

REPORT OF THE ELECTRICITY COMMITTEE

This report covers significant legal developments pertaining to the electric power system in 2021.¹

I.	FERC Advanced Notice of Proposed Rulemaking on Transmission Planning	2
II.	FERC Severe Cold Weather Event Preparation	3
III.	International Transmission Company v. FERC	6
IV.	Joint Federal-State Task Force on Electric Transmission	7
V.	Oklahoma Gas & Electric Company (OG&E) v. FERC	8
VI.	Southeast Energy Exchange Market Proceeding Provides FERC Opportunity to Address Calculation of Rehearing Request Deadlines	11
	A. General Recap of SEEM	11
	B. Interested Stakeholders	11
	C. Proceeding History	12
	D. Issues Addressed by FERC – Calculation of Rehearing Request Deadlines	12
	E. Legal Implications of FERC Order	13
	F. SEEM Implementation Timeline	13
VII.	FERC Docket No. IN18-9-000, Order Assessing Civil Penalties against GreenHat Energy, LLC	14
	A. Violation of FPA Section 222(a), Anti-Manipulation Rule and Four-Part Scheme	15
	B. Violation of FPA Section 222(a), Anti-Manipulation Rule and Scheme to Not Pay for FTR Losses	15
	C. Violation of FPA Section 222(a), Anti-Manipulation Rule, Scheme to Not Pay for FTR Losses, and False Representation to PJM	15
	D. Violation of FPA Section 222(a), Anti-Manipulation Rule: GreenHat made Uneconomic Trades to Increase the PJM Auction Clearing Price of FTRs sold to Shell	16
	E. Violations of PJM’s Tariff and Operating Agreement, Section 15.1.3 (Payment of Bills)	16
	F. Violations of PJM’s Tariff Attachment Q, Section Ia.B (Risk Management and Verification)	17
VIII.	Bonneville Power Administration joining the Western EIM and the Western Resource Adequacy Program	17
	A. Western Energy Imbalance Market	17
	B. Western Resource Adequacy Program	18

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I. FERC ADVANCED NOTICE OF PROPOSED RULEMAKING ON TRANSMISSION PLANNING

In July 2021, the Federal Energy Regulatory Commission (FERC or Commission) issued an Advanced Notice of Proposed Rulemaking (ANOPR) to address issues of electric transmission infrastructure reform.² The Commission explained that changes to transmission planning and cost allocation may be needed to facilitate both the changing electric generation resource mix and to accommodate new and different uses of the transmission system.³ In particular, FERC found that the electric generation fleet is relying on resources farther away from dense population load centers.⁴ Notwithstanding landmark reforms issued more than a decade ago in Order Nos. 890 and 1000, the Commission wrote it is again time to consider reforms to regional transmission planning issues.⁵ With the ANOPR, FERC solicited comments from stakeholders and industry participants in four main areas:

- Regional transmission planning and cost allocation for transmission upgrades in anticipation of future transmission additions;⁶
- Interregional transmission planning and the need for greater coordination among neighboring systems;⁷
- Generator interconnection network upgrade cost responsibility assignments;⁸ and
- Enhanced oversight and monitoring of identification and financing for new transmission facilities.⁹

While the ANOPR asks questions on a wide range of topics, the clear focus of the ANOPR appears to be probing ways of changing cost allocation and recovery for interconnection-related upgrade costs.¹⁰ The ANOPR also considered the prospect of integrating new and independent oversight of the planning process separate from existing regional grid operators.¹¹ As proposed, the transmission monitor would report directly to FERC if problems arose in transmission planning.¹² This ANOPR and subsequent rulemakings and proceedings will address and potentially modify several aspects of FERC Order No. 1000 in an effort to improve the function and oversight of transmission planning.¹³ The

2. Advanced Notice of Proposed Rulemaking, FERC Docket No. RM21-17 (2021).

3. *Id.* at 4-5.

4. *Id.* at 4.

5. *Id.* at 4-5.

6. Docket No. RM21-17, *supra* note 2, at 6-8.

7. *Id.*

8. *Id.*

9. *Id.*

10. Docket No. RM21-17, *supra* note 2, at 6-8.

11. *Id.*

12. *Id.*

13. *Id.*

ANOPR also calls for comments on grid-enhancing technologies, such as dynamic line ratings during interconnection studies, as an indirect way to strengthen the grid and alleviate pressure and costs on transmission systems to fully account for the range of services available.¹⁴

Chairman Glick and Commissioner Clements issued a joint concurrence indicating their concern that the current approach to transmission planning and cost allocation and interconnection processes will not meet future transmission needs in a just and reasonable manner.¹⁵ They urged the Commission to plan holistically and proactively for future transmission needs in light of increased demand for renewable energy.¹⁶ Commissioner Danley concurred separately, emphasizing the need for public comments to address: (1) whether certain proposed reforms are within the Commission's jurisdiction; and (2) the impact that the proposed reforms may have on ratepayers.¹⁷ Commissioner Christie concurred separately, indicating that he is not endorsing any of the potential reforms but otherwise agrees that the Commission should seek public comment on these issues to ensure a reliable, efficient, and cost-effective transmission system.¹⁸

Dozens of industry stakeholders submitted comments to the ANOPR docket in October and November 2021.¹⁹ FERC is expected to issue one or more Notices of Proposed Rulemakings in early 2022 and may ultimately issue one or more Final Rules in mid-to-late 2022.

II. FERC SEVERE COLD WEATHER EVENT PREPARATION

In November 2021, the FERC, the North American Electric Reliability Corporation (NERC), and Regional Entities (RE) issued a report on the severe cold weather event that occurred between February 8 and 20, 2021 that affected Texas and the South-Central region of the United States (hereinafter referred to as "Event").²⁰ The report highlighted the need for stronger mandatory electric reliability standards, particularly with respect to generator cold weather-critical components and systems.²¹ The report recommended revisions to the NERC Reliability Standards surrounding generator winterization and gas-electric coordination.²²

The Event had a significant impact on the reliability of the bulk electric system (BES).²³ "The Electric Reliability Council of Texas (ERCOT) averaged

14. Docket No. RM21-17, *supra* note 2, at 6-8.

15. Docket No. RM21-17, (Glick, Chairman, concurring), at 1, 8.

16. *Id.*

17. Docket No. RM21-17, (Danly, Comm'r, concurring), at 1-2.

18. Docket No. RM21-17, (Christie, Comm'r, concurring), at 1-2.

19. Directions to View Submitted Comments in October and November 2021, FERC, <https://elibrary.ferc.gov/eLibrary/search> (under the Docket Search option search by entering in the search criteria "RM21-17" under Docket Number, and "1/1/60 – 3/20/22" under Date Range).

20. FERC, The February 2021 Cold Weather Outages in Texas and The South Central U.S. 8 (2021).

21. *Id.* at 18.

22. *Id.*

23. *Id.* at 8.

34,000 MW of generation unavailable (based on expected capacity) for over two consecutive days, equivalent to nearly half of its all-time winter peak electric load of 69,871 MW.”²⁴ From February 8 through 20, a total of 1,045 individual generating units experienced 4,124 outages, derates, or failures to start.²⁵ Of those outages, “derates, and failures to start, 75 percent were caused by either freezing or fuel issues.”²⁶

The Event was “the fourth cold weather related event in the last ten years to jeopardize BES reliability, and with a combined 23,418 MW of manual firm load shed, the largest controlled firm load shed event in U.S. history.”²⁷ More than 4.5 million people in Texas lost power during the Event, and some went without power for as long as four days, while exposed to below-freezing temperatures for over six days.²⁸ At least 210 people died during the Event.²⁹ In cities including “Austin, Houston, and San Antonio, over 14 million people were ordered to boil drinking and cooking water.”³⁰ After the city of Denton, Texas, lost its gas supply, it was forced to cut power to nursing homes and water pumping stations.³¹

FERC concluded that two causes, both triggered by cold weather, led to the issues with the electric system, and that this was “part of a recurring pattern for the last ten years.”³² First, generating units unprepared for cold weather failed in large numbers.³³ Second, the natural gas fuel supply struggled to meet both residential heating load and generating unit demand for natural gas.³⁴ FERC noted that many natural gas-fired generating units rely on non-firm commodity and/or pipeline transportation contracts.³⁵ Analysts with the Federal Reserve Bank of Dallas estimated that the outages caused direct and indirect losses to the Texas economy of between \$80 to \$130 billion.³⁶ It also predicted continuing effects on the supply chain through the end of 2021.³⁷

“On February 16, 2021, while the Event was still occurring, the Commission and NERC jointly announced a FERC-NERC-Regional Entity staff inquiry

24. FERC, *supra* note 20, at 8.

25. *Id.* at 15.

26. *Id.*

27. *Id.* at 9.

28. FERC, *supra* note 20, at 9; *see also* Paul Takashi, *I lost my best friend: How Houston’s winter storm went from wonderland to deadly disaster*, Houston Chronicle (May 25, 2021), <https://www.houstonchronicle.com/news/investigations/article/failures-of-power-series-part-2-blackouts-houston>.

29. FERC, *supra* note 20, at 9; *see also* Andrew Weber, *Texas Winter Storm Toll Goes Up to 210, Including 43 Deaths in Harris County*, Houston Public Media (July 14, 2021), <https://www.houstonpublicmedia.org/articles/news/energy-environment/2021/07/14/403191/texas-winter-storm-death-toll-goes-up-to-210-including-43-deaths-in-harris-county>.

30. FERC, *supra* note 20, at 10.

31. *Id.*

32. Fed. Energy Reg. Comm’n, *supra* note 20, at 11.

33. *Id.*

34. *Id.* at 11-12.

35. *Id.* at 12.

36. FERC, *supra* note 20, at 10 (*see also* Garrett Golding *et al.*, *Cost of Texas’ 2021 Deep Freeze Justifies Weatherization*, Dallas Fed. Econ. (Apr. 15, 2021), <https://www.dallasfed.org/research/economics/2021>).

37. *Id.*

into the operations of the BES during the extreme winter weather conditions currently being experienced by the Midwest and South Central states in February 2021.”³⁸

Staff from FERC, NERC and all six RE quickly formed a team (the Team) of over 50 subject matter experts and identified the scope of the inquiry to include: assessing what occurred during the Event, identifying commonalities with previous cold weather events and any lessons that should be incorporated in the development by NERC of cold weather Reliability Standards, and making recommendations to avoid similar events in the future.³⁹

The purpose of the team formation was not to determine whether there may have been violations of applicable regulations, requirements, or standards subject to the Commission’s jurisdiction, but to make findings and recommendations with the aim of preventing future events.⁴⁰

As a result of the study, FERC suggested 28 recommendations and areas for additional study, including (a) changes to reliability standards to address winterization of generating plants, (b) providing generation owners an opportunity to be compensated for the costs of retrofitting their generating units to perform at specified ambient temperatures, and (c) that generation owners identify the reliability risks related to their natural gas fuel contracts so that they can provide the BAs with the percentage of total generating unit capacity that the BA can rely upon during the local forecasted cold weather.⁴¹

In August of 2021, the Commission approved revisions to the NERC Reliability Standards to address cold weather, including a new requirement for generating units to have a cold weather preparedness plan.⁴² However, the effective date for these revisions is April 1, 2023.⁴³ FERC also suggested that Generation Owners (GO) have the opportunity to be compensated for (a) the costs of retrofitting their generating units to perform at specified ambient temperatures or (ii) the costs of designing any new units to do so.⁴⁴ FERC, NERC and the REs will host a joint technical conference to discuss how to improve the winter readiness of generating units before the recently approved Reliability Standards revisions become effective.⁴⁵ In addition to revising the Reliability Standards, other recommendations include seasonal reserve margin calculations, effects of cold weather on mechanical fatigue, increasing the flexibility of manual load shedding, use of weather forecasts, and coordination of protective relay settings.⁴⁶

38. *Id.* at 22.

39. *Id.*

40. FERC, *supra* note 20, at 21.

41. *Id.* at 19.

42. FERC APPROVES NEW COLD WEATHER RELIABILITY STANDARDS 1-2 (2021), <https://www.jonesday.com/en/insights/2021/09/ferc-approves-new-cold-weather-reliability-standards>.

43. *North American Electric Reliability Corporation*, 176 FERC ¶ 61,119 (August 2021).

44. FERC, NERC STAFF REVIEW 2021 WINTER FREEZE, RECOMMEND STANDARDS IMPROVEMENTS 2 (2021), <https://www.ferc.gov/news-events/news/ferc-nerc-staff-review-2021-winter-freeze-recommend-standards-improvements>.

45. FERC, *supra* note 20, at 18.

46. *Id.* at 19.

The FERC recommendations are assigned to one of four timeframes: (1) before Winter 2021-2022; (2) before Winter 2022-2023; (3) before Winter 2023-2024; and (4) beyond Winter 2023-2024. Most recommendations fall within timeframes of Winter 2022-2024.⁴⁷ Also, because of the interdependencies between the gas and electric sectors that came to light during the winter storm, as well as the vulnerabilities of natural gas infrastructure that were exposed, the FERC urged Congress, state legislatures, and regulatory agencies to require natural gas facilities to implement and maintain cold weather preparedness plans.⁴⁸

III. INTERNATIONAL TRANSMISSION COMPANY V. FERC

Three electric transmission company subsidiaries of International Transmission Company (ITC) petitioned for review in the United States Court of Appeals for the District of Columbia Circuit (DC Circuit) of a FERC order that reduced the companies' Transco return on equity incentive adder to 25 basis points.⁴⁹ ITC argued that FERC (1) "arbitrarily and capriciously departed from precedent establishing a particular methodology to assess Transco independence"; and (2) "exceeded its statutory authority by reducing ITC's Transco adders without first finding the adders to be unjust and unreasonable."⁵⁰

On the first point, the court deferred to FERC's findings related to ITC's level of independence and determined that the FERC, "consistent with its stated intent in Order No. 679, never established any definitive methodology . . . to determining Transco independence[;]" therefore, the court rejected ITC's argument that the FERC contravened its own precedent.⁵¹ On the second point, the court found ITC's argument unavailing and asserted that the FERC correctly followed the requirements of Section 206 of the Federal Power Act (FPA), 16 U.S.C. § 824e (2021), and properly followed the court's holding in *Emera Me. v. FERC*, 854 F.3d 9, 24 (D.C. Cir. 2017) ("*Emera Maine*").⁵² In that decision, the Court held that the FERC "first show an existing rate is unlawful before ordering a new rate."⁵³ The court determined that FERC properly applied *Emera Maine* to the facts of this case by reassessing ITC's independence, and its merger with Fortis had reduced ITC's independence, thereby concluding that its existing 50 basis point adder -- for "fully independent" Transco -- was no longer appropriate.⁵⁴ As a result, the court denied ITC's petition for review.⁵⁵

Judge Sentelle dissented, claiming that the FERC improperly "altered ITC's rate under § 206 without [first] finding the existing rate unjust and unreasona-

47. *Id.* at 185.

48. *Id.* at 18.

49. *Int'l Transmission Co. v. FERC*, 988 F.3d 471, 479 (D.C. Cir. 2021).

50. *Id.* at 473.

51. *Id.* at 480.

52. *Id.* at 486.

53. *Int'l Transmission Co.*, 988 F.3d at 486.

54. *Id.*

55. *Id.* at 471.

ble.”⁵⁶ Unconvinced that the FERC had satisfied its two-step Section 206 burden pursuant to *Emera Maine*, Judge Sentelle wrote that: “FERC dismisses those congressional limits as ‘magic words,’ alluding to Hanna Diyab’s *Ali Baba and the Forty Thieves*.”⁵⁷ “Yet FERC would do well to remember that when Ali Baba’s brother forgot the magic words, he could not escape the thieves’ cave. Although ‘unjust’ or ‘unreasonable’ are congressional requirements rather than magic words, I would likewise refuse to allow FERC to escape a trap of its own making.”⁵⁸

IV. JOINT FEDERAL-STATE TASK FORCE ON ELECTRIC TRANSMISSION

On June 17, 2021, the FERC issued an order establishing a Joint Federal-State Task Force on Electric Transmission (Task Force) under Section 209(b) of the FPA.⁵⁹ The order stated that the Task Force would be comprised of all members of the Commission and ten state commissioners nominated by the National Association of Regulatory Utility Commissioners (NARUC) to serve in an advisory capacity.⁶⁰

The Task Force will focus on issues related to the development of new transmission infrastructure, such as transmission planning and cost allocation, including transmission to facilitate generator interconnection.⁶¹ The Task Force will convene for formal meetings several times annually, the meetings will be on the record and open to the public for listening and observing, and the Task Force will expire after three years, barring an extension by the Commission or NARUC.⁶² The record developed by the Task Force could be incorporated into FERC and/or state commission proceedings.⁶³

After receiving the nominations from NARUC, the Commission issued an order appointing the state commission members of the Task Force and setting the time and place for the first public meeting.⁶⁴ The Task Force held its first meeting on November 10, 2021, in Louisville, Kentucky.⁶⁵ The first public meeting focused on incorporating state perspectives into regional transmission planning.⁶⁶ The Commission has announced that the second Task Force meeting will be on February 16, 2022, in Washington, DC.⁶⁷

56. *Id.* at 486 (Sentelle, J., dissenting).

57. *Int’l Transmission Co.*, 988 F.3d at 487 (Sentelle, J., dissenting).

58. *Id.*

59. *Joint Fed.-State Task Force on Elec. Transmission*, 175 FERC ¶ 61,224 at PP 1, 3 (2021).

60. *Id.* at P 3.

61. *Id.* at P 6.

62. *Id.* at P 4.

63. 175 FERC ¶ 61,224, at P 5.

64. *Id.* at PP 4, 6.

65. FERC, Joint Federal-State Task Force on Electric Transmission (2021), <https://www.ferc.gov/TFSO ET>.

66. *Id.*

67. Notice Announcing Meeting and Inviting Agenda Topics, *Joint Fed.-State Task Force on Elec. Transmission*, Docket No. AD21-15-000 (Dec. 14, 2021).

V. OKLAHOMA GAS & ELECTRIC COMPANY (OG&E) V. FERC

On August 27, 2021, the DC Circuit issued a decision⁶⁸ denying petitions for review of two FERC orders.⁶⁹ The issue on appeal concerned the Commission's statutory authority to grant retroactive waiver of tariff provisions, which has been under increased scrutiny in recent years.⁷⁰ In *OG&E*, the court removed any doubt of the Commission's authority in this area, clarifying: "Once a tariff is filed, the Commission has no statutory authority to provide equitable exceptions or retroactive modifications to the tariff."⁷¹

This case originated with the Southwest Power Pool, Inc.'s (SPP) tariff provisions related to paying for network upgrades and the timing of bills and billing adjustments.⁷² The court explained that, under SPP's tariff, a utility initially funds network upgrades needed to accommodate an expansion of service, and other utilities that would subsequently use the upgraded transmission facilities would pay a share of the upgrade costs.⁷³ In addition, section I.7.1 of SPP's tariff requires SPP to bill transmission customers "for all services furnished under the Tariff during the preceding month."⁷⁴ The tariff also permitted billing adjustments if corrected within one year.⁷⁵

Under this framework, Oklahoma Gas and Electric Company (OG&E) developed a wind farm in western Oklahoma, and, consistent with the SPP tariff, funded the necessary network upgrades believing that it would later receive credits from users of the upgrades.⁷⁶ SPP, however, was unable to calculate the upgrade credits due to software issues.⁷⁷ And so, from 2008 through 2015 and into 2016, SPP did not issue bills to the users of the upgraded transmission facilities reflecting the costs of the upgrades funded by OG&E.⁷⁸ In 2016, SPP was finally able to calculate the upgrade charges for 2008 to 2016, and OG&E had completed the upgrades needed to transmit its wind energy.⁷⁹ While several other SPP stakeholders were using these transmission upgrades, OG&E had not received any credits for the upgrade costs.⁸⁰ SPP thus petitioned FERC for a waiv-

68. *Oklahoma Gas & Elec. Co. v. FERC*, 11 F.4th 821 (D.C. 2021).

69. *Sw. Power Pool, Inc.*, 166 FERC ¶ 61,160 (2019), *order on reh'g*, *Sw. Power Pool, Inc.*, 170 FERC ¶ 61,125 (2020).

70. *See, e.g.*, *Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223 (D.C. Cir. 2018). (affirming the Commission's decision declining to waive tariff provisions retroactively); *Waiver of Tariff Requirements*, 171 FERC ¶ 61,156 (2020) (issuing a proposed policy statement clarifying the Commission's policy regarding waiver requests of tariff provisions).

71. *Okla. Gas & Elec. Co.*, 11 F.4th at 824-825.

72. *Id.* at 825.

73. *Id.*

74. *Id.* at 826.

75. *Okla. Gas & Elec. Co.*, 11 F.4th at 826.

76. *Id.* at 825.

77. *Id.*

78. *Id.* During this time, SPP held multiple stakeholder meetings and issued several papers on this topic as they tried to resolve the software issues and determine the calculation of the upgrade charges.

79. *Okla. Gas & Elec. Co.*, 11 F.4th at 825.

80. *Id.* at 825-26.

er of its tariff provision governing the timing of invoices, namely section I.7.1, so that it may bill the users of the upgraded transmission facilities and provide credits to OG&E for the entire historical period.⁸¹

Initially, the Commission granted SPP's waiver request, applying its four-factor test⁸², and eventually denied rehearing.⁸³ SPP then began collecting upgrade charges from users for the historical period.⁸⁴ Xcel Energy Services, Inc. petitioned the DC Circuit for review, but before briefing was complete, the DC Circuit issued its *ODEC* decision, which reinforced the principle that FERC has no discretion to waive the operation of a filed rate or retroactively change or adjust the filed rate for equitable reasons.⁸⁵ The Commission moved for a voluntary remand, which the DC Circuit granted, and on remand, the Commission reversed course, denying the waiver request and ordering refunds for the credits SPP collected.⁸⁶ The Commission denied rehearing⁸⁷, and OG&E appealed.

On appeal, the court first reviewed the Commission's tariff interpretation of section I.7.1 *de novo*, and, agreeing with the Commission, found that section I.7.1 of the SPP tariff unambiguously requires SPP to provide monthly invoices to its stakeholders for *all charges* incurred during the preceding month, including the kind of upgrade charges at issue here.⁸⁸ Thus, the court found that SPP could not amend bills for network upgrade charges more than one year after the charges were incurred by the upgrade users without a waiver of the tariff.⁸⁹

Turning to the heart of the matter and whether the Commission could grant a retroactive waiver of SPP's tariff, the court noted the Commission's statutory charge to ensure "just and reasonable rates," and how regulated entities are required to maintain these rates on file with FERC.⁹⁰ Relying on *Nantahala Power and Light Co. v. Thornburg*, the court explained that the statutory terms make clear that the filed rate is not limited to rates *per se*, "but also extends to matters directly affect[ing] . . . rates[.]"⁹¹ and that "[t]hese statutory provisions mandating the open and transparent filing of rates and broadly proscribing their retroactive adjustment are known collectively as the filed rate doctrine."⁹² The court elaborated that the filed rate doctrine "is shorthand for the interconnected statutory requirements that bind regulated entities to charge only the rates filed with FERC and to change their rates only prospectively."⁹³ Reiterating its recent con-

81. *Id.* at 826.

82. *Id.* at 826. *See also* 171 FERC ¶ 61,156.

83. *Okla. Gas & Elec. Co.*, 11 F.4th at 826.

84. *Id.*

85. *Id.*; *See also* *Old Dominion Elec. Coop v. PJM Interconnection, L.L.C.*, 892 F.3d 1223, 1230 (D.C. Cir. 2018).

86. *Okla. Gas & Elec. Co.*, 11 F.4th at 826.

87. *Id.*

88. *Id.* at 827.

89. *Id.* at 829.

90. *Okla. Gas & Elec. Co.*, 11 F.4th at 829 (citing 16 U.S.C. § 824d (1920)).

91. *Id.* (quoting *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966-67 (1986)).

92. *Id.* (quoting *Old Dominion Elec. Coop.*, 892 F.3d at 1226-27) (internal quotation marks omitted).

93. *Id.*

clusion from *ODEC*, the court stated that “[w]hen it applies, the filed rate doctrine is ‘a nearly impenetrable shield’ and does not yield, ‘no matter how compelling the equities.’”⁹⁴ Thus, “[i]t follows that FERC ‘has no authority under the Act to allow retroactive change in the [filed] rate.’”⁹⁵

Petitioners did not contest that section I.7.1 is part of the filed rate; instead, they argued that FERC should not elevate non-rate terms, like the time bar provision in section I.7.1, over a rate term, like that governing the allocation of network upgrades.⁹⁶ The court, however, rejected the distinction between rate and non-rate terms of the tariff, noting that the FPA prohibits changes not just to rate terms, but also “any rule, regulation, or contract thereto.”⁹⁷ Pointing to *Boston Edison Company v. FERC*⁹⁸ and several FERC orders (including FERC’s 2020 proposed policy statement on waivers),⁹⁹ the court noted that non-rate terms within the tariff are part of the filed rate just as the rate terms are.¹⁰⁰

Petitioners also argued that they should benefit from an “exception” to the filed rate doctrine because SPP gave notice to the upgrade users that they would be responsible for the upgrade charges once they were properly calculated.¹⁰¹ The court, however, rejected these arguments, noting that the stakeholder processes and SPP’s reports on the upgrade crediting issues did not amount to the type of formal notice required to satisfy the filed rate doctrine, in that they are not specific or sufficient to provide requisite notice that upgrade charges could occur outside section I.7.1’s billing requirements.¹⁰²

Finally, because the Commission had initially granted SPP’s waiver request and OG&E received some credits from the upgrade users, the court addressed whether the Commission’s decision to order refunds from OG&E back to the upgrade users was arbitrary and capricious.¹⁰³ The court noted that its review of FERC’s remedial decisions is particularly narrow,¹⁰⁴ and found that FERC’s decision was not arbitrary and capricious because “the natural consequence” of finding that the “waiver of section I.7.1 ran afoul of the filed rate” doctrine was to order refunds for the amounts unlawfully reallocated.¹⁰⁵ Notably, the court rejected petitioners’ argument that ordering “refund[s] defies the cost causation

94. *Okla. Gas & Elec. Co.*, 11 F.4th at 829-30 (quoting *Old Dominion Elec. Coop.*, 892 F.3d at 1230).

95. *Id.* at 829 (quoting *Old Dominion Elec. Coop.*, 892 F.3d at 1226).

96. *Id.* at 830.

97. *Id.* (citing *Nantahala Power & Light*, 476 U.S. at 966-67; 16 U.S.C. § 824d(d)).

98. *Boston Edison Co., v. FERC*, 865 F.2d 361 (1st Cir. 1988).

99. 171 FERC ¶ 61, 156. Notably, the Commission has not taken further action on the proposed policy statement despite seeking comment on it. See FERC Docket No. PL20-7.

100. *Okla. Gas & Elec. Co.*, 11 F.4th at 830 (“The statute provides no grounds for distinguishing rate and non-rate terms, but rather binds the parties to the terms in the filed tariff.”).

¹⁰¹ *Id.*

102. *Id.* at 830-31. The court also explained how formula rates and FERC committing legal error did amount to formal notice such that these are not “exceptions” to the filed rate doctrine, but rather “elaborations of the boundaries of the statutory requirements that comprise the filed rate doctrine.”

103. *Okla. Gas & Elec. Co.*, 11 F.4th at 821, 826-27, 832.

104. *Id.* at 832 (citing *La. Pub. Serv. Comm’n v. FERC*, 772 F.3d 1297, 1302 (D.C. Cir. 2014)).

105. *Okla. Gas & Elec. Co.*, 11 F.4th at 832.

principle,”¹⁰⁶ stating that the “[c]ost causation is a principle for ratemaking, not an abstract principle that can trump a filed rate.”¹⁰⁷

VI. SOUTHEAST ENERGY EXCHANGE MARKET PROCEEDING PROVIDES FERC OPPORTUNITY TO ADDRESS CALCULATION OF REHEARING REQUEST DEADLINES

On October 12, 2021, the Southeast Energy Exchange Market (SEEM) Agreement filed with FERC went into effect by operation of law after a 2-2 deadlocked Commission failed to issue an order within the statutory review period.¹⁰⁸

A. General Recap of SEEM

As described in the tariff filing accompanying the SEEM Agreement, SEEM was established among the traditional vertically-integrated utilities of the Southeast to automate and expand the existing bilateral trading market.¹⁰⁹ Specifically, SEEM adds an additional 15-minute delivery interval for bilateral transactions, which leverages the current bilateral transaction infrastructure already in place, e.g., master enabling agreements, e-tag interchange scheduling tools, and point-to-point OASIS transmission reservations.¹¹⁰ Each individual SEEM utility will continue to maintain independent operational control over its generation, transmission, and balancing authority areas—which makes SEEM distinguishable from RTO markets, where generation and transmission are centrally dispatched by a single independent entity.¹¹¹ Nonetheless, the SEEM Agreement, being a multi-party agreement governing wholesale interstate electricity transactions, was still subject to FERC approval pursuant to section 205 of the FPA.¹¹²

B. Interested Stakeholders

SEEM currently consists of fourteen vertically-integrated utilities in the Southeast who used Southern Company Services as their filing agent (Members).¹¹³ When the Members filed the SEEM Agreement with FERC, the filing

106. The cost causation principle provides that “all approved rates [must] reflect to some degree the costs actually caused by the customer who must pay them.” *Id.* at 832 (quoting *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1368 (D.C. Cir. 2004)). *see also* *Illinois Com. Comm’n v. FERC*, 576 F.3d 470, 476 (7th Cir. 2009); *KN Energy, Inc. v. FERC*, 968 F.2d 1295, 1300 (D.C. Cir. 1992).

107. *Oklahoma Gas & Elec. Co.*, 11 F.4th at 833.

108. FERC Docket No. ER 21-1111-002 (Oct. 13, 2021).

109. FERC Docket No. ER21-1111-000 (Feb. 12, 2021) (Southeast EEM Agreement Transmittal).

110. *Id.*

111. *Id.* at 9 (stating “[t]his is not an RTO”)

112. 16 U.S.C. § 824d.

113. FERC Docket No. ER21-1111-000 (Feb. 12, 2021) (listing Alabama Power, Georgia Power Company, and Mississippi Power Company (collectively, “Southern Companies”); Associated Electric Cooperative, Inc.; Dalton Utilities; Dominion Energy South Carolina, Inc.; Duke Energy Carolinas, LLC, Duke Energy Progress, LLC; Louisville Gas & Electric Company, Kentucky Utilities Company; North Carolina Municipal Power Agency Number 1; Power South Energy Cooperative; North Carolina Electric Membership Corporation; and Tennessee Valley Authority (each a “Member” and collectively, the “Members”)).

elicited opposition from multiple environmental, renewable energy, and consumer interest groups desiring an RTO market over the market proposed by SEEM.¹¹⁴ The opposing entities coalesced into two filing parties—Clean Energy Coalition (CEC) and Public Interest Organizations (PIO).¹¹⁵

C. *Proceeding History*

The initial SEEM Agreement was filed with FERC on February 12, 2021. After responding to two separate deficiency letters,¹¹⁶ SEEM Members submitted an amended agreement on August 11, 2021, and requested an effective date of October 12, 2021, providing the Commission a 62-day review period.¹¹⁷ Unable to break a 2-2 deadlock, the Commission issued a notice on October 13th, stating: “[p]ursuant to section 205 of the FPA, in the absence of Commission action on or before October 11, 2021, the proposed [SEEM] Agreement and concurrences thereto became effective by operation of law.”¹¹⁸ “The notice further stated the effective date of the proposed tariff sheets is October 12, 2021[.]”¹¹⁹ In addition to the SEEM Agreement filing noted above, SEEM Members separately filed revisions to their respective OATTs, which added a new 15-minute non-firm transmission product needed to facilitate SEEM transactions.¹²⁰ On November 8, 2021, FERC issued an order accepting the filed tariff revisions as just and reasonable and not unduly discriminatory or preferential.¹²¹

D. *Issues Addressed by FERC – Calculation of Rehearing Request Deadlines*

In response to the SEEM Agreement going into effect by operation of law, the intervening opponents filed a rehearing request on November 12, 2021, which was denied by FERC as untimely, thus providing FERC with an opportunity to clarify its calculation method for rehearing request deadlines.¹²² Under section 313(a) of the FPA, parties have 30 days after the issuance of an order to request rehearing.¹²³ The opposing intervenors filed their request for rehearing on November 12, 2021, which was 32 days after the SEEM Agreement went into effect.¹²⁴ The opposing intervenors, in calculating the SEEM Agreement effec-

114. *Alabama Power Co.*, 177 FERC ¶ 61,178 at P 1 (2021).

115. *Id.* (Order Rejecting Rehearing Requests as Untimely).

116. *Id.*

117. *Id.* at P 4.

118. 177 FERC ¶ 61,178 at P 5.

119. *Id.*

120. *Duke Energy Progress*, 177 FERC ¶ 61,080 at PP 2, 8 (2021).

121. *Id.* at PP 1, 21.

122. *See* 177 FERC ¶ 61,178 at P 4 (holding that “[g]iven that the Commission has not previously explained in an order the proper calculation of the deadline for rehearing requests following the failure of the Commission to act within the time period prescribed by section 205(d) of the FPA, we take this opportunity to do so.”). *Id.* at P 9.

123. *Id.* at P 14 (quoting 16 U.S.C. § 825(a) (2005)).

124. *Id.* at PP 1, 16.

tive date, argued that the holiday weekend pushed back the effective date.¹²⁵ FERC did not agree, holding that the “order” accepting the SEEM Agreement was issued at the *conclusion* of Monday, October 11, 2021, which was Columbus Day—a federal holiday.¹²⁶ Relying on *Ind. & Mich. Elec. Co. v. FPC*, the Commission stated that the holiday and “weekend rules established in 18 C.F.R. § 385.2007(a)(2) cannot and do not operate to extend the statutory deadline for Commission action pursuant to section 205(d).”¹²⁷ Thus, FERC held that the 30-day rehearing request clock began to toll the first moments of Tuesday, October 12, 2021, and, thus, the deadline for submission of a rehearing request was the close of November 10, 2021, which the requestors failed to meet.¹²⁸

E. Legal Implications of FERC Order

The untimely filing of the rehearing request forecloses further judicial review of the SEEM Agreement on the merits. Section 313(a) of the FPA states that “[n]o proceeding to review any order of the Commission shall be brought by any entity unless such entity shall have made application to the Commission for a rehearing thereon.”¹²⁹ As mentioned above, SEEM Members separately filed OATT revisions to add a new 15-minute non-firm transmission product to facilitate the SEEM transactions.¹³⁰ On November 8th, 2021, the Commission issued an order approving the transmission tariff changes supporting SEEM on 3-1 vote.¹³¹ This time, the intervening opponents filed a timely request for rehearing on December 8, 2021.¹³² Whether FERC will deny the OATT rehearing request and whether SEEM opponents will pursue appeal is to be determined.

F. SEEM Implementation Timeline

With the necessary agreements and OATT tariffs now on file with FERC, SEEM Members are moving forward with implementation and are targeting mid-

125. *Id.* at P 8. *see* Rehearing Parties Motion for Leave to Answer and Answer, *Clean Energy Coalition and Public Interest Organization (collectively the “Rehearing Parties”)* (December 3, 2021)

126. *See* 177 FERC ¶ 61,178 at P 15 (holding that “the Commission’s ‘failure to issue an order’ on October 11, 2021, which under section 205(g)(1)(A) is ‘an order’ subject to rehearing, occurred on October 11, 2021.” (quoting 16 U.S.C. § 824d(g)(1))).

127. *Id.* at P 12; P 12 n.23. (holding “the statutory notice period . . . ‘is the maximum a utility can be compelled to wait . . .’” (quoting 502 F.2d 336, 341 (D.C. Cir. 1974))).

128. *Id.* at PP 15-16.

129. 16 U.S.C. § 825l(a). *See also* *New England Power Generators Ass’n, Inc. v. FERC*, 879 F.3d 1192, 1197 (D.C. Cir. 2018) (holding “we lack jurisdiction to consider the Association’s challenge to the Tariff Order because the Association has not met the requirements of FPA § 313(a), 16 U.S.C. § 825l(a). This provision is a ‘mandatory petition-for-rehearing requirement.’”) (quoting *Granholtm ex rel. Mich. Dep’t of Nat. Res. v. FERC*, 180 F.3d 278, 281 (D.C. Cir. 1999)).

130. Ethan Howland, *FERC Approves Transmission Rules for SEEM Market, Dismissing Open Access Concerns*, UTILITY DIVE (Nov. 10, 2021), <https://www.utilitydive.com/news/ferc-transmission-rules-seem-market-open-access-duke-southern/609774/>.

131. *Id.* *See* *Duke Energy Progress, LLC*, 177 FERC ¶ 61,080 at P 1 (2021).

132. *Id.*

2022 for their market go-live date.¹³³ On December 10, 2021, SEEM issued a press release stating that it has selected Hartigen Solutions, LLC to build the platform supporting the automated clearing of bids and offers for the 15-minute energy market.¹³⁴ Considering much of the underlying market infrastructure and systems are already in commercial use, SEEM Members have some built-in advantages for implementing their desired schedule on time.

VII. FERC DOCKET NO. IN18-9-000, ORDER ASSESSING CIVIL PENALTIES AGAINST GREENHAT ENERGY, LLC

On November 5, 2021 the FERC issued an order assessing civil penalties to GreenHat Energy, LLC (GreenHat) and its principal owners John Bartholomew, Kevin Ziegenhorn, and Luan Troxel, in her capacity as Executor of the Estate of Andrew Kittel, (collectively Respondents).¹³⁵ In the Order, the FERC found the respondents responsible for violating Section 222 of the FPA¹³⁶ and section 1c.2 of the Commission's regulations that prohibit manipulation of the energy market.¹³⁷ The FERC found that the manipulation occurred due to the Respondents' engaging in a trading scheme involving the Financial Transmission Rights (FTR) market operated by PJM Interconnection, L.L.C. (PJM).¹³⁸

Founded in July 2014, GreenHat was formed by the Respondents in order to trade products in PJM for speculative gain. FTRs¹³⁹ are financial contracts that reflect the cost of congestion between two points during some predetermined period in the future.¹⁴⁰ Utilities can use FTRs to hedge against future congestion.¹⁴¹ The value of FTRs change hourly depending upon pricing differences in energy nodes of the transaction.¹⁴² A holder of an FTR can make a financial gain or loss depending on the value of the sale price of the FTR from the purchase price.

The FERC applied Section 222 of the FPA which makes illegal any deceptive or manipulative device used in connection with trading of electric energy or transmission that is subject to the to the Commission's jurisdiction.¹⁴³ The Order identified four principal violations as discussed below.

133. See SE. ENERGY MARKET, *Southeast Electric Providers Receive Approval from FERC for New Energy Market Platform* (Oct. 13, 2021), <https://southeastenergymarket.com/wp-content/uploads/NR-SEEM-FERC-Approval-2-2-vote-FINAL-101321.pdf>.

134. SE. ENERGY MARKET, *SEEM Selects Hartigen As Market Platform Provider* (Dec. 10, 2021), https://www.pnews.com/news-releases/seem-selects-hartigen-as-market-platform-provider-301442513.html?tc=eml_cleartime.

135. *GreenHat Energy, LLC*, 177 FERC ¶ 61,073 (2021).

136. *Id.* at P 1 (citing 16 U.S.C. § 824v(a)).

137. *Id.* (citing 18 C.F.R. § 1c.2 (2006) (Anti-Manipulation Rule)).

138. *Id.*

139. 177 FERC ¶ 61,073 at P 4 (citing PJM, Intra-PJM Tariffs, OATT attach. K-app. § 7 (0.0.0); see also PJM Tariff, Schedule 9-2 (Financial Transmission Rights Administration Service)).

140. See PJM Manual 6 Financial Transmission Rights, § 1.1 (Rev. 17, June 1, 2016) (PJM Manual 6).

141. See *id.* §§ 1.1, 6.1.

142. 177 FERC ¶ 61,073 at P 5 (citing PJM Manual 6, § 1.2.1).

143. *Id.* at P 1 (citing 16 U.S.C. § 824v(a)).

A. Violation of FPA Section 222(a), Anti-Manipulation Rule and Four-Part Scheme

After considering the basis of fact and evidence, the FERC found that Respondents did engage in a willful four-staged fraudulent scheme “to defraud PJM and market participants”.¹⁴⁴ The order outlines the four stages as:

- (1) amass a significant FTR portfolio based on little to no upfront capital as opposed to establishing profitable positions;
- (2) buy primarily long-term FTRs;
- (3) plan to avoid paying pay for losses at settlement; and,
- (4) raise cash for Respondents by selling profitable FTRs to third parties at a discount.¹⁴⁵

B. Violation of FPA Section 222(a), Anti-Manipulation Rule and Scheme to Not Pay for FTR Losses

The FERC found that GreenHat engaged in trading of FTS such that very little to no collateral requirements were required.¹⁴⁶ The FERC also concluded that GreenHat traded in such a way as to ensure that its portfolio was not profitable and that GreenHat had no intent to pay for any losses at settlement.¹⁴⁷ In its Order, the FERC found that GreenHat’s fraudulent scheme with the intent not to pay for any losses created a separate significant violation from the four-part scheme outlined in the First Violation.¹⁴⁸

C. Violation of FPA Section 222(a), Anti-Manipulation Rule, Scheme to Not Pay for FTR Losses, and False Representation to PJM

After its review of evidence, the FERC found that GreenHat made false representations to PJM.¹⁴⁹ Specifically, GreenHat represented to PJM that it was owed more than \$62 million from Shell Energy North America as a result of certain bilateral deals.¹⁵⁰ GreenHat’s representation was designed to convince PJM that its intended margin call was not necessary.¹⁵¹ The FERC concluded that as a result of the misrepresentation to PJM, GreenHat was able “to continue its manipulative scheme”.¹⁵²

144. *Id.*

145. *Id.*

146. 177 FERC ¶ 61,073 at P 133.

147. *Id.* at P 160.

148. *Id.*

149. *Id.* at P 165.

150. 177 FERC ¶ 61,073 at P 165.

151. *Id.* at P 182.

152. *Id.*

D. Violation of FPA Section 222(a), Anti-Manipulation Rule: GreenHat made Uneconomic Trades to Increase the PJM Auction Clearing Price of FTRs sold to Shell.

FERC concluded that Respondents manipulated the PJM FTR auction market by submitting long term FTR bids (specifically, 2017/2020 Rounds Two and Three and 2018/2021 Round One Auctions) to purposefully raise the auction clearing price of FTRs owned by GreenHat and purchased by others.¹⁵³ The FERC found that GreenHat's actions were in violation of Section 222(a) of the FPA and the Anti-Manipulation Rule since they interfered with the well-functioning market and artificially raised the FTR clearing prices to achieve financial gain for GreenHat.¹⁵⁴

After determining that GreenHat's actions with respect to the alleged manipulation of the FTR market did constitute a violation of the FPA, the FERC then considered whether GreenHat had intent or "scienter" when it engaged in the actions.¹⁵⁵ The FERC explained that "scienter is the "second element" of the Anti-Manipulation Rule."¹⁵⁶ The FERC stated that *Prohibition of Energy Market Manipulation*, (Order No. 670) requires a showing of "reckless, knowing, or intentional actions taken in conjunction with a fraudulent scheme, material misrepresentation, or material omission" in order to establish scienter.¹⁵⁷ The FERC found that with respect to all four violations noted above, the Respondents acted with requisite scienter.¹⁵⁸ In the Order, the FERC also identified violations of PJM Tariff and Operating Agreement.:

E. Violations of PJM's Tariff and Operating Agreement, Section 15.1.3 (Payment of Bills)

The FERC established its authority under FPA to assign sanctions for violations of the PJM Tariff.¹⁵⁹ Pursuant to this authority, the FERC found that GreenHat directly violated section 15.1.3 of PJM's Operating Agreement when PJM notified GreenHat in June 2018 that it was in default of payments due from certain invoices.¹⁶⁰ Further, the FERC found the violation to be ongoing at the time of the Order since GreenHat had not yet paid the losses on the FTR portfolio that were incurred from June 2018 to May 2021.¹⁶¹ These losses total \$179,600,573 and were recovered (socialized) from other PJM market participants.¹⁶²

153. *Id.* at P 199.

154. 177 FERC ¶ 61,073 at P 199.

155. *Id.* at PP 204-213.

156. *Id.* at P 205 (citing Order No. 670, *Prohibition of Energy Market Manipulation*, 114 FERC ¶ 61,047 at P 49 (2006)) [hereinafter Order No. 670].

157. *Id.* (citing Order No. 670, *supra* note 157, at PP 52-53).

158. *See id.* at PP 206-213.

159. 177 FERC ¶ 61,073 at P 220.

160. *Id.* at P 221.

161. *Id.*

162. *Id.*

F. Violations of PJM's Tariff Attachment Q, Section Ia.B (Risk Management and Verification)

The FERC found “that GreenHat violated section Ia.B of Attachment Q to PJM’s Tariff by” making a series of false representations on its 2014-2018 Officer Certification Forms (Appendix 1 to Attachment Q) submitted to PJM.¹⁶³ The false representations included statements that GreenHat was using industry accepted standards to value its FTR portfolio, that it was not aware of changes to its portfolio that could impact collateral requirements, and other violations.¹⁶⁴

The FERC assessed a civil penalty of \$179,600,573 against GreenHat.¹⁶⁵ In addition, the FERC assessed a civil penalty of \$25 million against Bartholomew and a civil penalty of \$25 million against Ziegenhorn.¹⁶⁶ The Order also assessed the disgorgement by Respondents of \$13,072,428 in profits.¹⁶⁷

VIII. BONNEVILLE POWER ADMINISTRATION JOINING THE WESTERN EIM AND THE WESTERN RESOURCE ADEQUACY PROGRAM

A. Western Energy Imbalance Market

On July 29, 2021, Bonneville Power Administration (BPA) released a draft decision proposing to join the Western Energy Imbalance Market (EIM) as one of the agency’s grid modernization efforts, explaining that it was doing so after conducting “an extensive assessment and public process over the last three years.”¹⁶⁸ On September 27, 2021, BPA released its Final EIM Close-out Letter.¹⁶⁹ In that letter, the BPA Administrator and Chief Executive Officer outlined the next steps in advance of the anticipated March 2, 2022 “EIM Go Live date,” including initial testing, which already was underway, and parallel operations, which are taking place from December 1, 2021 through February 28, 2022.¹⁷⁰

On October 1, 2021, the California Independent System Operator Corporation (CAISO) submitted to FERC six individual service agreements (EIM Participation Agreements) between the CAISO and the United States Department of Energy, acting by and through BPA.¹⁷¹ Under the EIM Participation Agreements, Bonneville will comply with the CAISO tariff provisions applicable to EIM participants, with certain limited modifications to account for Bonneville’s status as a federal entity and additions to clarify that Bonneville will participate

163. 177 FERC ¶ 61,073 at P 234.

164. *Id.* at PP 234-235.

165. *Id.* at P 265.

166. *Id.* at P 276.

167. 177 FERC ¶ 61,073 at P 296.

168. Draft EIM Close-out Letter from John L. Hairston, Adm’r and Chief Exec. Officer, Bonneville Power Admin (July 29, 2021).

169. Letter from John L. Hairston, Adm’r and Chief Exec. Officer, Bonneville Power Admin., to Parties interested in BPA’s market participation (September 27, 2021).

170. *Id.*

171. Letter from Steven T. Wellner, Dir., Div. of Electric Power Regul.– West, to John C. Anders, Cal. Ind. Sys. Operator Corp. (Nov. 17, 2021) [hereinafter Letter from Steven T. Wellner].

with three aggregated resources and make available interchange rights for EIM transfers as provided by the CAISO tariff.¹⁷² In its filing, the CAISO requested that the FERC accept the EIM Participation Agreements for filing effective December 1, 2021 to facilitate BPA's participation in the EIM on March 2, 2022.¹⁷³ On November 17, 2021, the FERC accepted the EIM Participation Agreements.¹⁷⁴

B. Western Resource Adequacy Program

On August 20, 2021, BPA released a draft decision proposing to participate in the next phase of the Northwest Power Pool's Resource Adequacy Program—the non-binding forward showing phase (Phase 3A).¹⁷⁵ During Phase 3A, BPA “will have the ability to test the effectiveness of the program without making operational commitments or incurring financial penalties for non-compliance.”¹⁷⁶ According to the BPA Administrator and Chief Executive Officer, participation in Phase 3A will allow BPA “to make an informed decision about joining the program's final phase, the binding program, in 2022” by permitting BPA “to determine whether the final binding program design aligns with its statutory obligations, and whether the resources relied upon by participants are adequate to meet demands for power.”¹⁷⁷ On September 29, 2021, BPA released its Final Letter to the Region.¹⁷⁸

BPA joins several other Phase 3A participants: Arizona Public Service, Avangrid, Avista, Black Hills Energy, Basin Electric Power Cooperative, Calpine, Chelan PUD, Clatskanie PUD, Douglas PUD, Eugene Water and Electric Board, Grant PUD, Idaho Power, NorthWestern Energy, NV Energy, PacifiCorp, Portland General Electric, Powerex, Puget Sound Energy, Seattle City Light, Snohomish PUD, Shell Energy, Salt River Project, Tacoma Power, Turlock Irrigation District, and The Energy Authority (representing seven Washington and Oregon public utilities).¹⁷⁹

The twenty-six (26) Phase 3A participants represent an estimated peak winter load of 65,122 MW and an estimated peak summer load of 66,768 MW across ten (10) states and one Canadian province.¹⁸⁰

172. *Id.*, Transmittal Letter at 1-2.

173. *Id.*, Transmittal Letter at 5.

174. Letter from Steven T. Wellner, *supra* note 172.

175. Letter from John L. Hairston, Adm'r and Chief Exec. Officer, Bonneville Power Admin., to BPA stakeholders (August 20, 2021).

176. *Id.*

177. *Id.*

178. Letter from John L. Hairston, Adm'r and Chief Exec. Officer, Bonneville Power Admin., to Bonneville customers, stakeholders, and interested parties (September 29, 2021).

179. Rebecca Sexton, *WRAP Announces Full Participation of Phase 3A*, Northwest Power Pool (December 7, 2021), <https://www.westernpowerpool.org/news/wrap-announces-full-participation-of-phase-3a>.

180. *Id.*