, a facility utilized solely to provide Regional Network Service, it is just and reasonable to allow VTransco to recover the Highgate Transaction costs through the ISO-NE Tariff formula rate, rather than through the VTA.

<sup>36</sup> *Id.* at P 16.

<sup>37</sup> *Id.* at P 18.

<sup>38</sup> *ISO New England Inc.*, 161 FERC ¶ 61,031 (Oct. 6, 2017) (“*Order Rejecting Filing*”), *reh’g requested*.

<sup>39</sup> *Emera Maine v. FERC*, 854 F.3d 9 (D.C. Cir. 2017) (“*Emera Maine*”).

<sup>40</sup> *Order Rejecting Filing* at P 1.

<sup>41</sup> *Id.* at P 36.

ISO Tariff for the period June 1, 2018 through May 31, 2019. The filing reflected the charges to be assessed under annual transmission formula rates, reflecting actual 2017 cost data, Forecasted Annual Transmission Revenue Requirements associated with projected PTF additions for the 2018 Forecast Period, and the Annual True-up including associated interest. The PTO AC stated that the annual updates result in a Pool “postage stamp” RNS Rate of \$110.43 /kW-year effective June 1, 2018, a decrease of \$1.53 /kW-year from the charges that went into effect on June 1, 2017. In addition, the annual update to the Schedule 1 formula rate resulted in a charge of \$1.59 kW-year, a \$0.22/kW-year decrease from the Schedule 1 charge that last went into effect on June 1, 2017. This filing was reviewed at the August 7-8 Reliability/Transmission Committee summer meeting. The filing was not noticed for public comment. If there are questions on this proceeding, please contact Eric Runge (617-345-4735; [ekrunge@daypitney.com](mailto:ekrunge@daypitney.com)).

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

- **Order 844 Compliance Filing (ER18-2394)**

On September 7, ISO-NE and NEPOOL jointly filed changes to Market Rule 1, the Information Policy and the centralized definitions section of the Tariff in response to the requirements of FERC *Order 844*<sup>42</sup> (“Order 844 Changes”). The September 7 filing proposes those revisions to meet *Order 844*’s monthly reporting requirements. Each report will be publically available on the ISO website in machine-readable format. The Zonal Uplift Report will be reported 20 days after month’s end, with daily Net Commitment Period Compensation (“NCPC”) dollars by load zone and uplift category. The Resource-Specific Uplift Report will be reported 90 days after month’s end, with total monthly NCPC dollars by resource. The Operator-Initiated Commitment Report will be reported 30 days after month’s end, with the size, transmission zone, commitment reason, and commitment start time for the relevant commitments. Reference is made to the three reports in the Information Policy. With respect to the TCPF Requirements, a new defined term “Transmission Constraint Penalty Factor” was added to the Tariff’s Centralized Definitions Section (§1.2.2) and the Tariff revised to reflect the ISO’s current TCPF implementation. The Order 844 Changes were unanimously supported by the Participants Committee at its August 24 meeting. Comments on this filing are due September 28. Thus far, a doc-less intervention has been filed by Eversource. 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)**

On August 31, ISO-NE filed changes to Market Rule 1 in response to the *Mystic Waiver Order*’s direction to file, if ISO-NE did not show cause why its current tariff provisions are just and reasonable despite the identified fuel security issues, “interim Tariff revisions that provide for the filing of a short-term, cost-of-service agreement to address demonstrated fuel security concerns”.<sup>43</sup> ISO-NE proposed three sets of provisions to expand its authority on a short-term basis to enter into out-of-market arrangements in order to provide greater assurance of fuel security during winter months in New England (collectively, the “Fuel Security Retention Proposal”).<sup>44</sup> ISO-NE

<sup>42</sup> As reported in Section XII below, *Order 844* directed each RTO/ISO to establish in its tariff requirements to report, on a monthly basis: (1) total uplift payments for each transmission zone, broken out by day and uplift category (Zonal Uplift Report); (2) total uplift payments for each resource (Resource-Specific Uplift Report); and (3) for certain operator-initiated commitments after the Day-Ahead Energy Market, the size of the commitment, transmission zone, commitment reason, and commitment start time (Operator-Initiated Commitment Report). In addition to these reporting requirements, *Order 844* requires each RTO/ISO to include in its tariff the transmission constraint penalty factors (“TCPFs”) used in its market software, as well as any circumstances under which those TCPFs can set locational marginal prices, and any process by which the TCPFs can be temporarily changed (“TCPF Requirements”).

<sup>43</sup> Mystic Waiver Order at P 55.

<sup>44</sup> The three sets of provisions include: (1) a trigger mechanism for authorizing ISO-NE action to retain capacity resources it determines are needed for fuel security reliability, as contained in a new Appendix L to Market Rule 1 (the “Appendix L Proposal”); (2) a new Section 13.2.5.2.5A of Market Rule 1 and revisions to Section III.13.2.5.2.5.1, to effectuate ISO-NE’s proposed treatment of resources retained for fuel security in the FCA, the timing and integration of fuel security reliability reviews (including the ISO-NE’s proposed application in the Substitution and Reconfiguration Auctions), and a proposal to allocate the costs associated with retaining units for fuel

stated that the interim provisions would sunset after FCA15, with a longer-term market solution to be filed by July 1, 2019, as directed in the *Mystic Waiver Order*. In addition, the ISO-NE transmittal letter described (i) the generally-applicable fuel security reliability review standard that will be used to determine whether a retiring generating resource is needed for fuel security reliability reasons; (ii) the proposed cost allocation methodology (Real-Time Load Obligation, though ISO-NE indicated an ability to implement NEPOOL's alternative allocation methodology if determined appropriate by the FERC); and (iii) the proposed treatment in the FCA of a retiring generator needed for fuel security reasons that elects to remain in service. The ISO-NE Fuel Security Changes were considered but not supported by the Participants Committee at its August 24 meeting. There was, however, super-majority support for (1) the Appendix L Proposal with some important adjustments to make that proposal more responsive to the FERC's guidance in the *Mystic Waiver Order* and other FERC precedent, and (2) the PP-10 Revisions, also with important adjustments (together, the "NEPOOL Alternative"). The NEPOOL Alternative will also be submitted for FERC consideration. Comments on the Fuel Security Retention Proposal are due September 21. Thus far, doc-less interventions have been filed by NEPOOL, Avangrid, Calpine, CLF, ConEd, Energy New England ("ENE"), Eversource, Exelon, Invenegy, MA AG, NESCOE, NRG, Vistra, NH PUC, EPSA, Public Citizen, and RENEW Northeast. If you have any questions concerning this proceeding, please contact Sebastian Lombardi (860-275-0663; [slombardi@daypitney.com](mailto:slombardi@daypitney.com)).

- **FCM Cost Allocation Improvements (ER18-2125)**

On August 1, ISO-NE and NEPOOL jointly filed changes to the Tariff to improve the methodology for allocating costs associated with the FCM ("FCM Cost Allocation Improvements"). Specifically, the changes (i) align the cost allocation methodology with the use of MRI-based demand curves<sup>45</sup>; and (ii) increase transparency by eliminating the use of a zonal-blended clearing price for cost allocation purposes (the Net Regional Clearing Price) and, instead, to separately calculate and allocate each of the discrete charges and adjustments that are currently reflected in a blended rate. The FCM Cost Allocation Improvements were unanimously supported by the Participants Committee at its June 26-28, 2018 Summer Meeting. Comments on this filing were due August 22; none were filed. Doc-less interventions were filed by NRG/GenOn and Public Citizen. This matter is pending before the FERC. If you have any questions concerning this proceeding, please contact Sebastian Lombardi (860-275-0663; [slombardi@daypitney.com](mailto:slombardi@daypitney.com)).

- **FCA Rationing Minimum Limit (ER18-2078)**

On July 27, ISO-NE and NEPOOL jointly filed changes to the Tariff to provide for generating resources to elect a rationing limit in the Forward Capacity Auction ("FCA Rationing Minimum Limit"). The FCA Rationing Minimum Limit establishes the lowest MW quantity value for which a generator is willing to accept a CSO (i.e., the minimum acceptable CSO amount, versus accepting no CSO at all) and will provide Market Participants an opportunity to better align the magnitude of a potential CSO with a resource's de-list price. A September 25, 2018 effective date was requested. The FCA Rationing Minimum Limit changes were unanimously supported by the Participants Committee at its July 24 teleconference. Comments on this filing were August 17. NEPGA filed comments that day supporting the filing. Doc-less interventions were filed by Calpine (out-of-time), Dominion, Exelon, and NRG/Gen. This matter is pending before the FERC. If you have any questions concerning this proceeding, please contact Sebastian Lombardi (860-275-0663; [slombardi@daypitney.com](mailto:slombardi@daypitney.com)).

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

ISO-NE and NEPOOL's June 11 joint filing of revised Tariff language to change the determination of economic life under Section III.13.1.2.3.2.1.2.C of the Tariff remains pending before the FERC. The revisions provide that the economic life of an Existing Capacity Resource is calculated as the evaluation period in which the net present value of the resource's expected future profit is maximized. An August 10, 2018 effective date was

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security (the "Section 13 Revisions"); and (iii) detailed reliability review implementation rules contained in revisions to ISO-NE Planning Procedure 10, Appendix I (the "PP-10 Revisions").

<sup>45</sup> MRI-based demand curves are sloped demand curves that are based on the marginal improvement in reliability associated with adding capacity in constrained capacity zones versus the remainder of the system.

requested. The Economic Life Determination Revisions were supported by the Participants Committee at its June 1, 2018 meeting. On June 27, NEPOOL filed supplemental comments to provide the FERC with additional information regarding stakeholder consideration of the changes that was not included in the joint filing.

Comments on the joint filing were due on or before July 2. NEPGA protested, arguing that the request to change the mitigation rules after ISO-NE “has begun to apply those rules to binding FCA retirement offers” is a retroactive change to the mitigation rules that violates the filed rate doctrine and, alternatively, should be rejected “because of the adverse effects it would have on Market Participant confidence in the” FCM. NEPGA asked the FERC to “direct ISO-NE and the IMM to bring their proposal through the NEPOOL stakeholder process for discussion and deliberation for effect in FCA 14, if at all.” Doc-less interventions were filed by Calpine, Dominion, Eversource, NESCOE, NextEra, and NRG. Answers to NEPGA’s protest were filed by NEPOOL and ISO-NE.

**Deficiency Letter & Response.** On August 9, the FERC issued a deficiency letter informing ISO-NE that its filing is deficient and that additional information is required in order to process the filing. Accordingly, ISO-NE was directed to file responses to a series of multi-part questions. As directed, on September 10, ISO-NE filed responses to those questions. ISO-NE’s responses re-set the 60-day clock for FERC action and comments on the responses are due on or before October 1, 2018.

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

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

On July 2, 2018, the FERC issued an order<sup>46</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 order requires 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); or (b) show cause as to why the Tariff remains just and reasonable in the short- and long-term such that one or both of Tariff revisions filings is not necessary. In addition, the FERC *sua sponte* extended the deadline in two Tariff provisions to enable Exelon to postpone its Mystic 8 and 9 retirement decision to and including January 4, 2019.

Addressing the waiver element, the FERC found the waiver request “an inappropriate vehicle for allowing Mystic 8 and 9 to submit a [COS Agreement] in response to the identified fuel security need” and further that the request “would not only suspend tariff provisions but also alter the existing conditions upon which a market participant could enter into a [COS Agreement] (for a transmission constraint that impacts reliability) and allow for an entirely new basis (for fuel security concerns that impact reliability) to enter into such an agreement.” The FERC concluded that “[s]uch new processes may not be effectuated by a waiver of the ISO-NE Tariff; they must be filed as proposed tariff provisions under FPA section 205(d).”<sup>47</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>48</sup>

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<sup>46</sup> *ISO New England Inc.*, 164 FERC ¶ 61,003 (July 2, 2018), *reh’g requested* (“Mystic Waiver Order”).

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

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

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>49</sup> The FERC directed the ISO 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>50</sup> The FERC also directed the ISO include with any proposed Tariff revisions a mechanism that addresses how cost-of-service-retained resources would be treated in the FCM<sup>51</sup> and an *ex ante* cost allocation proposal that appropriately identifies beneficiaries and adheres to FERC cost causation precedent.<sup>52</sup>

**Requests for Rehearing and or Clarification.** Requests for rehearing and or clarification of the *Mystic Waiver Order* were filed by:

- ◆ **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-month or at any other uncompetitive offer price);
- ◆ **Connecticut Parties**<sup>53</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 prejudice whether entering those resources in the FCM as price takers would be just and reasonable; and (iii) that ISO-NE may confirm its submitted position that price taking treatment for these resources would, in fact, be a just and reasonable outcome. Failing such clarification, Connecticut Parties request rehearing, asserting that the record fails to support a determination that resources retained for reliability to address fuel security concerns must be entered into the FCM at a price greater than zero);
- ◆ **ENECOS** (asserting that the *Mystic Waiver Order* (i) misplaces reliance on ISO-NE “assertions concerning ‘fuel security,’ which do not in fact establish a basis in evidence or logic for initiating” a Section 206(a) proceeding; (ii) impermissibly relies on extra-record material that the FERC did not actually review and that intervenors were afforded no meaningful opportunity to challenge; and (iii) speculation concerning potential future modifications to the FCM bidding rules as to retiring generation retained for fuel security misunderstands the problem it seeks to address, and prejudices the already truncated opportunities for stakeholder input in this proceeding), ENECOS suggest that the FERC should grant rehearing, vacate its show cause directive, strike its dictum concerning potential treatment of FCM bidding for retiring generation retained for “fuel security,” and direct ISO-NE to proceed either in accordance with its Tariff or under FPA Section 205 to address, with appropriate evidentiary support, whatever concerns it believes to exist concerning “fuel security”);
- ◆ **MA AG** (asserting that the decision to institute a Section 206 proceeding was insufficiently supported by sole reliance on highly contested OFSA and Mystic Retirement Studies; and the FERC should reconsider the timeline for the permanent tariff solution and set the deadline for implementation no later than February 2020);

<sup>49</sup> *Id.* at P 55.

<sup>50</sup> *Id.* at PP 56-57.

<sup>51</sup> *Id.* at P 57.

<sup>52</sup> *Id.* at P 58.

<sup>53</sup> “Connecticut Parties” are the Conn. Pub. Utils. Regulatory Authority (“CT PURA”) and the Conn. Dept. of Energy and Environ. Protection (“CT DEEP”).



- ◆ **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>54</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>55</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, CT Parties opposed the NEPGA motion for clarification. On August 14, NEPOOL filed a limited response to Indicated New England EDCs, requesting that the FERC “reject the relief sought in [their motion] to the extent that relief would bypass or predetermine the outcome of the stakeholder process, without prejudice to [them] refiling their proposal, if appropriate, following its full consideration in the stakeholder process.” Answers to the Indicated New England EDCs were also filed by the MA AG, NEPGA, NextERA, and CLF/NRDC/Sierra Club/Sustainable FERC Project. On August 29, the Indicated New England EDCs answered the August 14/16 answers. On August 27, the FERC issued a tolling order affording it additional time to consider the requests for rehearing, which remain pending. If you have any questions concerning this proceeding, please contact Dave Doot (860-275-0102; [dtdoot@daypitney.com](mailto:dtdoot@daypitney.com)) or Sebastian Lombardi (860-275-0663; [slombardi@daypitney.com](mailto:slombardi@daypitney.com)).

- **PER Settlement Compliance Filing (ER18-1153)**

The PER Settlement Compliance Filing remains pending. As previously reported, on March 22, 2018, in accordance with the Commission-accepted PER Settlement Agreement, ISO-NE filed changes to Market Rule section 13.7.2.7.1.1.1 revising the methodology for calculating the PER Strike Price for the period September 30, 2016 through May 31, 2018 (the “Refund Period”). The revised language increases the Daily PER Strike Price for the Refund Period. ISO-NE requested the changes become effective as of September 30, 2016. Comments on this filing were due on or before April 12, 2018. NEPOOL submitted comments supporting the compliance changes. NESCOE submitted a limited protest requesting that the FERC reject the March 22 Filing as non-compliant with the *PER Settlement Order*, asserting that the Compliance Changes, if accepted, would “use the Adjusted PER Strike Price to calculate monthly capacity payments to resources for at least some, and potentially all, of Capacity Commitment Period 9 ... [an] outcome [ ]inconsistent with the Settlement Order.” NEPGA answered NESCOE’s

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<sup>54</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>55</sup> “PIOs” are the Sierra Club, Natural Resources Defense Council (“NRDC”), and Sustainable FERC Project.

protest on April 24. NEPOOL answered NESCOE's protest on April 27 (to clarify that (i) NEPOOL fully supports the compliance changes as filed and (ii) on the disagreements among NESCOE and NEPGA, which are broader than the filed Tariff changes, NEPOOL has not and does not take any substantive position). ConEd, Dominion, Eversource, Exelon (out-of-time), National Grid, NESCOE, and NRG/GenOn filed doc-less interventions. This matter is pending before the FERC. If you have any questions concerning this proceeding, please contact Sebastian Lombardi (860-275-0663; [slombardi@daypitney.com](mailto:slombardi@daypitney.com)).

- **CASPR (ER18-619)**

Rehearing of the FERC's order accepting and ISO-NE's Competitive Auctions with Sponsored Policy Resources ("CASPR") revisions,<sup>56</sup> summarized in more detail in prior Reports, remains pending. Those requests were filed by (i) *NextEra/NRG* (which challenged the RTR Exemption Phase Out); (ii) *ENECOS*<sup>57</sup> (challenging the FERC's findings with respect to the definition of Sponsored Policy Resource and the allocation of CASPR side payment costs to municipal utilities); (iii) *Clean Energy Advocates*<sup>58</sup> (which challenged the CASPR construct in its entirety, asserting that state-sponsored resources should not be subject to the MOPR); and (iv) *Public Citizen* (which also challenged the CASPR construct in its entirety and the CASPR Order's failure to define "investor confidence"). On April 24, ISO-NE answered Clean Energy Advocates' answer. On May 7, the FERC issued a tolling order affording it additional time to consider the requests for rehearing, which remain pending. If you have any questions concerning this proceeding, please contact Dave Doot (860-275-0102; [dtdoot@daypitney.com](mailto:dtdoot@daypitney.com)) or Sebastian Lombardi (860-275-0663; [slombardi@daypitney.com](mailto:slombardi@daypitney.com)).

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

Rehearing remains pending of the FERC's October 6, 2017 order accepting updated FCM Cost of New Entry ("CONE"), Net CONE and Offer Review Trigger Price ("ORTP") values.<sup>59</sup> In accepting the changes, the FERC disagreed with the challenges to ISO-NE's choice of reference technology (gas-fired simple cycle combustion-turbine) and on-shore wind capacity factor (32%). The changes were accepted effective as of March 15, 2017, as requested. On November 6, NEPGA requested rehearing of the *CONE/ORTP Updates Order*. On December 4, 2017, the FERC issued a tolling order providing it additional time to consider NEPGA's request for rehearing of the *CONE/ORTP Updates Order*, which remains pending. If you have any questions concerning this proceeding, please contact Sebastian Lombardi (860-275-0663; [slombardi@daypitney.com](mailto:slombardi@daypitney.com)).

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

Still pending before the FERC is ISO-NE's compliance filing in response to the FERC's August 8, 2016 remand order.<sup>60</sup> In the *2013/14 Winter Reliability Program Remand Order*, the FERC directed ISO-NE to request from Program participants the basis for their bids, including the process used to formulate the bids, and to file with the FERC a compilation of that information, an IMM analysis of that information, and the ISO's recommendation as to the reasonableness of the bids, so that the FERC can further consider the question of

<sup>56</sup> *ISO New England Inc.*, 162 FERC ¶ 61,205 (Mar. 9, 2018) ("*CASPR Order*").

<sup>57</sup> The Eastern New England Consumer-Owned Systems ("ENECOS") are: Braintree Electric Light Department, Georgetown Municipal Light Department, Groveland Electric Light Department, Littleton Electric Light & Water Department, Middleton Electric Light Department, Middleborough Gas & Electric Department, Norwood Light & Broadband Department, Pascoag (Rhode Island) Utility District, Rowley Municipal Lighting Plant, Taunton Municipal Lighting Plant, and Wallingford (Connecticut) Department of Public Utilities. Wellesley Municipal Light Plant, which intervened in this proceeding as one of the ENECOS, did not join in the ENECOS' request for rehearing.

<sup>58</sup> "Clean Energy Advocates" are, collectively the NRDC, Sierra Club, Sustainable FERC Project, CLF, and RENEW Northeast, Inc.

<sup>59</sup> *ISO New England Inc.*, 161 FERC ¶ 61, 035 (Oct. 6, 2017) ("*CONE/ORTP Updates Order*"), *reh'g requested*.

<sup>60</sup> *ISO New England Inc.*, 156 FERC ¶ 61,097 (Aug. 8, 2016) ("*2013/14 Winter Reliability Program Remand Order*"). As previously reported, the DC Circuit remanded the FERC's decision in ER13-2266, agreeing with TransCanada that the record upon which the FERC relied is devoid of any evidence regarding how much of the 2013/14 Winter Reliability Program cost was attributable to profit and risk mark-up (without which the FERC could not properly assess whether the Program's rates were just and reasonable), and directing the FERC to either offer a reasoned justification for the order in ER13-2266 or revise its disposition to ensure that the Program rates are just and reasonable. *TransCanada Power Mktg. Ltd. v. FERC*, 2015 U.S. App. LEXIS 22304 (D.C. Cir. 2015).

whether the Bid Results were just and reasonable.<sup>61</sup> ISO-NE submitted its compliance filing on January 23, 2017, reporting the IMM's conclusion that "the auction was not structurally competitive and a 'small proportion' of the total cost of the program may be the result of the exercise of market power" but that the "vast majority of supply was offered at prices that appear reasonable and that, for a number of reasons, it is difficult to assess the impact of market power on cost." Based on the IMM and additional analysis, ISO-NE recommended that "there is insufficient demonstration of market power to warrant modification of program." In February 13 comments, both TransCanada and the MA AG protested ISO-NE's conclusion and recommendation that modification of the program was unwarranted. TransCanada requested that FERC establish a settlement proceeding where Market Participants could "exchange confidential information to determine what the rates should be" and refunds and "such other relief as may be warranted" provided. On February 28, ISO-NE answered the TransCanada and MA AG protests. On March 10, 2017, TransCanada answered ISO-NE's February 28 answer. This matter is pending before the FERC. If you have any questions concerning these matters, please contact Sebastian Lombardi (860-275-0663; [slombardi@daypitney.com](mailto:slombardi@daypitney.com)).

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

- **Order 842 (Frequency Response) Compliance Filing (ER18-1523)**

The *Order 842 Compliance Changes* remain pending before the FERC. As previously reported, on May 4, 2018, ISO-NE, NEPOOL and the PTO AC filed changes to Schedules 22 and 23 of the ISO-NE OATT to incorporate *Order 842's pro forma* revisions, as well as some conforming modifications to the defined terms and article numbers used in the OATT's *pro forma* LGIA and SGIA, and changes to address the time lag between System Impact Studies and LGIA/SGIA execution ("*Order 842 Compliance Changes*"). A May 15, 2018 effective date (the effective date of *Order 842*) was requested. The *Order 842 Compliance Changes* were supported by the Participants Committee at its May 4, 2018 meeting (Agenda Item # 6). Comments on this filing were due on or before May 25, 2018; none were filed. Dominion filed a doc-less intervention. This matter remains pending before the FERC. 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 FTR FA Changes (ER18-2293)**

On August 24, ISO-NE and NEPOOL jointly filed changes to the Financial Assurance Policy to modify the methodology for calculating the financial assurance ("FA") associated with Financial Transmission Rights ("FTRs"). The changes are to ensure that FA calculation properly account for the increased number of monthly FTR auctions that will be implemented in 2019. ISO-NE asked that an order be issued no later than November 1, 2018 and that the changes themselves become effective on September 17, 2019. The Participants Committee supported these changes at its December 8, 2017 meeting. Comments on this filing are due September 14. Thus far, a doc-less intervention has been filed by NRG. If you have any questions concerning this proceeding, please contact Paul Belval (860-275-0381; [pnbelval@daypitney.com](mailto:pnbelval@daypitney.com)).

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

- **Schedule 21-UI: LCSA: UI/CPV Towantic (ER18-2302)**

On August 24, UI filed under Schedule 21-UI a Localized Costs Sharing Agreement ("LCSA") by and between UI and CPV Towantic LLC ("CPV Towantic"). UI filed the LCSA so that it can recover Towantic's Category B Load Ratio Share of the revenue requirement for UI's Localized Facilities under Schedule 21-UI. A January 1, 2018 effective date was requested. Comments on this filing are due September 14. If you have any questions concerning this matter, please contact Pat Gerity ([pmgerity@daypitney.com](mailto:pmgerity@daypitney.com); 860-275-0533).

<sup>61</sup> 2013/14 Winter Reliability Program Remand Order at P 17.

- **Schedule 21-NEP: GMP G-33 Circuit Support Agreement (ER18-2174)**

On August 6, New England Power Company (“NEP”) filed under Schedule 21-NEP a G-33 Circuit Support Agreement (“Support Agreement”) with Green Mountain Power (“GMP”). Under the Support Agreement, GMP agrees to pay a *pro rata* (14.3%) share of NEP’s expenses associated with the G-33 circuit, in the form of a prorated Direct Assignment Facilities Charge, similar to the predecessor agreement being succeeded by the Support Agreement. An August 1, 2018 effective date was requested. Comments on this filing were due August 27; 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).

- **Schedule 21-NEP: IA Cancellation: Superseded NEP/Wheelabrator Millbury IA (ER18-1861)**

On August 21, the FERC accepted a notice of cancellation of a 2013 Interconnection Agreement (“IA”) between NEP and Wheelabrator Millbury.<sup>62</sup> The IA was superseded by a conforming LGIA among NEP, ISO-NE and Wheelabrator Millbury, which is included in NEP’s and ISO-NE’s Electric Quarterly Reports (“EQRs”). The notice was accepted effective as of August 27, 2018, as requested. Unless the August 21 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-EM: BHD Tax Law & Settlement Changes (ER18-1213)**

As previously reported, Emera Maine filed changes to the Emera Maine, Bangor-Hydro District (“BHD”) Formula Rate on March 29, 2018 to reflect: (i) the reduction to the federal corporate income tax rate resulting from the 2017 Tax Law and the 2017 Annual Update Settlement Agreement and (ii) recent IRS guidance regarding tax normalization accounting for ratemaking. Comments on this filing were due on or before April 19, 2018. On April 19, MPUC requested that the FERC accept the filing, but subject to refund and to hearing and settlement judge procedures. MPUC stated that, although it agreed conceptually that the tariff changes were necessary to address recent changes in the tax law, it identified that some questions remain regarding the implementation of the concept and asked for an opportunity through settlement and hearings if necessary to better understand Emera Maine’s proposed changes and to ensure that Emera Maine’s ratepayers receive the full benefit of the lower tax rate resulting from the 2017 Tax Law. MPUC’s request was supported by a motion from the Maine Officer of the Public Advocate (“MOPA”).

**Deficiency Letter I.** On May 14, the FERC issued a deficiency letter requiring Emera Maine to file responses providing additional information. Given the similarities with Emera Maine’s MPD OATT Changes (ER18-1244) (see Section XI below), the deficiency letter addressed both filings. Emera Maine filed its responses on June 13, re-setting the 60-day clock for FERC action. On July 17, Emera Maine answered the comments submitted by the MPUC July 2 in ER18-1244.

**Deficiency Letter II.** On August 10, the FERC issued a deficiency letter informing Emera Maine that its June 13 deficiency response was deficient and that additional information is required in order to process the filing. Accordingly, Emera Maine was directed to file a response in both this proceeding and in ER18-1244, given the similarity of the proceedings, to the following question on or before September 10:

In its Deficiency Response, Emera Maine states that it intends to amortize unprotected excess/deficient ADIT amounts over ten years, and that this amortization period is consistent with the methodology recently proposed by Emera Maine in its distribution rate case before the Maine Public Utilities Commission. Please further specify the nature of the underlying assets associated with these unprotected excess/deficient ADIT amounts. In addition, recognizing that the amortization period is consistent with the methodology proposed in the state

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<sup>62</sup> *New England Power Co.*, Docket No. ER18-1861 (Aug. 21, 2018) (unpublished letter order).

proceeding, please explain why Emera Maine's proposal to use an amortization period of ten years is just and reasonable.

Emera Maine filed its response on September 10, re-setting the 60-day clock for FERC action. Comments on Emera Maine's September 10 response are due on or before October 1, 2018.

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

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

The MPS Merger Cost Recovery Settlement, filed by Emera Maine on May 8, 2018 to resolve all issues pending before the FERC in the consolidated proceedings set for hearing in the *MPS Merger-Related Costs Order*,<sup>63</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-EM of the BHD OATT and \$260,000 under the MPD OATT. Comments on the MPS Merger Cost Recovery Settlement were due on or before May 29, 2018; none were filed. On June 11, Settlement Judge Dring<sup>64</sup> certified the MPS Merger Cost Recovery Settlement to the FERC.<sup>65</sup> The MPS Merger Cost Recovery Settlement is pending before the FERC. If you have any questions concerning these matters, please contact Pat Gerity ([pmgerity@daypitney.com](mailto:pmgerity@daypitney.com); 860-275-0533).

## VII. NEPOOL Agreement/Participants Agreement Amendments

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

On August 13, NEPOOL filed changes to the NEPOOL Agreement (the "Amendments") implemented by the One Hundred Thirty-Second Agreement Amending New England Power Pool Agreement ("132nd Agreement"). The Amendments make clear that NEPOOL *membership* is not open to Press. Specifically, the Amendments prohibit Press from becoming a NEPOOL Participant or the designated representative of a Participant. A November 1, 2018 effective date was requested. The 132nd Agreement was approved in balloting following the Summer Meeting. Comments on this filing are due September 14.<sup>66</sup>

<sup>63</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>64</sup> ALJ John Dring was the settlement judge for these proceedings. There were five settlement conferences: three in 2016 and two in 2017. In his most recent May 24, 2018 status report, Judge Dring indicated that the parties reached a settlement in principle, had filed a joint offer of settlement on May 8 ("*MPS Merger Cost Recovery Settlement*"), and recommended that settlement judge procedures be continued. The Settlement remains pending before the FERC and settlement judge procedures, for now, have not been terminated.

<sup>65</sup> *Emera Maine and BHE Holdings*, 163 FERC ¶ 63,018 (June 11, 2018).

<sup>66</sup> The FERC initially noticed a Sep. 4 comment date. Public Citizen requested a 30-day extension of that deadline. NEPOOL responded to that request asking that, in any action the FERC might take in response to Public Citizen's request, it preserve the opportunity for full consideration of any appropriate responses prior to any final determination. NEPOOL offered to defer the requested effective date for the Amendments as necessary. On Aug. 22, the FERC granted a 10-day extension of time, to Sep. 14, for comments.

Thus far, protests have been submitted by UCS, the New England Professional Chapter of the Society of Professional Journalists (“NE SPJ”), and RTO Insider. In justifying their position that the Amendments should be rejected, UCS suggested that “Press participation in NEPOOL improves our collective problem-solving abilities, not reduces them.” NE SPJ argues that “not allowing reporters access to public policy debates that will determine changes to the electricity markets ... is doing a disservice to energy consumers.” NEPOOL submitted a preliminary response to the UCS and NE SPJ protests on September 6, indicating that its full response will be submitted on October 1. As its comments, RTO Insider submitted a copy of its Complaint (see EL18-196, Section I above). Bill Short filed a protest on September 11. In addition, doc-less interventions have been submitted by Avangrid, ConEd, NH OCA, Public Citizen, and Reporters Committee for Freedom of Press, and some of these parties can be expected to file comments by the September 14 comment deadline. If you have any questions concerning this proceeding, please contact Pat Gerity (860-275-0533; [pmgerity@daypitney.com](mailto:pmgerity@daypitney.com)), Dave Doot (860-275-0102; [dtdoot@daypitney.com](mailto:dtdoot@daypitney.com)), or Sebastian Lombardi (860-275-0663; [slombardi@daypitney.com](mailto:slombardi@daypitney.com)).

## VIII. Regional Reports

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

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

- **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>67</sup> and *531-B*<sup>68</sup> also remains pending. If there are questions on this matter, please contact Pat Gerity (860-275-0533; [pmgerity@daypitney.com](mailto:pmgerity@daypitney.com)).

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

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

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

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

- **Capital Projects Report - 2018 Q2 (ER18-2204)**

On August 10, ISO-NE filed its Capital Projects Report and Unamortized Cost Schedule covering the second quarter (“Q2”) of calendar year 2018 (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) Energy Management Platform 3.2 Upgrade - Part I (\$5.2 million); (ii) External Transaction Tool (\$1.47million); and (iii) Annual Reconfiguration Transactions (\$1.015 million). One project with a significant change was the CASPR Project (2018 Budget decrease of \$515,000, \$200,000 reallocated to 2019). Comments on this filing are due on or before August 31. NEPOOL filed a doc-less intervention on August 20 and comments supporting the filing on August 28. This matter is pending before the FERC. If you have any questions concerning this matter, please contact Paul Belval (860-275-0381; [pnbelval@daypitney.com](mailto:pnbelval@daypitney.com)).

<sup>67</sup> *Martha Coakley, Mass. Att’y Gen.*, 149 FERC ¶ 61,032 (Oct. 16, 2014) (“*Opinion 531-A*”).

<sup>68</sup> *Martha Coakley, Mass. Att’y Gen.*, *Opinion No. 531-B*, 150 FERC ¶ 61,165 (Mar. 3, 2015) (“*Opinion 531-B*”).

## IX. Membership Filings

- **September 2018 Membership Filing (ER18-2371)**

On August 31, NEPOOL requested that the FERC accept, effective September 1, 2018, (i) the memberships of Able Grid Infrastructure Holdings (Provisional Member Group Seat); BioUrja Power (Supplier Sector); Interconnect Energy Storage (Provisional Member Group Seat); Marathon Power (Supplier Sector); MP2 Energy NE [Related Person to Shell Energy North America (Supplier Sector)]; New England Battery Storage [Related Person to Energy Management Inc. (Generation Sector Group Seat)]; NN8 [Related Person to Solea Energy (Supplier Sector)]; Stonepeak Kestrel Energy Marketing (Supplier Sector); Tidal Energy Marketing (Supplier Sector); Vineyard Wind [Related Person to Avangrid Companies (Transmission Sector)]; and Woods Hill Solar [Related Person to CHI Power Marketing and its Related Person EnerNOC AR Sector]; (ii) the termination of the Participant status of Bloom Energy [Related Person to Yellow Jacket Energy, which moves to the Supplier Sector]; and (iii) the change to the name of Palmco Power MA, LLC to add its “d/b/a” “Indra Energy”. Comments on this filing are due on or before September 21.

- **August 2018 Membership Filing (ER18-2116)**

On September 11, the FERC accepted (i) the memberships of AM Trading Solutions (Supplier Sector); Clear River Energy ([Related Person to Invenergy Energy Management] Generation Sector); EDP Renewables North America ([Related Person to Marble River *et al.*] Supplier Sector); Empire Generating (Supplier Sector); and Village of Hyde Park (VT) Electric Department (Publicly Owned Entity Sector); and (ii) the termination of the Participant status of Entrust Energy East, Inc. (Supplier Sector); and Torofino Trading, LLC (Supplier Sector).

- **July 2018 Membership Filing (ER18-1910)**

On August 20, the FERC accepted (i) the memberships of Grid Power Direct, LLC (Supplier Sector) and Sperian Energy Corp. (Supplier Sector); and (ii) the name change of Central Rivers Power MA, LLC (f/k/a Nautilus Hydro, LLC).

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

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

- **Revised Reliability Standard: BAL-002-3 (RD18-7)**

On August 17, NERC filed for approval changes to Reliability Standard BAL-002-3 (Disturbance Control Performance – Contingency Reserve for Recovery from a Balancing Contingency Event), associated implementation plan, and retirement of the currently-effective version of the revised Standard (BAL-002-2). Specifically, BAL-002 has been revised to require an entity seeking to avail itself of the exemption in Requirement R1.3<sup>69</sup> “to obtain an extension of the 15-minute [Area Control Error (“ACE”)] recovery period by informing the reliability coordinator of the circumstances and providing it with an ACE recovery plan and target time period.” BAL-002 has also been clarified to make clear that communication with the Reliability Coordinator should proceed in accordance with Energy Emergency Alert procedures within the EOP Reliability Standard. Comments on this filing were due on or before September 10; none were filed. This matter is pending before the FERC.

- **NOPR: Revised Reliability Standards: CIP-005-6, CIP-010-3, CIP-013-1 (RM17-13)**

The *Supply Chain Risk Management Standards NOPR* remains pending before the FERC. The January 18, 2018 NOPR proposes to approve revised CIP Reliability Standards -- CIP-005-6 (Cyber Security – Electronic Security

<sup>69</sup> Requirement R1 Part 1.3 provides a limited exemption from the Balancing Authority’s or Reserve Sharing Group’s obligation to restore Reporting ACE within the Contingency Event Recovery Period if the entity is recovering from an emergency event under NERC Emergency Preparedness and Operations (“EOP”) Reliability Standards and meets certain other qualifications.

Perimeter(s)), CIP-010-3 (Cyber Security – Configuration Change Management and Vulnerability Assessments) and CIP-013-1 (Cyber Security – Supply Chain Risk Management) (together, the “Supply Chain Cybersecurity Risk Management Changes”).<sup>70</sup> The Supply Chain Cybersecurity Risk Management Changes are designed to further mitigate cybersecurity risks associated with the supply chain for BES Cyber Systems, consistent with *Order 829*. With respect to the proposed Reliability Standards’ implementation plan and effective date, the FERC proposed to reduce the implementation period as proposed by NERC to the first day of the first calendar quarter that is 12 months following the effective date of a FERC order. In addition, the FERC proposed to direct NERC (i) to develop modifications to the CIP Reliability Standards to include Electronic Access Control and Monitoring Systems (“EACMS”) associated with medium and high impact BES Cyber Systems within the scope of the supply chain risk management Reliability Standards; (ii) to evaluate the cyber security supply chain risks presented by Physical Access Control Systems (“PACS”) and Protected Cyber Assets (“PCAs”) in the study of cyber security supply chain risks requested by the NERC Board of Trustees (“BOT”) in its resolutions of August 10, 2017; and (iii) to file the BOT-requested study’s interim and final reports with the FERC upon their completion.

Comments on the *Supply Chain Risk Management Standards NOPR* were due on or before March 26, 2018,<sup>71</sup> and were filed by over 20 parties, including NERC, ISO/RTO Council, EEI, Joint Trade Associations,<sup>72</sup> and the MPUC. On May 11, the American Public Power Association (“APPA”) and National Rural Electric Cooperative Association (“NRECA”) submitted their white paper, “Managing Cyber Supply Chain Risk – Best Practices for Small Entities” for consideration in this proceeding. On September 7, 2018, NERC submitted an interim report related to supply chain risk management issues as indicated in the *Supply Chain Risk Management Standards NOPR*. This matter is pending before the FERC.

- **Revised GMD Research Work Plan (RM15-11)**

In accordance with *Order 830*,<sup>73</sup> NERC submitted on April 19, 2018, a revised work plan for research on topics related to geomagnetic disturbances (“GMD”) and their impacts on the reliability of the Bulk-Power System (“BPS”). The Revised Plan demonstrates the improvements that have been made (the work plan was last accepted in October 2017) as a result of further work on the plan and with the benefit of early experience implementing some of the research activities. Specifically, the Revised Plan includes additional background information and specificity regarding the research activities that will be performed under the plan’s nine broad work categories and an updated project timeline specifying the anticipated completion dates for each of the research activities. NERC encouraged anyone interested in NERC’s GMD research activities to participate in GMD Task Force meetings, which are open to the public, with remote participation available. Comments on the Revised Plan were due on or before May 21 and were filed by Foundation for Resilient Societies (“FRS”) and D. Bardin, who also filed additional comments on June 7. This matter is pending before the FERC.

## XI. Misc. - of Regional Interest

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

On August 10, VTransco requested FERC authorization for its acquisition of the ownership shares of the Burlington and Stowe Electric Departments in the Highgate Transmission Facility.<sup>74</sup> VTransco stated that, after the

<sup>70</sup> *Supply Chain Risk Mgmt. Rel. Standards*, 162 FERC ¶ 61,044 (Jan. 18, 2018) (“*Supply Chain Risk Management Standards NOPR*”).

<sup>71</sup> *Supply Chain Risk Mgmt. Rel. Standards NOPR* was published in the *Fed. Reg.* on Jan. 25, 2018 (Vol. 83, No. 17) pp. 3,433-3,442.

<sup>72</sup> For purposes of this proceeding, “Joint Trade Associations” are the American Public Power Association (“APPA”), the Electricity Consumers Resource Council (“ELCON”), the Large Public Power Council (“LPPC”), the National Rural Electric Cooperative Association (“NRECA”), and the Transmission Access Policy Study Group (“TAPS”).

<sup>73</sup> *Rel. Standard for Trans. System Planned Performance for Geomagnetic Disturbance Events*, Order No. 830, 156 FERC ¶ 61,215 (Sep. 22, 2016) (“*Order 830*”).

<sup>74</sup> The Highgate Transmission Facility is the United States portion of a line that extends from a site near Bedford Substation, in Québec, to a substation in Highgate, Vermont, crossing the International Boundary near Saint Armand, Québec, and Franklin, Vermont, and provides an interconnection between Hydro-Québec TransÉnergie and the transmission system in Vermont owned by VTransco.



close of the Transaction, VTransco will be the sole owner of the Highgate Transmission Facility. Comments on this application were due on or before August 31; none were filed. Avangrid submitted a doc-less intervention. This matter is pending before the FERC.

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

On August 3, Linde Energy Services (“Linde”) requested FERC authorization for a transaction, expected to be a condition to FTC approval of the Linde AG/Praxair Inc. merger, pursuant to which Linde AG will divest Linde’s parent, Linde North America, Inc. to an unaffiliated third-party. Comments on this application were due on or before August 24, 2018; none were filed. This matter is pending before the FERC.

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

On August 2, Wheelabrator Technologies (“WTI”) requested FERC authorization for the disposition of up to 49% of the indirect ownership interests in its indirectly held public utility subsidiaries resulting from an initial public offering of up to approximately 49% of WTI’s common stock. Comments on this application were due on or before August 23, 2018; none were filed. This matter is pending before the FERC.

- **203 Application: National Grid Green Homes (Sunrun) (EC18-120)**

On August 17, the FERC authorized<sup>75</sup> National Grid to acquire from Sunrun Inc. (“Sunrun”) rights to participate in the “grid services” activities<sup>76</sup> of certain rooftop solar facilities owned by Sunrun, in which National Grid currently holds certain non-voting securities. On August 22, National Grid filed a notice of consummation. Reporting on this proceeding has concluded.

- **203 Application: NEP (Vuelta and Old Wardour Interconnection Assets) (EC18-85)**

On August 1, the FERC authorized the acquisition by New England Power (“NEP”) from Vuelta Solar, LLC certain interconnection assets associated with the 9.88 MW Vuelta and Old Wardour solar facilities located in East Brookfield, Massachusetts.<sup>77</sup> Among other conditions, the order required notice within 10 days of the acquisition’s consummation, which has not yet been filed.

- **203 Application: NRG/GIP III Zephyr Acquisition Partners (EC18-61)**

On August 31, GIP III Zephyr Acquisition Partners, L.P. (“Buyer”) consummated the FERC-authorized transaction<sup>78</sup> whereby Buyer acquired, among other things, interests held by NRG in NRG Yield, NRG Renew and their public utility subsidiaries and Carlsbad. As a result of the acquisition, GenConn remains a Related Person to UI, becomes a Related Person of CPV Towantic, and is no longer an NRG Related Person. Clearway Energy Group (f/k/a as Zephyr Renewables) filed a notice of consummation of the transaction on September 10. Reporting on this proceeding is now concluded.

- **203 Application: PSNH/HSE Hydro NH (EC18-42)**

On February 28, the FERC authorized<sup>79</sup> the acquisition by HSE Hydro NH AC, LLC (“HSE Hydro NH”)<sup>80</sup> of PSNH’s portfolio of hydroelectric generation assets (the “PSNH Hydro Transaction”).<sup>81</sup> On August 27, HSE Hydro

<sup>75</sup> *National Grid USA*, 164 FERC ¶ 62,093 (Aug. 17, 2018) (unpublished letter order).

<sup>76</sup> “Grid services” includes, but is not limited to, providing resource adequacy, operating reserves, and load relief, energy services such as demand reduction, energy injection, and energy consumption, and ancillary services such as primary and secondary frequency response, frequency regulation, and voltage support.

<sup>77</sup> *New England Power Co.*, 164 FERC ¶ 62,058 (Aug 1, 2018).

<sup>78</sup> *NRG Yield, Inc., NRG Renew LLC and Carlsbad Energy Center LLC*, 163 FERC ¶ 62,101 (May 16, 2018).

<sup>79</sup> *Pub. Srv. Co. of NH and HSE Hydro NH AC, LLC*, 162 FERC ¶ 62,122 (Feb. 28, 2018).

<sup>80</sup> HSE Hydro NH is a Related Person to Generation Sector Group Seat members Central Rivers Power MA and Pawtucket Power.

<sup>81</sup> PSNH’s hydro portfolio (61.8 MW) includes the following facilities: Smith (15.78 MW); Amoskeag (17.5 MW); Garvins Falls/Hooksett (7.09 MW); Ayers Island (8.94 MW); Eastman Falls (6.1 MW); Jackman (3.54 MW); Gorham (1.68 MW); Canaan (1.17 MW).

NH filed a notice that the acquisition was consummated on August 26. Reporting on this proceeding has concluded.

- **203 Application: GenOn Reorganization (EC17-152)**

On October 31, 2017, the FERC approved certain conversions of GenOn notes into common equity of, and corporate structure changes that will result in, a “reorganized GenOn”.<sup>82</sup> Reorganized GenOn will emerge as a result of a plan of reorganization to be confirmed by the United States Bankruptcy Court for the Southern District of Texas in connection with GenOn’s Chapter 11 restructuring (the “Restructuring”). As a result of the Restructuring, Reorganized GenOn will likely not be a subsidiary of, and GenOn Energy Management will thus likely no longer be a Related Person to, NRG. Among other conditions, the order required notice within 10 days of the consummation of the transaction. Subject to that notice, this proceeding will be concluded.

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

On June 29, the FERC issued an order (“*PJM Order*”)<sup>83</sup> regarding out-of-market support affecting the PJM capacity market.<sup>84</sup> Opening with the statement that “the integrity and effectiveness of the capacity market administered by [PJM] have become untenably threatened by out-of-market payments provided or required by certain states for the purpose of supporting the entry or continued operation of preferred generation resources,” the *PJM Order* determined that the PJM Tariff is currently unjust and unreasonable, rejected PJM’s Section 205 Filing, granted in part Calpine’s Complaint, and established a paper hearing to resolve the “price-suppressive” effects of out-of-market support for certain resources. Commissioners LaFleur and Glick both dissented, and Commissioner Powelson wrote a separate concurrence.

In the *PJM Order*, the FERC found “that it has become necessary to address the price suppressive impact of resources receiving out-of-market support.” The FERC agreed with Calpine and PJM that changes to the PJM Tariff were required, but did not accept the changes proposed in the Calpine Complaint or the PJM Filing, finding that neither had been shown to be just and reasonable, and not unduly discriminatory or preferential. The majority stated that it was unable to determine, based on the record of either proceeding, the just and reasonable rate to replace the rate in PJM’s Tariff. The *PJM Order* therefore found the PJM Tariff unjust and unreasonable, granted the Calpine Complaint, in part, and *sua sponte* initiated a new FPA section 206 proceeding (EL18-178), consolidating the record of the two earlier proceedings, and setting for paper hearing the issue of how to address a proposed alternative put forth in the *PJM Order*,<sup>85</sup> which would modify two existing aspects of the PJM Tariff, “or any other proposal that may be presented.”

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<sup>82</sup> *GenOn Energy Inc.*, 161 FERC ¶ 62,063 (Oct. 31, 2017).

<sup>83</sup> *Calpine Corp. et al.*, 163 FERC ¶ 61,236 (June 29, 2018), *clarif. and/or reh’g requested*.

<sup>84</sup> The *PJM Order* addressed two separate, but related proceedings. The first, EL16-49, was initiated by a complaint originally filed by Calpine, joined by additional generation entities (“Calpine Complaint”) on March 21, 2016, and later amended on January 9, 2017. The Calpine Complaint argued that PJM’s MOPR was unjust and unreasonable because it did not address the impact of existing resources receiving out-of-market payments on the capacity market, and proposed interim tariff revisions that would extend the MOPR to a limited set of existing resources. The Calpine Complaint also requested the FERC to direct PJM to conduct a stakeholder process to develop and submit a long-term solution. The second proceeding was PJM’s filing of its proposed revisions to its Tariff, pursuant to section 205 of the FPA in ER18-1314 (“PJM Filing”). The PJM Filing consisted of two alternate proposals designed to address the price impacts of state out-of-market support for certain resources. The first approach, preferred by PJM but not supported by its stakeholders, consisted of a two-stage annual auction, with capacity commitments first determined in stage one of the auction and the clearing price set separately in stage two (“Capacity Repricing”). The second alternative approach, proposed in the event that the FERC determined that Capacity Repricing was unjust and unreasonable, would have revised PJM’s MOPR to mitigate capacity offers from both new and existing resources, subject to certain proposed exemptions (“MOPR-Ex”).

<sup>85</sup> The proposed alternative approach would (i) modify PJM’s MOPR such that it would apply to new and existing resources that receive out-of-market payments, regardless of resource type, but would include few to no exemptions; and (ii) in order to accommodate state policy decisions and allow resources that receive out-of-market support to remain online, establish an option in PJM’s Tariff that would allow, on a resource-specific basis, resources receiving out-of-market support to choose to be removed from the PJM capacity market, along with a commensurate amount of load, for some period of time. That option, which is similar in concept to the Fixed Resource

Following an August 22 notice of extension of time, interested parties are now invited to submit their initial round of testimony, evidence, and/or argument by October 2, 2018. Reply testimony, evidence, and/or argument may be submitted on or before November 6, 2018. The FERC committed to make every effort to issue an order establishing the just and reasonable replacement rate no later than January 4, 2019. The FERC also established a refund effective date of March 21, 2016, the date of the original Calpine Complaint in EL16-49.

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

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

On June 7, Kathryn Leonard, an individual ratepayer and councilwoman for the City of Newport RI (“Complainant”), filed a complaint against the RI PUC, National Grid, and Deepwater Wind Block Island (“Deepwater Wind”) seeking, among other things, declaratory and injunctive relief barring the continued implementation of the Deepwater Wind Rhode Island PPA and prohibiting the RI PUC from “designating renewable power costs as ‘distribution’ costs in any way that prevents consumers from the benefits of purchasing power from competitive sources”. Following a partially granted request for an extension of time by the RI PUC, answers to and comments on this Complaint were due on or before July 13. Answers were filed by Deepwater Wind, National Grid and the RI PUC. On July 23, Complainant objected separately to each of the answers. This matter is pending before the FERC. If you have any questions concerning this matter, please contact Pat Gerity ([pmgerity@daypitney.com](mailto:pmgerity@daypitney.com); 860-275-0533).

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

On May 31, in a proceeding that could impact potentially impact New England’s markets, CPV Power Holdings, L.P. (“CPV”), Calpine Corporation (“Calpine”), and Eastern Generation, LLC (“Eastern Generation”) (collectively, “PJM MOPR Complainants”) filed a complaint requesting that the FERC protect PJM’s Reliability Pricing Model (“RPM”) market from below-cost offers for resources receiving out-of-market subsidies by requiring PJM to adopt a “Clean MOPR” (i.e. a MOPR applicable to all subsidized resources and without categorical exemptions like those in PJM’s MOPR-Ex proposal). PJM MOPR Complainants state that the Complaint offers the FERC a procedural vehicle to require adoption of the “Clean MOPR” that Complainants opine is not otherwise available in pending FERC proceedings (EL16-49 (PJM MOPR Complaint)<sup>86</sup> and ER18-1314 (PJM’s pending MOPR changes)). They assert that the “Clean MOPR” is required to effectively address the impacts of state subsidy programs, and is consistent with the FERC’s MOPR principles identified in the *CASPR Order*. Comments on the PJM Clean MOPR Complaint were due on or before June 20. PJM’s answer, as well as comments and protests from over 25 parties were filed. Given its potential to impact New England, NEPOOL filed a doc-less motion to intervene. More than 30 other parties also intervened. This matter is pending before the FERC. If you have any questions concerning this proceeding, please contact Sebastian Lombardi (860-275-0663; [slombardi@daypitney.com](mailto:slombardi@daypitney.com)) or Sunita Paknikar (202-218-3904; [spaknikar@daypitney.com](mailto:spaknikar@daypitney.com)).

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Requirement (“FRR”) that currently exists in PJM’s Tariff, is referred to as the “FRR Alternative.” Unlike the existing FRR construct, the FRR Alternative would apply only to resources receiving out-of-market support. Both aspects of the proposed replacement rate, along with a series of questions that need to be addressed, are more fully explained and raised in the *PJM Order*.

<sup>86</sup> The “PJM MOPR Complaint” seeks a FERC order expanding the PJM MOPR in the Base Residual Auction for the 2019/2020 Delivery Year to prevent the artificial suppression of prices in the Reliability Pricing Model (“RPM”) market by below-cost offers for existing resources whose continued operation is being subsidized by State-approved out-of-market payments. Complainants in the MOPR Complaint are Calpine, Dynegy, Eastern Generation, Homer City Generation, the NRG Companies, Carroll County Energy, C.P. Crane, the Essential Power PJM Companies, GDF SUEZ Energy Marketing NA, Oregon Clean Energy, and Panda Power Generation Infrastructure Fund.

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

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

If you have any questions concerning these proceedings, please contact Dave Doot (860-275-0102; [dtodoot@daypitney.com](mailto:dtodoot@daypitney.com)) or Sebastian Lombardi (860-275-0663; [slombardi@daypitney.com](mailto:slombardi@daypitney.com)).

- **IAs: PSNH/HSE Hydro NE Subs (ER18-2294 et al.)**

On August 24, Eversource filed two-party small generator interconnection agreements ("IAs") that relate to the former PSNH Hydro Facilities<sup>87</sup> that were transferred to HSE Hydro NE on August 26. The executed IAs allow for the continued interconnection of the Hydro Facilities, with no change in interconnection service to be provided by PSNH. The IAs are two-party agreements, each between the Interconnection Customer and PSNH. ISO-NE is not a party to the IAs because the Hydro Facilities are long-standing, existing, and were not modified in connection with the transfers. Eversource requested an August 26, 2018 effective date for the IAs (the date the Hydro Facilities were transferred to HSE Hydro NE). Comments on the IA filings are due on or before September 14. If you have any questions concerning these matters, please contact Pat Gerity ([pmgerity@daypitney.com](mailto:pmgerity@daypitney.com); 860-275-0533).

- **UI/HQUS Phase I/II HVDC-TF Service Agreement (ER18-2286)**

On August 23, UI filed a new Phase I/II HVDC-TF Service Agreement with HQUS to allow the continuation without interruption of service provided pursuant to an existing agreement between NEP and HQUS that conforms to the pro forma Phase I/II HVDC-TF Service Agreement set forth in Attachment A of Schedule 20A—Common to the ISO-NE OATT. The Agreement is being filed as "non-conforming" as it was unclear whether the FERC would deem conforming the provisions included in the Agreement that accommodate HQUS' exercise of its right of first refusal to extend its transmission customer service rights beyond the five-year term of its currently effective Service Agreement with UI pursuant to Schedule 20A (while taking into account the fact that UI currently only has contractual rights allowing it to sell service over the Phase I/II HVDC-TF through October 31, 2020). A January 1, 2018 effective date was requested. Comments, if any, on this filing are due on or before September 13. If you have any questions concerning this matter, please contact Pat Gerity ([pmgerity@daypitney.com](mailto:pmgerity@daypitney.com); 860-275-0533).

- **TSAs: New England Clean Energy Connect (ER18-2261 et al.)**

On August 20, CMP filed seven bi-lateral, cost-based transmission service agreements ("TSAs") with the participants<sup>88</sup> that will fund the construction, operation and maintenance of CMP's portion of a the NECEC Transmission Line.<sup>89</sup> The TSAs set forth the rates, terms and conditions under which CMP will provide transmission service over the NECEC Transmission Line. In the filings, CMP requested the following transmission rate incentives: (i) recovery of 100% of prudently incurred costs in the event that the NECEC Transmission Line is abandoned as a result of changes to Massachusetts law or regulations, and (ii) for single-issue ratemaking with respect to the TSA filings. CMP requested that the TSAs become effective as of October 20, 2018. Comments on this filing were due on or before September 10, 2018; none were filed. National Grid,

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<sup>87</sup> The "Hydro Facilities" are the Amoskeag, Ayers Island, Canaan, Eastman Falls, Hooksett, Garvins Falls, Gorham, Jackman, and Smith Stations.

<sup>88</sup> Eversource, HQUS, National Grid, Unitil.

<sup>89</sup> The "NECEC Transmission Line" is a new, high-voltage direct current ("HVDC") transmission line that will be capable of delivering 1,200 MW of clean energy from Québec to the New England Control Area. CMP plans to construct, own, operate, and maintain approximately 145.3 miles of ±320 kV overhead HVDC transmission lines that will run between the U.S. border in Maine and a new HVDC converter station approximately 1.6 miles from the existing Larrabee Road Substation in Lewiston, Maine.

NSTAR and HQUS filed doc-less interventions. 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).

- **TSAs: Emera Maine-ReEnergy Fort Fairfield (ER18-2124) and ReEnergy Ashland (ER18-2123)**

On August 1, Emera Maine filed non-conforming service agreements for non-firm point-to-point transmission service by and between Emera Maine and ReEnergy Fort Fairfield LLC (ER18-2124) and ReEnergy Ashland LLC (ER18-2123). The agreement provide for a discounted rate of \$0/MW-mo. under Emera Maine's MPD OATT for the October 1, 2018, through December 31, 2020 period. Emera Maine stated that among the facts leading to the agreements were: (i) the companies provide much-needed jobs in Northern Maine; (ii) the companies indicated that a substantial discount is one element necessary for them to remain in business, particularly in view of the pancaked transmission charges that must be paid to move energy from their facilities to the ISO-NE market; (iii) encouragement to support State of Maine efforts to keep biomass facilities in operation; and (iv) the precedent of CMP providing a \$0 rate for point-to-point service. An October 1, 2018 effective date was requested. Comments on these filings were due on or before August 22, 2018. Maine Governor LePage submitted a protest asking the FERC to deny Emera Maine's request. Interventions were filed by the Maine Public Utilities Commission ("MPUC") and the Northern Maine Independent System Administrator ("NMISA"). These matters are pending before the FERC. If you have any questions concerning either of these matters, please contact Pat Gerity ([pmgerity@daypitney.com](mailto:pmgerity@daypitney.com); 860-275-0533).

- **Emera/MPD OATT Order 842 Compliance Filing (ER18-1569)**

Emera Maine's May 11 filing of changes to the Large and Small Generator Interconnection Procedures and Agreements in the Maine Public District Open Access Transmission Tariff for (the "MPD OATT") in compliance with *Order 842* remains pending. A May 15, 2018 effective date (the effective date of *Order 842*) was requested. Comments on this filing were due on or before June 1; none were filed. If you have any questions concerning this matter, please contact Pat Gerity ([pmgerity@daypitney.com](mailto:pmgerity@daypitney.com); 860-275-0533).

- **MPD OATT Changes (ER18-1244)**

As previously reported, On March 30, 2018, Emera Maine filed changes to Attachment J of the MPD OATT to reflect the reduction to the marginal corporate income tax rate resulting from the 2017 Tax Law and the 2017 Annual Update Settlement Agreement. Comments on this filing were due on or before April 20, 2018. On April 20, MPUC requested that the FERC accept the filing, but subject to refund and to hearing and settlement judge procedures. MPUC stated that, although it agreed conceptually that the tariff changes were necessary to address recent changes in the tax law, it identified that some questions remain regarding the implementation of the concept and asked for an opportunity through settlement and hearings if necessary to better understand Emera Maine's proposed changes and to ensure that Emera Maine's ratepayers receive the full benefit of the lower tax rate resulting from the 2017 Tax Law. MPUC's request was supported by motions from MOPA and from the Maine Customer Group.<sup>90</sup> On May 4, Emera Maine answered the MPUC, MOPA and MCG. MCG answered that May 4 answer on May 10.

**Deficiency Letter I.** On May 14, the FERC issued a deficiency letter requiring Emera Maine to file responses providing additional information. Given the similarities with Emera Maine's Schedule 21-EM: BHD Tax Law & Settlement Changes (ER18-1213) (see Section VI above), the deficiency letter addressed both filings. Emera Maine filed its responses to the deficiency letter on June 13, re-setting the 60-day clock for FERC action. Comments on the deficiency letter response were filed by MCG and the MPUC. On June 21, MCG protested the deficiency letter responses and reiterated its request that the FERC "accept the March 30 Filing by Emera Maine and allow the tariff changes to go into effect on June 1, 2018, subject to refund and subject to hearing and settlement judge procedures." On July 2, the MPUC protested the responses and again

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<sup>90</sup> For purposes of this proceeding, Maine Customer Group ("MCG") consists of: Houlton Water Co., Van Buren Light and Power District and Eastern Maine Electric Coop., Inc.

requested that the matter be set for hearing and settlement judge procedures. Emera Maine answered the MPUC protest on July 17. MCG answered the Emera July 17 answer on July 31.

**Deficiency Letter II.** On August 10, the FERC issued a deficiency letter informing Emera Maine that its June 13 deficiency response was deficient and that additional information is required in order to process the filing. Accordingly, Emera Maine was directed to file a response in both this proceeding and in ER18-1244, given the similarity of the proceedings, to the following question on or before September 10:

In its Deficiency Response, Emera Maine states that it intends to amortize unprotected excess/deficient ADIT amounts over ten years, and that this amortization period is consistent with the methodology recently proposed by Emera Maine in its distribution rate case before the Maine Public Utilities Commission. Please further specify the nature of the underlying assets associated with these unprotected excess/deficient ADIT amounts. In addition, recognizing that the amortization period is consistent with the methodology proposed in the state proceeding, please explain why Emera Maine's proposal to use an amortization period of ten years is just and reasonable.

Emera Maine filed its response on September 10, re-setting the 60-day clock for FERC action. Comments on Emera Maine's September 10 response are due on or before October 1, 2018.

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

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

As previously reported, the FERC issued an order<sup>91</sup> on June 18, 2018 directing Footprint Power LLC and Footprint Power Salem Harbor Operations LLC (collectively, "Footprint") to show cause why they should not (i) be found to have violated the ISO-NE Tariff and FERC regulations by submitting what Enforcement Staff has concluded were false and misleading supply offers for, and by failing to report the fuel status and related operational status of, Salem Harbor Unit 4 in June and July of 2013; and as a result (ii) disgorge \$2.05 million in CSO payments and be assessed a \$4.2 million civil penalty. Enforcement Staff alleged that from June 26 through July 25, 2013, Footprint submitted supply offers that Unit 4 could not satisfy because Salem Harbor lacked usable fuel, and failed to report to ISO-NE that Salem Harbor's lack of usable fuel reduced Unit 4's output capabilities and availability as a capacity resource. In addition, Staff alleged that Footprint omitted material information from and/or misrepresented the fuel status of Salem Harbor and related operational status of Unit 4 in its communications with ISO-NE. On July 13, Footprint submitted a "Notice of De Novo Election", which requires the FERC to institute an action in the appropriate United States district court for a *de novo* review of the matter should the FERC assess civil penalties that Footprint fails to pay within 60 days. Following a FERC-granted extension of time to answer, Footprint filed its answer on August 2. Enforcement's response, pursuant to an August 23 notice of extension of time, is now due on or before September 19. This matter is pending before the FERC.

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

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

<sup>91</sup> *Footprint Power LLC and Footprint Power Salem Harbor Ops. LLC*, 163 FERC ¶ 61,198 (June 18, 2018).

Unlike a staff NOV, a FERC order converting an informal, non-public investigation to a formal, non-public investigation does not indicate that the FERC has determined that any entity has engaged in market manipulation or otherwise violated any FERC order, rule, or regulation. It does, however, give OE's Director, and employees designated by the Director, the authority to administer oaths and affirmations, subpoena witnesses, compel their attendance and testimony, take evidence, compel the filing of special reports and responses to interrogatories, gather information, and require the production of any books, papers, correspondence, memoranda, contracts, agreements, or other records.

## XII. Misc. - Administrative & Rulemaking Proceedings

- **BPS Reliability Technical Conference (AD18-11)**

On July 31, the FERC held a technical conference that discussed policy issues related to BPS reliability. Panel presentations covered the following topics: (i) the changing Electric Reliability Organization ("ERO") enterprise, standards, and reliability; (ii) advancing reliability and resilience of the grid; (iii) managing the new grid; and (iv) addressing the evolving cybersecurity threat. Speaker materials are posted on the FERC's eLibrary. Post-technical conference comments not exceeding 30 pages were invited to be filed on or before September 10. Comments were filed by AEP, American Petroleum Institute ("API"), APPA, EEI, ELCON, FRS, PG&E, Public Citizen, SoCal Edison, and Utilities Technology Council. This matter is pending before the FERC.

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

On January 8, 2018, the FERC initiated a new Grid Resilience in RTO/ISOs proceeding (AD18-7)<sup>92</sup> and terminated the DOE NOPR rulemaking proceeding (RM18-1).<sup>93</sup> In terminating the DOE NOPR proceeding, the FERC concluded that the Proposed Rule and comments received did not support FERC action under Section 206 of the FPA, but did suggest the need for further examination by the FERC and market participants of the risks that the bulk power system faces and possible ways to address those risks in the changing electric markets. On February 7, FRS requested rehearing of the January 8 order terminating the DOE NOPR proceeding. The FERC issued a tolling order on March 8, 2018 affording it additional time to consider the FRS request for rehearing, which remains pending.

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

**ISO-NE Response.** In its response, ISO-NE identified fuel security<sup>94</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

<sup>92</sup> *Grid Rel. and Resilience Pricing*, 162 FERC ¶ 61,012 (Jan. 8, 2018), *reh'g requested*.

<sup>93</sup> As previously reported, the FERC opened the DOE NOPR proceeding in response to a September 28, 2017 proposal by Energy Secretary Rick Perry, issued under a rarely-used authority under §403(a) of the Department of Energy ("DOE") Organization Act, that would have required RTO/ISOs to develop and implement market rules for the full recovery of costs and a fair rate of return for "eligible units" that (i) are able to provide essential energy and ancillary reliability services, (ii) have a 90-day fuel supply on site in the event of supply disruptions caused by emergencies, extreme weather, or natural or man-made disasters, (iii) are compliant with all applicable environmental regulations, and (iv) are not subject to cost-of-service rate regulation by any State or local authority. More than 450 comments were submitted in response to the DOE NOPR, raising and discussing an exceptionally broad spectrum of process, legal, and substantive arguments. A summary of those initial comments was circulated under separate cover and can be found with the posted materials for the November 3, 2017 Participants Committee meeting. Reply comments and answers to those comments were filed by over 100 parties.

<sup>94</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."

to develop a solution and test its robustness through the stakeholder process. In the meantime, ISO-NE indicated that it would continue to independently assess the level of fuel-security risk to reliable system operation and, if circumstances dictate, would take, with FERC approval when required, actions it determines to be necessary to address near-term reliability risks. ISO-NE's response was broken into 3 parts: (i) an introduction to fuel-security risk; (ii) background on how ISO-NE's work in transmission planning, markets, and operations support the New England bulk power system's resilience; and (iii) answers to the specific questions posed in the January 8 order.

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

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

- **NOI: 2017 Tax Law Effect on FERC-Jurisdictional Rates (RM18-12)**

On March 15, the FERC opened an inquiry ("NOI")<sup>95</sup> seeking comments on the effect of the 2017 Tax Cuts and Jobs Act ("2017 Tax Law") (which reduced the federal corporate income tax rate from a maximum 35% to a flat 21%) on FERC-jurisdictional rates. Of particular interest is whether, and if so how, the FERC should address changes relating to ADIT,<sup>96</sup> bonus depreciation,<sup>97</sup> or other rates (not otherwise being addressed in the concurrently issued show cause orders). Comments on the NOI were due on or before May 21, 2018,<sup>98</sup> and were filed by over 45 parties, including Avangrid, Eversource, Exelon MA AG et al., National Grid, PSEG, APPA, and EEI. Reply comments and answers were filed by Dominion, EQT Midstream Partners, INGAA, Six Cities,<sup>99</sup> Tallgrass Pipelines, and TransCanada. This matter is pending before the FERC.

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<sup>95</sup> *Inquiry Regarding the Effect of the Tax Cuts and Jobs Act on Comm.-Jurisdictional Rates*, 162 FERC ¶ 61,223 (Mar. 15, 2018).

<sup>96</sup> ADIT arises from differences between the methods of computing taxable income for IRS reporting purposes and computing income for regulatory accounting and ratemaking purposes. As a result of the Tax Cuts and Jobs Act, a portion of an ADIT liability that was collected from customers will no longer be due to the IRS, is considered excess ADIT, and must be returned to customers in a cost-of-service ratemaking context.

<sup>97</sup> Bonus depreciation is a tax incentive given to companies to encourage certain types of investment. Bonus depreciation allows companies to deduct a percentage of the cost of a qualified property in the year the property is placed into service, in addition to other depreciation deductions. Under the Act, bonus depreciation is no longer available for "assets acquired in the trade or business of the furnishing or sale of electrical energy, water, or sewage disposal services; gas or steam through a local distribution system; or transportation of gas or steam by pipeline."

<sup>98</sup> The NOI was published in the *Fed. Reg.* on Mar. 21, 2018 (Vol. 83, No. 55) pp. 12,371 – 12,376.

<sup>99</sup> "Six Cities" are the California Cities of Anaheim, Azusa, Banning, Colton, Pasadena, and Riverside.



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

On July 18, 2018, the FERC issued its final rule,<sup>100</sup> *Order 849*, adopting procedures through which the cost-based rates of natural gas pipelines are to be examined to determine which, if any, of those entities are collecting unjust and unreasonable rates in light of the 2017 Tax Law's reduction in the corporate tax rate from 35% to 21% and the disallowance in the Tax Policy Statement (see PL17-1 below) of income tax allowances for MLP pipelines. With certain exceptions,<sup>101</sup> the procedures adopted are generally the same as the FERC proposed in its March 15, 2018 *Pipeline Rates NOPR*<sup>102</sup> and will require interstate pipelines to (a) file a one-time report, FERC Form No. 501-G, that will provide financial information from the pipeline's 2017 FERC Form 2; and (b) voluntarily make a filing to address the changes to the pipeline's recovery of tax costs, or explain why no action is needed. Pipelines can respond in one of four ways:

1. A limited Natural Gas Act ("NGA") section 4 filing to reduce the pipeline's cost-based rates by the percentage reduction in its cost of service shown in its FERC Form No. 501-G;
2. A commitment to file either a prepackaged uncontested rate settlement or a general NGA section 4 rate case by December 31, 2018;
3. The filing of a statement explaining why no change in rates is required; or
4. The taking of no other action (other than the submittal of the one-time report).<sup>103</sup>

*Order 849* will become effective on September 13, 2018.<sup>104</sup> Requests for rehearing of *Order 849* were filed by Enable Mississippi River Transmission and Enable Gas Transmission, Natural Gas Pipeline Company of America, and Process Gas Consumers Group and American Forest and Paper Association. The requests for rehearing are pending, with FERC action required on or before September 17, 2018, or the requests will be deemed denied by operation of law.

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

In *Order 841*<sup>105</sup> (see RM16-23 below), the FERC initiated a new proceeding in order to continue to explore the proposed distributed energy resource ("DER") aggregation reforms it was considering in the *Storage NOPR*.<sup>106</sup> All comments filed in response to the *Storage NOPR* will be incorporated by reference into Docket No. RM18-9 and further comments regarding the proposed distributed energy resource aggregation reforms, including comments regarding the April 10-11 technical conference in AD18-10,<sup>107</sup> were also to be filed in RM18-9. On June

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<sup>100</sup> *Interstate and Intrastate Natural Gas Pipelines; Rate Changes Relating to Fed. Income Tax Rate*, Order No. 849, 164 FERC ¶ 61,031 (July 18, 2018) ("*Order 849*").

<sup>101</sup> *Order 849* modifies the *Pipeline Rates NOPR*'s proposed treatment of master limited partnership (MLP) pipelines and other pass-through entities in several respects, makes several changes to proposed FERC Form 501-G, and provides a guarantee that the FERC will not initiate a NGA section 5 rate investigation for a three-year moratorium period of an interstate pipeline that makes a limited NGA section 4 rate reduction filing that reduces its ROE to 12 percent or less.

<sup>102</sup> *Interstate and Intrastate Natural Gas Pipelines; Rate Changes Relating to Fed. Income Tax Rate*, 162 FERC ¶ 61,226 (Mar. 15, 2018) ("*Pipeline Rates NOPR*").

<sup>103</sup> If the pipeline chooses the latter two options, FERC will consider after reviewing both the one-time report and the comments of others whether to initiate an NGA Section 5 investigation.

<sup>104</sup> *Order 849* was published in the *Fed. Reg.* on July 30, 2018 (Vol. 83, No. 146) pp. 36,672-36,717.

<sup>105</sup> *Elec. Storage Participation in Mkts. Operated by Regional Trans. Orgs. and Indep. Sys. Operators*, Order No. 841, 162 FERC ¶ 61,127 (Feb. 15, 2018), reh'g and/or clarif. requested ("*Order 841*").

<sup>106</sup> *Elec. Storage Participation in Mkts. Operated by Regional Trans. Orgs. and Indep. Sys. Operators*, 157 FERC ¶ 61,121 (Nov. 17, 2016) ("*Storage NOPR*").

<sup>107</sup> On April 10-11, 2018, the FERC held a technical conference to gather additional information to help the FERC determine what action to take on DER aggregation reforms proposed in the *Storage NOPR* and to explore issues related to the potential effects of DERs on the bulk power system. Technical conference materials are posted on the FERC's eLibrary. Interested persons were invited to file post-

26, over 50 parties submitted post-technical conference comments in this proceeding, including comments from ISO-NE, Calpine, Direct, Eversource, Ictec, NRG, Utility Services, EEI, EPRI, EPSA, NARUC, NRECA, and SEI. This matter is pending before the FERC.

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

On April 19, 2018, the FERC issued its final rule,<sup>108</sup> *Order 845*, revising its *pro forma* Large Generator Interconnection Procedures (“LGIP”) and *pro forma* Large Generator Interconnection Agreement (“LGIA”) to implement 10 specific reforms designed to improve certainty for interconnection customers,<sup>109</sup> promote more informed interconnection decisions,<sup>110</sup> and enhance the interconnection process.<sup>111</sup> Based on the comments received on its December 15, 2016 NOPR<sup>112</sup> in this proceeding as well as other factors, *Order 845* declined to adopt four proposed reforms related to requiring periodic restudies, self-funding of network upgrades, the posting of congestion and curtailment information, and the modeling of electric storage resources. *Order 845* took no action on two additional issues raised in the NOPR -- cost caps for network upgrades and affected system coordination (which is being addressed in a separate proceeding). *Order 845* will become effective July 23, 2018, and requires compliance filings to be filed on or before August 7, 2018. On May 17, the ISO/RTO Council (“IRC”) requested a 70-day extension of time, to October 16, 2018, for the submission of compliance filings, which NEPOOL supported in comments submitted on May 23. On May 26, Southern Companies separately moved for a 90-day extension of time. On June 1, the FERC issued a notice extending the compliance date by 90 days for all so that New England’s filing is now due on or before November 5. Plans for expedited Principal Committee consideration to support the earlier deadline have been cancelled.

Requests for rehearing and/or clarification of *Order 845* were filed by APPA, Arizona Public Service Company, AWEA, California Utilities,<sup>113</sup> Duke, EEI, EON Climate & Renewables, MISO Transmission Owners, NYISO, SCE, and Southern Company Services. On June 6, ISO-NE answered AWEA’s request for clarification. AWEA answered ISO-NE’s answer on June 14. Answers to AWEA’s answers were filed by Ameren on June 21 and the MISO Transmission Owners on June 29. On June 18, the FERC issued a tolling order affording it additional time to consider the requests for rehearing and/or clarification, which remain pending before the FERC.

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technical conference comments on the topics concerning the Commission’s DER aggregation proposal discussed during the technical conference, including on follow-up questions from FERC Staff related to the panels. Comments related to DER aggregation were to be filed in RM18-9; comments on the potential effects of DERs on the bulk power system, in AD18-10.

<sup>108</sup> *Reform of Generator Interconnection Procedures and Agreements*, Order No. 845, 163 FERC ¶ 61,043 (Apr. 19, 2018) (“*Order 845*”).

<sup>109</sup> To improve certainty for interconnection customers, *Order 845* (1) removes the limitation that interconnection customers may only exercise the option to build a transmission provider’s interconnection facilities and stand-alone network upgrades in instances when the transmission provider cannot meet the dates proposed by the interconnection customer; and (2) requires that transmission providers establish interconnection dispute resolution procedures that allow a disputing party to unilaterally seek non-binding dispute resolution.

<sup>110</sup> To promote more informed interconnection decisions, *Order 845* (1) requires transmission providers to outline and make public a method for determining contingent facilities; (2) requires transmission providers to list the specific study processes and assumptions for forming the network models used for interconnection studies; (3) revises the definition of “Generating Facility” to explicitly include electric storage resources; and (4) establishes reporting requirements for aggregate interconnection study performance.

<sup>111</sup> To enhance the interconnection process, *Order 845* (1) allows interconnection customers to request a level of interconnection service that is lower than their generating facility capacity; (2) requires transmission providers to allow for provisional interconnection agreements that provide for limited operation of a generating facility prior to completion of the full interconnection process; (3) requires transmission providers to create a process for interconnection customers to use surplus interconnection service at existing points of interconnection; and (4) requires transmission providers to set forth a procedure to allow transmission providers to assess and, if necessary, study an interconnection customer’s technology changes without affecting the interconnection customer’s queued position.

<sup>112</sup> *Reform of Generator Interconnection Procedures and Agreements*, 157 FERC ¶ 61,212 (Dec. 15, 2016) (“*LGIP/LGIA Reforms NOPR*”). The *LGIP/LGIA Reforms NOPR* was published in the *Fed. Reg.* on Jan. 13, 2017 (Vol. 82, No. 9) pp. 4,464-4,501.

<sup>113</sup> “California Utilities” are Pacific Gas and Elec. (“PG&E”), So. Cal. Edison (“SCE”), and San Diego Gas & Elec. (“SDG&E”).

- **Order 844: Uplift Transparency in RTO/ISO Markets (RM17-2)**

Also on April 19, the FERC issued *Order 844* which requires each RTO/ISO to establish in its tariff requirements to report on, on a monthly basis, zonal uplift, resource-specific uplift and operator-initiated commitment. In addition to these reporting requirements, each RTO and ISO must include in its tariff the TCPFs used in its market software, as well as any circumstances under which those penalty factors can set locational marginal prices, and any process by which the penalty factors can be temporarily changed. In response to a number of concerns raised, including by ISO-NE, *Order 844* withdrew the FERC's proposal in the *Uplift/Transparency NOPR* to require that each RTO/ISO that currently allocates the costs of Real-Time uplift to deviations allocate such Real-Time uplift costs only to those market participants whose transactions are reasonably expected to have caused the real-time uplift costs.

*Order 844* requires that each RTO/ISO submit a compliance filing within 135 days of *Order 844*'s publication in the *Federal Register* (or by September 7, 2018).<sup>114</sup> On July 25, PJM requested an extension of time, to November 9, 2018, which was granted, to address the compliance directive that implicates PJM's transmission constraint penalty factor rules, which it is in the process of changing in its stakeholder process. *Order 844* allows each RTO/ISO a further 120 days from the compliance filing to implement *Order 844*. As noted above, ISO-NE and NEPOOL submitted New England's *Order 844* compliance filing on September 7.

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

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

- (1) ensure that a resource using the participation model is eligible to provide all capacity, energy and ancillary services that the resource is technically capable of providing in the markets;
- (2) ensure that a resource using the participation model can be dispatched and can set the wholesale market clearing price as both a wholesale seller and wholesale buyer consistent with existing market rules that govern when a resource can set the wholesale price;
- (3) account for the physical and operational characteristics of electric storage resources through bidding parameters or other means; and
- (4) establish a minimum size requirement for participation in the RTO/ISO markets that does not exceed 100 kW.

Additionally, each RTO/ISO must specify that the sale of electric energy from the RTO/ISO markets to an electric storage resource that the resource then resells back to those markets must be at the wholesale locational marginal price. RTO/ISOs must file any necessary tariff changes on or before November 30, 2018 (270 days from *Order 841*'s publication in the *Federal Register*)<sup>115</sup> and implement those tariff provisions within one year of that compliance filing. *Order 841* became effective June 4, 2018.

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

<sup>114</sup> *Order 844* was published in the *Fed. Reg.* on Apr. 25, 2018 (Vol. 83, No. 80) pp. 18,134-18,157.

<sup>115</sup> *Order 841* was published in the *Fed. Reg.* on Mar. 6, 2018 (Vol. 83, No. 44) pp. 9,580-9,633.

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

The FERC's *Data Collection NOPR* remains pending. As previously reported, the FERC issued a July 21, 2016 NOPR, which superseded both its *Connected Entity NOPR* (RM15-23) and *Ownership NOPR* (RM16-3), proposing to collect certain data for analytics and surveillance purposes from market-based rate ("MBR") sellers and entities trading virtual products or holding FTRs and to change certain aspects of the substance and format of information submitted for MBR purposes.<sup>116</sup> The *Data Collection NOPR* presents substantial revisions from what the FERC proposed in the *Connected Entity NOPR*, and responds to the comments and concerns submitted by NEPOOL in that proceeding. Among other things, the changes proposed in the *Data NOPR* include: (i) a different set of filers; (ii) a reworked and substantially narrowed definition of Connected Entity; and (iii) a different submission process. With respect to the MBR program, the proposals include: (i) adopting certain changes to reduce and clarify the scope of ownership information that MBR sellers must provide; (ii) reducing the information required in asset appendices; and (iii) collecting currently-required MBR information and certain new information in a consolidated and streamlined manner. The FERC also proposes to eliminate MBR sellers' corporate organizational chart submission requirement adopted in *Order 816*. Comments on the *Data Collection NOPR* were due on or before September 19, 2016<sup>117</sup> and were filed by over 30 parties, including: APPA, Avangrid, Brookfield, EPSA, Macquarie/DC Energy/Emera Energy Services, NextEra, and NRG.

- **Order 842: Primary Frequency Response - Essential Reliability Services and the Evolving Bulk-Power System (RM16-6)**

On February 15, the FERC issued *Order 842*,<sup>118</sup> which requires all newly interconnecting large and small generating facilities, both synchronous and non-synchronous, to install and enable primary frequency response capability as a condition of interconnection. The FERC also established certain uniform minimum operating requirements, including maximum droop and deadband parameters and provisions for timely and sustained response. *Order 842* requirements will also apply to *existing* large and small generating facilities that take any action that requires the submission of a new interconnection request that results in the filing of an executed or unexecuted interconnection agreement on or after *Order 842*'s effective date. These requirements will not apply to existing generating facilities, a subset of combined heat and power ("CHP") facilities, or generating facilities regulated by the Nuclear Regulatory Commission. The FERC did not impose a headroom requirement for new generating facilities, and did not mandate that new generating facilities receive compensation for complying with the primary frequency response requirements. To implement these requirements, the FERC modified the *pro forma* LGIA and the *pro forma* SGIA. *Order 842* became effective May 15, 2018.<sup>119</sup>

Requests for rehearing and/or clarification and reconsideration of *Order 842* were filed by PJM, the AES Companies and Arizona Public Service. On August 24, 2018, the FERC granted PJM's request for clarification, and denied APS' and AES' requests for rehearing.<sup>120</sup> In granting PJM's request for clarification, the FERC clarified that *Order 842* (i) does not relieve a generating facility from any requirement that it may have as a condition of an existing interconnection agreement or any other requirement to provide primary frequency response;<sup>121</sup> (ii) does not address the justness and reasonableness of any existing RTO/ISO

<sup>116</sup> *Data Collection for Analytics and Surveillance and Market-Based Rate Purposes*, 156 FERC ¶ 61,045 (July 21, 2016) ("*Data Collection NOPR*").

<sup>117</sup> The *Data Collection NOPR* was published in the *Fed. Reg.* on Aug. 4, 2016 (Vol. 81, No. 150) pp. 51,726-51,772.

<sup>118</sup> *Essential Reliability Services and the Evolving Bulk-Power System—Primary Frequency Response*, Order No. 842, 162 FERC ¶ 61,128 (Feb. 15, 2018) ("*Order 842*"), *order on reh'g and clarif.*, 164 FERC ¶ 61,135 (Aug. 24, 2018).

<sup>119</sup> *Order 842* was published in the *Fed. Reg.* on Mar. 6, 2018 (Vol. 83, No. 44) pp. 9,636-9,677.

<sup>120</sup> *Essential Reliability Services and the Evolving Bulk-Power System—Primary Frequency Response*, 164 FERC ¶ 61,135 (Aug. 24, 2018) ("*Order 842 Rehearing Order*").

<sup>121</sup> *Id.* at PP 18-19.

requirements for primary frequency response, other than to find that public utility transmission providers, including RTOs/ISOs, need to revise their OATTs to adopt *Order 842's* requirements;<sup>122</sup> (iii) does not bar a transmission provider from proposing additional frequency response requirements under section 205 of the FPA;<sup>123</sup> (iv) does not obviate the need for primary frequency response from existing generating facilities and was not intended to limit the supply of primary frequency response to only newly interconnecting generating facilities;<sup>124</sup> and (v) does not mandate compensation to existing generators that are capable of providing primary frequency response.<sup>125</sup>

- **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>126</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>127</sup> comments were due on or before July 25, 2018. Literally thousands of individual and mass mailed comments were filed. Since the last Report, Spectra Energy Partners submitted an answer to the comments that various parties submitted in this proceeding, the New Jersey State Agriculture Development Committee submitted comments, and the FERC responded individually to each of the members of the US Congress that submitted comments (individually or collectively) in this proceeding. This matter remains pending before the FERC.

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

On March 15, 2018, the FERC found that an impermissible double recovery results from granting a Master Limited Partnership pipeline ("MLP") both an income tax allowance and an ROE pursuant to the DCF methodology.<sup>128</sup> Accordingly, the FERC issued a revised policy statement that it will no longer permit an MLP to recover an income tax allowance in its cost of service. The finding follows an NOI<sup>129</sup> that sought comments regarding how to address any double recovery resulting from the FERC's income tax allowance and ROE policies in light of the D.C. Circuit's *United Airlines*<sup>130</sup> holding. The FERC indicated that it will address the application of *United Airlines* to non-MLP partnership forms as those issues arise in subsequent proceedings. The revised policy statement took effect on March 21, 2018. Requests for rehearing of the March 15 order were filed by the Dominion, Enable Mississippi River Transmission and Enable Gas Transmission, Enbridge and Spectra Energy Partners, EQT Midstream Partners, Kinder Morgan, Master Limited Partnership Association ("MLPA"), NGAA, SPPP, LP, Oil Pipe Lines, Plains Pipeline, Tallgrass Pipelines, and TransCanada. On July 18, the FERC issued its order on

<sup>122</sup> *Id.* at P 19.

<sup>123</sup> *Id.* at P 20.

<sup>124</sup> *Id.* at P 21.

<sup>125</sup> *Id.* at P 22.

<sup>126</sup> The NOI was published in the *Fed. Reg.* on Apr. 26, 2018 (Vol. 83, No. 80) pp. 18,020-18,032.

<sup>127</sup> *Certification of New Interstate Natural Gas Facilities*, 163 FERC ¶ 61,138 (May 23, 2018).

<sup>128</sup> *Inquiry Regarding the FERC's Policy for Recovery of Income Tax Costs*, 162 FERC ¶ 61,227 (Mar. 15, 2018), *order on reh'g*, 164 FERC ¶ 61,030 (July 18, 2018).

<sup>129</sup> *Inquiry Regarding the FERC's Policy for Recovery of Income Tax Costs*, 157 FERC ¶ 61,210 (Dec. 15, 2016).

<sup>130</sup> *United Airlines Inc. v. FERC*, 827 F.3d 122, 134, 136 (D.C. Cir. 2016) ("*United Airlines*") (holding that the FERC failed to demonstrate that there is no double recovery of taxes for a partnership pipeline as a result of the income tax allowance and ROE determined pursuant to the DCF methodology, and remanding the decisions to the FERC to develop a mechanism "for which the Commission can demonstrate that there is no double recovery" of partnership income tax costs). *Id.* at 137.

rehearing,<sup>131</sup> dismissing the requests for rehearing and clarification and providing guidance regarding the treatment of Accumulated Deferred Income Taxes (“ADIT”) where the income tax allowance is eliminated from cost-of-service rates under the FERC’s post-*United Airlines* policy. On August 17, the MLPA requested clarification and/or reconsideration of the *Order on Rehearing*, which is pending before the FERC. On September 4, R. Gordon Gooch answered MLPA’s August 17 pleading.

### XIII. Natural Gas Proceedings

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

- **Natural Gas-Related Enforcement Actions**

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

**BP (IN13-15).** On July 11, 2016, the FERC issued *Opinion 549*<sup>132</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>133</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>134</sup> Accordingly, the FERC assessed a **\$20.16 million civil penalty** and required BP to **disgorge \$207,169** in “unjust profits it received as a result of its manipulation of the Houston Ship Channel Gas Daily index.” The \$20.16 million civil penalty was at the top of the FERC’s Penalty Guidelines range, reflecting increases for having had a prior adjudication within 5 years of the violation, and for BP’s violation of a FERC order within 5 years of the scheme. BP’s penalty was mitigated because it cooperated during the investigation, but BP received no deduction for its compliance program, or for self-reporting. The *BP Penalties Order* also denied BP’s request for rehearing of the order establishing a hearing in this proceeding.<sup>135</sup> BP was directed to pay the civil penalty and disgorgement amount within 60 days of the *BP Penalties Order*. On August 10, 2016 BP requested rehearing of the *BP Penalties Order*. On September 8, the FERC issued a tolling order, affording it additional time to consider BP’s request for rehearing of the *BP Penalties Order*, which remains pending.

On September 7, 2016, BP submitted a motion for modification of the *BP Penalties Order*’s disgorgement directive because it cannot comply with the disgorgement directive as ordered. BP explained that the entity to which disgorgement was to be directed, the Texas Low Income Home Energy Assistance Program (“LIHEAP”), is not set up to receive or disburse amounts received from any person other than the Texas Legislature. In response, on September 12, 2016, the FERC stayed the disgorgement directive (until an order on BP’s pending request for

<sup>131</sup> *Inquiry Regarding the FERC’s Policy for Recovery of Income Tax Costs*, 164 FERC ¶ 61,030 (July 18, 2018) (“*Order on Rehearing*”).

<sup>132</sup> *BP America Inc.*, Opinion No. 549, 156 FERC ¶ 61,031 (July 11, 2016) (“*BP Penalties Order*”).

<sup>133</sup> *BP America Inc.*, 152 FERC ¶ 63,016 (Aug. 13, 2015) (“*BP Initial Decision*”).

<sup>134</sup> *BP Penalties Order* at P 3.

<sup>135</sup> *BP America Inc.*, 147 FERC ¶ 61,130 (May 15, 2014) (“*BP Hearing Order*”), *reh’g denied*, 156 FERC ¶ 61,031 (July 11, 2016).

rehearing is issued), but indicated that interest will continue to accrue on unpaid monies during the pendency of the stay.<sup>136</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>137</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>138</sup>

The FERC also directed TGPNA to show cause why it should not be required to disgorge unjust profits of **\$9.18 million**, plus interest; TGPNA, Tran and Hall to show cause why they should not be assessed civil penalties (TGPNA - **\$213.6 million**; Hall - **\$1 million** (jointly and severally with TGPNA); and Tran - **\$2 million** (jointly and severally with TGPNA)). In addition, the FERC directed TGPNA's parent company, Total, S.A. ("Total"), and TGPNA's affiliate, Total Gas & Power, Ltd. ("TGPL"), to show cause why they should not be held liable for TGPNA's, Hall's, and Tran's conduct, and be held jointly and severally liable for their disgorgement and civil penalties based on Total's and TGPL's significant control and authority over TGPNA's daily operations. Respondents filed their answer on July 12, 2016. OE Staff replied to Respondents' answer on September 23, 2016. Respondents answered OE's September 23 answer on January 17, 2017, and OE Staff responded to that answer on January 27, 2017. This matter remains pending before the FERC.

#### Staff Notices of Alleged Violations (IN\_\_ - \_\_)

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

Recall that Notices of Alleged Violations ("NoVs") are issued only after the subject of an enforcement investigation has either responded, or had the opportunity to respond, to a preliminary findings letter detailing

<sup>136</sup> *BP America Inc.*, 156 FERC ¶ 61,174 (Sep. 12, 2016) ("*Order Staying BP Disgorgement*")

<sup>137</sup> *Total Gas & Power North America, Inc.*, 155 FERC ¶ 61,105 (Apr. 28, 2016) ("*TGPNA Show Cause Order*").

<sup>138</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.

Staff's conclusions regarding the subject's conduct.<sup>139</sup> NoVs are designed to increase the transparency of Staff's nonpublic investigations conducted under Part 1b of its regulations. A NoV does not confer a right on third parties to intervene in the investigation or any other right with respect to the investigation.

- **New England Pipeline Proceedings**

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

- **Portland Express Project (CP18-251)**

- ▶ On April 20, 2018, Portland Natural Gas Transmission System LP ("PNGTS") submitted an abbreviated application for a certificate of public convenience and necessity seeking authorization for 40,000 Dth/d of increased pipeline capacity; intended to be the first phase of a three-phase system expansion known as the Portland Xpress ("PXP") Project.
- ▶ Phase I is intended to increase PNGT's certificated capacity on its Northern Facilities from Pittsburg, NH, to Westbrook, ME, and its certificated capacity by 1,641 Mcf/d on its Joint Facilities (shared with Maritimes and Northeast Pipeline LLC) from Westbrook, ME to Dracut, MA.
- ▶ PNGTS has also asked for authorization to amend its Presidential Permit under NGA Section 3 that would permit it to increase its import/export capacity from 210,000 Mcf/d to 274,216 Mcf/d at border-crossing facilities at the US/Canadian border in NH.
- ▶ No new construction or modifications are being proposed to the existing pipeline infrastructure. Rather, the addition of 40,000 Mcf/d of capacity on the Northern Facilities is being created through pressure reductions at Westbrook, ME into the Joint Facilities.
- ▶ Eight precedent agreements have been executed with firm shippers totaling 137,378 Dth/d under PNGT's Rate Schedule FT, and have been filed under seal at the FERC as part of the certificate application.
- ▶ PNGTS seeks FERC certificate authorization on or before September 30, 2018, with a targeted in-service date of November 1, 2018.
- ▶ PNGTS was asked to respond to a July 13 data request from FERC staff regarding the end-use by the shippers with which PNGTS has agreements. PNGTS responded on July 19. Action on this matter continues to be pending before the FERC.

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

- ▶ 132,700 Dth/d of firm transportation to new and existing delivery points on the Algonquin system and 106,276 Dth/d of firm transportation service from Beverly, MA to various existing delivery points on the Maritimes & Northeast system.
- ▶ 6.3 miles of replacement pipeline along Algonquin in NY and CT; new 7,700-horsepower compressor station in Weymouth, MA; more horsepower at existing compressor stations in CT and NY.
- ▶ Seven firm shippers: Heritage Gas Limited, Maine Natural Gas Company, NSTAR Gas Company d/b/a Eversource Energy, Exelon Generation Company, LLC (as assignee and asset manager of Summit Natural Gas of Maine), Irving Oil Terminal Operations, Inc., New England NG Supply Limited, and Norwich Public Utilities.
- ▶ Certificate of public convenience and necessity granted Jan. 25, 2017.<sup>140</sup>

<sup>139</sup> See *Enforcement of Statutes, Regulations, and Orders*, 129 FERC ¶ 61,247 (Dec. 17, 2009), *order on requests for reh'g and clarification*, 134 FERC ¶ 61,054 (Jan. 24, 2011).

<sup>140</sup> *Order Issuing Certificate and Authorizing Abandonment, Algonquin Gas Transmission LLC and Maritimes & Northeast Pipeline, LLC*, 158 FERC ¶ 61,061 (Jan. 25, 2017), *order denying stay*, 160 FERC ¶ 61,015 (2017), *reh'g denied*, 161 FERC ¶ 61,255 (Dec. 13, 2017) ("*Atlantic Bridge Project Order*").



- ▶ Certain facilities,<sup>141</sup> providing 40,000 out of the project's total capacity of 132,705 dekatherms per day of incremental firm transportation service, placed into service on November 1, 2017.<sup>142</sup> Remaining Project capacity will be available when the remaining Project facilities are placed into service following Director of OEP authorization.
  - ▶ Algonquin files notice that construction of Salem Pike, Needham, Pine Hills and Plymouth meter and regulating stations began on April 2, 2018. Detailed information regarding construction activities can be found in the weekly construction reports filed in this docket.
  - ▶ On February 16, 2018, Algonquin filed with the DC Circuit Court of Appeals, pursuant to NGA Section 19(d)(2), a petition for review of the MA DEP's failure to issue, condition, or deny a minor-source air permit for Algonquin's proposed natural gas compressor station in the Town of Weymouth, MA by the July 31, 2016 deadline established by the FERC. Algonquin seeks an order establishing a deadline for the MA DEP to issue, condition, or deny the permit.
  - ▶ On May 31, the DC Circuit issued a *per curiam* order that holds this case in abeyance pending further order of the court.<sup>143</sup> The court based its order on the parties' representation that they have agreed on a schedule by which to resolve their dispute. The parties were directed to file status reports at 90-day intervals August 29 and to file motions to govern future proceedings within 30 days of respondents' final decision to issue, condition, or deny petitioner's permit application.
- **Constitution Pipeline (CP13-499) and Wright Interconnection Project (CP13-502)**
    - ▶ Constitution Pipeline Company and Iroquois Gas Transmission (Wright Interconnection) concurrently filed for Section 7(c) certificates on June 13, 2013.
    - ▶ 650,000 Dth/d of firm capacity from Susquehanna County, PA (Marcellus Shale) through NY to Iroquois/Tennessee interconnection (Wright Interconnection).
    - ▶ New 122-mile interstate pipeline.
    - ▶ Two firm shippers: Cabot Oil & Gas and Southwestern Energy Services.
    - ▶ Final EIS completed on Oct 24, 2014.
    - ▶ Certificates of public convenience and necessity granted Dec 2, 2014.
      - By letter order issued July 26, 2016, the Director of the Division of Pipeline Certificates (Director) granted Constitution's requested two-year extension of time to construct the project.
      - Construction was expected to begin Spring 2016 (after final Federal Authorizations), but has been plagued by delays (see below).
    - ▶ On April 22, 2016, New York State Department of Environmental Conservation (NY DEC) denied Constitution's application for a Section 401 permit under the Clean Water Act.
      - On August 18, 2017, the 2nd Circuit denied Constitution's petition for review of the NY DEC decision, concluding that (1) the court lacked jurisdiction over the Constitution's claims to the extent that they challenged the timeliness of the decision; and (2) the NY DEC acted within its statutory authority in denying the certification, and its denial was not arbitrary or capricious.
      - Constitution filed a petition for a writ of certiorari of the 2nd Circuit's decision at the United States Supreme Court in January 2018 alleging, among other things,

<sup>141</sup> The following facilities placed into service: Southeast Discharge Take-up and Relay (Fairfield County, CT); Modified Oxford Compressor Station (New Haven County, CT); Modified Chaplin Compressor Station (Windham County, CT); Modified Danbury (CT) Meter Station; and Modified Stony Point Compressor Station (Rockland County, NY).

<sup>142</sup> *Algonquin Gas Transmission, LLC*, 158 FERC ¶ 61,061 (Oct. 27, 2017).

<sup>143</sup> *Algonquin Gas Trans. v. Mass. Dept. of Env'tl. Protection*, Case No. 18-1045, DC Cir. (May 31, 2018).

that the State's denial of the Clean Water Act permit exceeded the state's authority, and interfered with FERC's exclusive jurisdiction. On April 30, 2018, the Supreme Court denied Constitution's petition, thereby letting stand the 2nd Circuit's ruling.

- ▶ On October 11, 2017, Constitution filed with the FERC a petition for declaratory order ("Petition") requesting that the FERC find that NY DEC waived its authority under section 401 of the Clean Water Act by failing to act within a "reasonable period of time." (CP18-5)
  - On January 11, 2018, the FERC denied Constitution's Petition.<sup>144</sup> Although noting that states and project sponsors that engage in repeated withdrawal and refiling of applications for water quality certifications are acting, in many cases, contrary to the public interest and to the spirit of the Clean Water Act by failing to provide reasonably expeditious state decisions, the FERC did not conclude that the practice violates the letter of the statute, found factually that Constitution gave the NY DEC new deadlines, and found that the record did not show that the NY DEC in any instance failed to act on Constitution's application for more than the outer time limit of one year.<sup>145</sup>
  - On February 12, 2018, Constitution Pipeline requested rehearing of the January 11, 2018 order. The FERC issued a tolling order on March 14 affording it additional time to consider Constitution Pipelines' request, which remains pending.
- ▶ On May 16, 2016, the New York Attorney General filed a complaint against Constitution at the FERC (CP13-499) seeking a stay of the December 2014 order granting the original certificates, as well as alleging violations of the order, the Natural Gas Act, and the Commission's own regulations due to acts and omissions associated with clear-cutting and other construction-related activities on the pipeline right of way in New York.
  - In July 2016, the FERC rejected the NY AG's filing as procedurally deficient, and declined to stay of the Certificate Order. The NY AG sought rehearing, and the Commission denied rehearing on November 22, 2016, noting again that the NY AG's complaint was still procedurally deficient.
- ▶ Tree felling and site preparation continues, but the long-term status of the pipeline is currently unknown.
- ▶ On June 25, 2018, Constitution requested a further 2-year extension of the deadline to complete construction of its project, given the delays caused by the on-going fight over the water quality certification from the NYSDEC. That request was opposed by several parties and Constitution answered some of the opposition pleadings. The request is pending before the FERC.

- **Non-New England Pipeline Proceedings**

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

- **Southeast Market Pipelines Project (CP14-554, CP15-16, CP15-17)**
  - ▶ Florida Southeast Connection, LLC, Transcontinental Gas Pipe Line Company, LLC and Sabal Trail Transmission, LLC (Sabal Trail) filed for a Section 7(c) certificates in Sept. – Nov. 2014.
  - ▶ The three separate but connected natural gas transmission pipeline projects total approximately 685.5 miles of natural gas transmission pipeline and provide transportation

<sup>144</sup> *Constitution Pipeline Co.*, 162 FERC ¶ 61,014 (Jan. 11, 2018), *reh'g requested*.

<sup>145</sup> *Id.* at P 23.

service for up to approximately 1.1 billion cubic feet per day of natural gas to markets in Florida and the southeast United States (“SMP Project”).

- ▶ Certificates of public convenience and necessity were granted Feb. 2, 2016.<sup>146</sup>
  - Project construction began in August 2016, and in June and July 2017, Commission Staff authorized the pipelines to commence service on the completed facilities.
- ▶ On August 22, 2017, the DC Circuit vacated and remanded the FERC’s certificate order, holding that the FERC’s environmental review of the SMP Project failed to adequately consider the downstream effects of greenhouse gas emissions resulting from increased power generation.<sup>147</sup>
  - The DC Circuit held that FERC must either quantify and consider the project’s downstream carbon emissions or explain in more detail why it cannot do so.
- ▶ On September 27, 2017, the FERC issued a Draft Supplemental EIS, estimating the pipeline would potentially increase the Florida GHG emission inventory between 3.7 and 9.7 percent.
  - In the supplemental EIS, the FERC stated that it “could not find a suitable method to attribute discrete environmental effects to GHG emissions.”
- ▶ On March 14, 2018, the FERC issued an Order on Remand reinstating the certificates of public convenience and necessity.<sup>148</sup> The majority found that while the FERC calculated the gross and net emissions, there was nothing to do with that information as there is “no widely accepted standard to ascribe significance to a given rate or volume of GHG emissions.” The FERC also noted that it is only approving the means of transportation, and it is not the Commission’s job to “decide national policy on the use of natural gas.”
  - Commissioner LaFleur dissented in part because she could not “support the Commission’s responses to the Court on downstream GHG emissions and the Social Cost of Carbon.”
  - Commissioner Glick also dissented, arguing that the FERC must consider the reasonably foreseeable indirect effects of the SMP Project. Glick argues that the “Commission must take a ‘hard look’ at climate change – the ultimate environmental impact,” and should be more transparent in its decision-making. He concluded by noting “that t[he] order, by limiting analysis of the environmental impacts of a proposed pipeline, will both increase the Commission’s litigation risk and contribute further to the cynicism of the pipeline siting process.”
  - On April 13, 2018, several intervenors (including the Sierra Club) jointly filed a rehearing request and motion for stay of the FERC’s Order on Remand. On April 27, 2018, Florida Southeast Connection, LLC and Florida Power & Light filed an answer in opposition to the joint motion for stay.
  - On August 10, 2018, the FERC denied the rehearing requested by intervenors on April 13.<sup>149</sup> Commissioners LaFleur and Glick again dissented from the majority opinion. In addition, given that denial, the FERC dismissed as moot the pending request for stay.

<sup>146</sup> *Fla. Southeast Connection, LLC*, 154 FERC ¶ 61,080, 61 (Feb. 2, 2016) (order issuing certificate).

<sup>147</sup> *Sierra Club v. FERC*, 2017 U.S. App. LEXIS 15911 (D.C. Cir. Aug. 22, 2017).

<sup>148</sup> *Fla. Southeast Connection, LLC*, 162 FERC ¶ 61,233 (Mar. 14, 2018), *reh’g denied*, 164 FERC ¶ 61,099 (Aug 10, 2018).

<sup>149</sup> *Fla. Southeast Connection, LLC*, 164 FERC ¶ 61,099 (Aug 10, 2018).

- **Northern Access Project (CP15-115)**
  - ▶ The New York State Department of Environmental Conservation (“NY DEC”) and the Sierra Club requested rehearing of the *Northern Access Certificate Rehearing Order* on August 14 and September 5, respectively. On August 29, National Fuel Gas Supply Corporation and Empire Pipeline answered the NY DEC’s August 14 rehearing request and request for stay. The requests for rehearing are pending, with FERC action required on or before September 13, 2018 (30 days from the date the first (NY DEC) request for clarification was filed), or the requests will be deemed denied by operation of law.
  - ▶ On August 6, the FERC dismissed or denied the requests for rehearing of the *Northern Access Certificate Order*.<sup>150</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>151</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.
  - ▶ As previously reported, the FERC issued an order, on Feb. 3, 2017, authorizing the Companies to construct and operate pipeline, compression, and ancillary facilities in McKean County, Pennsylvania, and Allegany, Cattaraugus, Erie, and Niagara Counties, New York (“Northern Access Project”).<sup>152</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>153</sup> Oral argument was held on November 16, 2017. The Court’s decision is pending, and it remains to be seen how the Court will factor in the FERC’s waiver determination in the *Northern Access Rehearing & Waiver Determination Order*.
  
- **PennEast Project (CP15-558)**
  - ▶ On September 24, 2015, PennEast Pipeline Company, LLC (“PennEast”) filed an application pursuant to NGA Section 7(c) requesting authorization to construct and operate 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”).
  - ▶ PennEast is a joint venture owned by Red Oak Enterprise Holdings, Inc., a subsidiary of

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<sup>150</sup> *Nat’l Fuel Gas Supply Corp. and Empire Pipeline, Inc.*, 164 FERC ¶ 61,084 (Aug. 6, 2018) (“*Northern Access Rehearing & Waiver Determination Order*”).

<sup>151</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).

<sup>152</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>153</sup> *Nat’l Fuel Gas Supply Corp. v. NYSDEC et al.* (2d Cir., Case No. 17-1164).

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.

- ▶ The project is designed to provide up to 1,107,000 Dth/d of firm transportation service.
- ▶ Certificates of public convenience and necessity were granted by FERC on January 19, 2018.<sup>154</sup> Requests for rehearing of the January 19 Order and the subsequent tolling order were denied.<sup>155</sup>
- ▶ The New Jersey Attorney General and several conservation groups have filed actions in federal district court in New Jersey seeking to limit PennEast's use of its NGA eminent domain authority.

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

- **Massachusetts Emissions Allowance Auctions**

In an action that could have implications for the New England Markets, the Massachusetts (MA) Department of Environmental Protection ("MA DEP") issued on August 11, 2017 final regulations to ensure that MA will meet the 2020 statewide greenhouse gas ("GHG") emissions limits mandated by MA's 2008 Global Warming Solutions Act ("GWSA"). Section 7.74<sup>156</sup> of those regulations reduces carbon dioxide ("CO<sub>2</sub>") emissions from MA-based power plants by imposing an annually declining aggregate emissions cap on MA's 21 large fossil fuel-fired generators. Operators of those facilities will have to offset their CO<sub>2</sub> production with allowances (a limited authorization to emit one metric ton of CO<sub>2</sub> in a calendar year). Allowances will be allocated directly in 2018 based on historical generation. Beginning with compliance year 2019, Section 7.74 requires auctioning of the emissions allowances that facilities must use to comply with the regulation. Allowances may be traded between facilities and a limited quantity may be banked from year to year. On December 15, 2017, MassDEP filed final amendments to correct errors for two facilities in the 2018 allowance allocations. These amendments were published in the Massachusetts register on December 29, 2017.

On July 30, 2018, the MA Executive Office of Energy and Environmental Affairs ("MA EEA") and MA DEP filed final amendments to Section 7.74 for publication in the MA Register on August 10. The amendments are designed to phase in auction requirements, modify allowance banking requirements and extend emergency deferred compliance to the entire year.<sup>157</sup> Questions regarding 310 CMR 7.74 can be directed to Will Space ([william.space@state.ma.us](mailto:william.space@state.ma.us); 617-292-5610).

#### 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)).

<sup>154</sup> *PennEast Pipeline Co., LLC*, 162 FERC ¶ 61,053 (Jan. 19, 2018), *reh'g denied*, 163 FERC ¶ 61,159 (May 30, 2018).

<sup>155</sup> *PennEast Pipeline Co., LLC*, 163 FERC ¶ 61,159 (May 30, 2018).

<sup>156</sup> Additional information about 310 CMR 7.74 (Reducing CO<sub>2</sub> Emissions from Electricity Generating Facilities) is available at: <http://www.mass.gov/eea/agencies/massdep/climate-energy/climate/ghg/electricity-generator-emissions-limits.html>.

<sup>157</sup> The text of the final amendments and a Response to Comments document are available at <https://www.mass.gov/guides/electricity-generator-emissions-limits-310-cmr-774>.

- **Base ROE Complaint IV (2016) (18-1077)**  
**Underlying FERC Proceedings: EL16-64**<sup>158</sup>  
**Petitioner: TOs**

On March 15, 2018, the TOs petitioned the DC Circuit Court of Appeals for review of the FERC's *Base ROE Complaint IV Orders*. On April 16, TOs submitted their initial materials, including certificates, docketing statement form, procedural motions, and its statement of issues. The TOs also requested that the Court hold the appeal in abeyance while the FERC completes its proceedings with respect to Base ROE Complaints II and III, committing to submit a report on a periodic basis (e.g. every 90 days) regarding the developments in those proceedings. On April 30, EMCOS moved to dismiss the case for lack of jurisdiction, arguing that TOs seek review of orders that are not final and therefore not subject to judicial review under Section 313(b) of the FPA. On May 10, the TOs opposed and CAPs supported the April 30 motion. TOs and EMCOS filed answers to the May 10 motions on May 17. On August 14, the Court issued an order denying the TOs' request to hold the appeal in abeyance and granting EMCOS motion to dismiss, without prejudice to submission of another petition for review at the conclusion of the FERC proceedings.

- **FCM Resource Retirement Reforms (17-1275)**  
**Underlying FERC Proceedings: ER16-551**<sup>159</sup>  
**Petitioner: Constellation**

As previously reported, Constellation ("Petitioner") petitioned the DC Circuit Court of Appeals on December 28, 2017 for review of the FERC's *FCM Resource Retirement Reforms Orders*. On April 17, Exelon filed Petitioner's Brief. FERC's Brief was filed on July 2, 2018; Petitioner's Reply Brief, July 30, 2018. Since the last Report, the Deferred Appendix was filed on August 13, 2018 and Final Briefs on August 17 by FERC Trial Staff and August 20 by Exelon. All briefing is now complete and this matter is before the Court.

- **Base ROE Complaints II & III (2012 & 2014) (15-1212)**  
**Underlying FERC Proceedings: EL13-33; EL14-86**<sup>160</sup>  
**Appellants: New England Transmission Owners**

As previously reported, the TOs filed a petition for review of the FERC's orders in the 2012 and 2014 ROE complaint proceedings on July 13, 2015. On August 14, 2015, the TOs filed an unopposed motion to hold this case in abeyance pending final FERC action on the 2012 and 2014 ROE Complaints (see Section I above). On August 20, 2015, the Court granted the TOs' motion to hold the case in abeyance, subject to submission of status reports every 90 days. The most recent status report, the twelfth such report filed, was filed on August 13, 2018. In that report, the parties again indicated, ultimately, that the proceedings upon which the TOs based their request for abeyance of this appeal remain ongoing. This case continues to be held in abeyance.

- **FCM Pricing Rules Complaints (15-1071\*\*, 16-1042) (consol.)**  
**Underlying FERC Proceeding: EL14-7,**<sup>161</sup> **EL15-23**<sup>162</sup>  
**Petitioners: NEPGA, Exelon**

On February 2, 2018, DC Circuit granted NEPGA's and Exelon's petitions for review of orders accepting the FCM's 7-year price lock-in (EL14-7) and capacity-carry-forward rules (EL15-23).<sup>163</sup> Finding that "the FERC failed to adequately explain why its rationale [for rejecting price lock-in and capacity carry forward rules] in PJM – which

<sup>158</sup> *Belmont Mun. Light Dept. v. Central Me. Power Co.*, 156 FERC ¶ 61,198 (Sep. 20, 2016), *reh'g denied*, 162 FERC ¶ 61,035 (Jan. 18, 2018) ("*Base ROE Complaint IV Orders*").

<sup>159</sup> *ISO New England Inc.*, 155 FERC ¶ 61,029 (Apr. 12, 2016) ("*Resource Retirement Reforms Order*"), *reh'g and clarif. denied*, 161 FERC ¶ 61,115 (Oct. 30, 2017) ("*FCM Resource Retirement Reforms Orders*").

<sup>160</sup> 147 FERC ¶ 61,235 (June 19, 2014); 149 FERC ¶ 61,156 (Nov. 24, 2014); 151 FERC ¶ 61,125 (May 14, 2015).

<sup>161</sup> 150 FERC ¶ 61,064 (Jan. 30, 2015); 146 FERC ¶ 61,039 (Jan. 24, 2014).

<sup>162</sup> 154 FERC ¶ 61,005 (Jan. 7, 2016); 150 FERC ¶ 61,067 (Jan. 30, 2015).

<sup>163</sup> *New England Power Generators Assoc. v FERC*, 881 F.3d 202 (DC Cir. 2018).

seems to foreclose signing off on a Tariff scheme like ISO-NE's – does not apply even more forcefully to the scheme it accepted in the Orders [appealed from]," the DC Circuit granted the Petitions and remanded to FERC for further proceedings in which the FERC, in order to accept the changes filed, must provide some analysis and explanation why it changed course.

#### Other Federal Court Developments of Interest

- ***California Public Utilities Commission v. FERC (9th Cir., 16-70481)*** (Jan. 8, 2018)

In a decision that could impact how the FERC approaches future orders on ROE filings, the Ninth Circuit Court of Appeals held that the FERC acted arbitrarily and capriciously, and erred, by granting a transmission owner (PG&E) an incentive adder for its participation in an RTO (CAISO) where the participation by the TO was not voluntary. Doing so created a generic incentive adder (for TO participation in an RTO) in contravention of Order 679's requirement of case-by-case review of adders to be granted, which were designed to induce voluntary RTO participation. The Ninth Circuit remanded the matter back to the FERC with instructions to follow the appeals court's reasoning.

**INDEX**  
**Status Report of Current Regulatory and Legal Proceedings**  
**as of September 12, 2018**

***I. Complaints/Section 206 Proceedings***

206 Proceeding: RNS/LNS Rates and Rate Protocols.....	(EL16-19).....	3
Base ROE Complaint IV (2016).....	(EL16-64).....	2
Base ROE Complaints I-IV: TOs’ Motion to Dismiss/Consolidate.....	(EL16-64 et al.).....	3
Base ROE Complaints II & III (2012 & 2014) (Consolidated).....	(EL13-33 and EL14-86).....	4
PER Settlement Agreement.....	(ER17-2153).....	1
RTO Insider Press Policy Complaint.....	(EL18-196).....	1

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

2018/19 Power Year Transmission Rate Filing.....	(ER09-1532; RT04-2).....	8
206 Proceeding: RNS/LNS Rates and Rate Protocols.....	(EL16-19).....	3
Base ROE Complaints II & III (2012 and 2014) (Consolidated).....	(EL13-33 and EL14-86).....	4
Base ROE Complaint IV (2016).....	(EL16-64).....	2
FCA13 De-List Bids Filing.....	(ER18-2047).....	5
Mystic 8/9 Cost of Service Agreement.....	(ER18-1639).....	6
NEPGA PER Adjustment Complaint Settlement Agreement.....	(ER17-2153).....	1
TOs’ Opinion 531-A Compliance Filing Undo.....	(ER15-414).....	8
VTransco Recovery of Highgate Ownership Share Acquisition Costs.....	(ER18-1259).....	7

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

2013/14 Winter Reliability Program Remand Proceeding.....	(ER13-2266).....	14
CASPR.....	(ER18-619).....	14
CONE & ORTP Updates.....	(ER17-795).....	14
Economic Life Determination Revisions.....	(ER18-1770).....	10
FCA Rationing Minimum Limit.....	(ER18-2078).....	10
FCM Cost Allocation Improvements.....	(ER18-2125).....	10
Fuel Security Retention Proposal.....	(ER18-2364).....	9
ISO-NE Waiver Filing: Mystic 8 & 9.....	(ER18-1509; EL18-182).....	11
NEPGA PER Adjustment Complaint Settlement Agreement.....	(ER17-2153).....	1
Order 844 Compliance Filing.....	(ER18-2394).....	9
PER Settlement Compliance Filing.....	(ER18-1153).....	13

***IV. OATT Amendments/Coordination Agreements***

Order 842 (Frequency Response) Compliance Filing.....	(ER18-1523).....	15
---	------------------	----

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

FAP FTR FA Changes.....	(ER18-2293).....	15
-------------------------	------------------	----



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

Schedule 21-EM: Bangor Hydro/Maine Public Service Merger-Related Costs Recovery ..... (ER15-1434 et al.) .....17  
 Schedule 21-EM: BHD Tax Law & Settlement Changes ..... (ER18-1213) .....16  
 Schedule 21-NEP: GMP G-33 Circuit Support Agreement ..... (ER18-2174) .....16  
 Schedule 21-NEP: IA Cancellation: Superseded NEP/Wheelabrator Millbury IA..... (ER18-1861) .....16  
 Schedule 21-UI: LCSA: UI/CPV Towantic..... (ER18-2302) .....15

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

132nd Agreement (Press Membership Provisions) ..... (ER18-2208) .....17

**VIII. Regional Reports**

Capital Projects Report - 2018 Q2 ..... (ER18-2204) .....18  
 Opinion 531-A Local Refund Report: FG&E ..... (EL11-66) .....18  
 Opinions 531-A/531-B Local Refund Reports ..... (EL11-66) .....18  
 Opinions 531-A/531-B Regional Refund Reports ..... (EL11-66) .....18

**IX. Membership Filings**

132nd Agreement (Press Membership Provisions) ..... (ER18-2208) .....17  
 Aug 2018 Membership Filing ..... (ER18-2116) .....19  
 July 2018 Membership Filing ..... (ER18-1910) .....19  
 RTO Insider Press Policy Complaint ..... (EL18-196) .....1  
 September 2018 Membership Filing ..... (ER18-2371) .....19

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

BPS Reliability Technical Conference..... (AD18-11).....27  
 NOPR: Revised Rel. Standards: CIP-005-6, CIP-010-3, CIP-013-1..... (RM17-13) .....19  
 Revised GMD Research Work Plan ..... (RM15-11) .....20  
 Revised Rel. Standard: BAL-002-3..... (RD18-7) .....19

**XI. Misc. Regional Interest**

203 Application: BED/Stowe Highgate Share ..... (EC18-137) .....20  
 203 Application: GenOn Reorganization ..... (EC17-152) .....22  
 203 Application: Linde Energy Services ..... (EC18-132) .....21  
 203 Application: National Grid Green Homes (Sunrun) ..... (EC18-120) .....21  
 203 Application: NEP (Vuelta and Old Wardour Interconnection Assets)..... (EC18-85) .....21  
 203 Application: NRG/GIP III Zephyr Acquisition Partners ..... (EC18-61) .....21  
 203 Application: PSNH/HSE Hydro NE ..... (EC18-42) .....21  
 203 Application: Wheelabrator Technologies ..... (EC18-130) .....21  
 Deepwater Wind PURPA Complaint ..... (EL18-171) .....23  
 Emera/MPD OATT Order 842 Compliance Filing ..... (ER18-1569) .....25  
 FERC Enforcement Action: Show Cause Order – Footprint Power ..... (IN18-7) .....26  
 FERC Enforcement Action: Formal Investigation  
 (MISO Zone 4 Planning Resource Auction Offers)..... (IN15-10) .....26  
 IAs: PSNH/HSE Hydro NE Subs ..... (ER18-2294 et al.) .....24  
 MPD OATT Changes ..... (ER18-1244) .....25  
 NYISO MOPR-Related Proceeding ..... (EL13-62) .....24  
 PJM Clean MOPR Complaint..... (EL18-169) .....23  
 PJM MOPR-Related Proceedings ..... (EL18-178;ER18-1314;

.....	EL16-49) .....	22
TSA: Emera Maine - ReEnergy Fort Fairfield.....	(ER18-2124) .....	25
TSA: Emera Maine - ReEnergy Ashland .....	(ER18-2123) .....	25
TSA: New England Clean Energy Connect .....	(ER18-2261 et al.) .....	24
UI/HQUS Phase I/II HVDC-TF Service Agreement .....	(ER18-2286) .....	24

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

BPS Reliability Technical Conference.....	(AD18-11).....	27
DER Participation in RTO/ISOs .....	(RM18-9) .....	29
FirstEnergy DOE Application for Section 202(c) Order .....	.....	27
Grid Resilience in RTO/ISOs; DOE NOPR.....	(AD18-7).....	27
NOI: 2017 Tax Law Effect on FERC-Jurisdictional Rates.....	(RM18-12) .....	28
NOI: Certification of New Interstate Natural Gas Facilities .....	(PL18-1).....	33
NOI: FERC's Policy for Recovery of Income Tax Costs & ROE Policies .....	(PL17-1).....	33
NOPR: Data Collection for Analytics & Surveillance and MBR Purposes .....	(RM16-17).....	32
<i>Order 841</i> : Electric Storage Participation in RTO/ISO Markets.....	(RM16-23; AD16-20).....	31
<i>Order 842</i> : Primary Frequency Response .....	(RM16-6) .....	32
<i>Order 844</i> : Uplift Transparency in RTO/ISO Markets .....	(RM17-2) .....	31
<i>Order 845</i> : LGIA/LGIP Reforms .....	(RM17-8) .....	30
<i>Order 849</i> : Pipeline Rates .....	(RM18-11).....	29

***XIII. Natural Gas Proceedings***

Enforcement Action: BP Initial Decision .....	(IN13-15).....	34
Enforcement Action: Rover-Staff Notice of Alleged Violation.....	(not docketed) .....	35
Enforcement Action: Total Gas & Power North America, Inc.....	(IN12-17) .....	34
New England Pipeline Proceedings .....	.....	36
Non-New England Pipeline Proceedings .....	.....	38

***XIV. State Proceedings & Federal Legislative Proceedings***

Massachusetts Emissions Allowance Auctions .....	.....	41
--	-------	----

***XV. Federal Courts***

Base ROE Complaints II & III (2012 & 2014) .....	15-1212..... (DC Cir.) .....	42
Base ROE Complaint IV (2016).....	(18-1077) .. (DC Cir.) .....	42
California Public Utilities Commission v. FERC .....	16-70481 .. (9th Cir.) .....	43
FCM Pricing Rules Complaints .....	15-1071/16-1042(DC Cir.).....	42
FCM Resource Retirement Reforms .....	17-1275..... (DC Cir.) .....	42