

## REPORT OF THE FERC PRACTICE COMMITTEE

This report covers significant Federal Energy Regulatory Commission (FERC or Commission) practice and procedural issues, including appellate court decisions, major FERC orders and rulemakings, and administrative actions, from July 1, 2018 through June 30, 2019.\*

I.	Procedural Holdings from the Federal Courts.....	2
A.	U.S. Court of Appeals for the District of Columbia Circuit.....	2
1.	Delaware Riverkeeper Network v. FERC .....	2
2.	Utility Workers Union of America Local 464 v. FERC.....	4
3.	Verso Corporation v. FERC .....	4
B.	Other Circuit Court Decisions.....	6
1.	Adorers of the Blood of Christ v. FERC .....	6
2.	Berkley v. Mountain Valley Pipeline .....	7
C.	Other Court Decisions: Bold Alliance v. FERC .....	9
II.	Federal Energy Regulatory Commission Headlines and Notable Administrative Actions .....	10
A.	Update on Commissioners .....	10
1.	Commissioner Bernard McNamee .....	10
2.	Chairman Neil Chatterjee.....	10
3.	Commissioner Kevin McIntyre .....	11
4.	Commissioner Cheryl LaFleur .....	11
B.	Staffing Updates.....	12
1.	Office of Energy Policy and Innovation.....	12
2.	Chairman’s Office .....	12
3.	Dispute Resolution Services.....	13
C.	FERC Budget .....	13
1.	FERC Fiscal Year 2020 Budget Request and Fiscal Year 2018 Annual Performance Report.....	13
2.	FERC Fiscal Year 2018-2022 Strategic Plan .....	14
3.	FERC Fiscal Year 2018 Agency Financial Report.....	16
D.	Rulemakings.....	16
1.	Order No. 852, Elimination of Form 80 and Revision of Regulations on Recreational Opportunities and Development at Licensed Hydropower Projects.....	16
2.	Order No. 858, Hydroelectric Licensing Regulations Under the America’s Water Infrastructure Act of 2018 .....	17
3.	Order No. 859, Revisions to the Filing Process for Commission Forms.....	18
E.	Commission Decisions.....	18
1.	ALLETE, Inc.....	18

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2. Ambit Northeast, LLC.....	19
3. Boyce Hydro Power, LLC.....	20
4. City and County of Denver, Colorado.....	21
5. Nevada Hydro Company, Inc. ....	23
6. Utah Board of Water Resources .....	23
F. Administrative Litigation: FERC Administrative Law Judges .	24
1. Patricia M. French .....	24
2. Stephanie Nagel.....	24
3. Andrew Satten .....	24

### I. PROCEDURAL HOLDINGS FROM THE FEDERAL COURTS

Pursuant to the Federal Power Act (FPA) and the Natural Gas Act (NGA), parties to a FERC proceeding may appeal an order issued by the Commission in the “United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia.”<sup>1</sup> Parties must file their appeal within sixty days after the FERC order, and “upon the application for rehearing, a written petition praying that the order of the [FERC] be modified or set aside in whole or in part.”<sup>2</sup> “The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the [FERC], shall be final, subject to review by the Supreme Court of the United States. . . .”<sup>3</sup> The case summaries below address appellate decisions involving notable procedural issues (e.g., standing, failure to raise issue on rehearing) that resulted in the court dispensing with one or more issues without reaching the merits.

#### A. *U.S. Court of Appeals for the District of Columbia Circuit*

##### 1. *Delaware Riverkeeper Network v. FERC*

On July 10, 2018, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) issued an order upholding FERC’s recovery of operating costs through industry fees and charges, and finding FERC’s use of tolling orders generally permissible under the Due Process Clause of the Fifth Amendment.<sup>4</sup> This ruling stems from an appeal by the Delaware Riverkeeper Network (Riverkeeper) to the United States District Court for the District of Columbia related to a natural gas pipeline certificate proceeding for a pipeline running through Pennsylvania and New Jersey.<sup>5</sup> Specifically, the court addressed claims brought by Riverkeeper that (1) FERC’s collection of fees and assessments under the Om-

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1. 16 U.S.C. § 825l(b) (2012); 15 U.S.C. § 717r(b) (2012).

2. 16 U.S.C. § 825l(b); 15 U.S.C. § 717r(b).

3. 16 U.S.C. § 825l(b); 15 U.S.C. § 717r(b).

4. *Delaware Riverkeeper Network v. FERC*, 895 F.3d 102 (D.C. Cir. 2018).

5. *Delaware Riverkeeper Network v. FERC*, 243 F. Supp. 3d 141 (D.D.C. 2017); *Delaware Riverkeeper*, 895 F.3d at 106.

nibus Budget Reconciliation Act of 1986 creates structural bias in favor of granting natural gas pipeline certificates; and (2) that FERC's practice of issuing tolling orders on rehearing in pipeline certificate proceedings while simultaneously allowing pipeline construction frustrates judicial review.<sup>6</sup> Riverkeeper argued that both practices violate the Due Process Clause.<sup>7</sup>

The D.C. Circuit disagreed.<sup>8</sup> With regard to the collection of fees and assessments, the court first found that Riverkeeper failed to establish a protected liberty interest under the Due Process Clause.<sup>9</sup> Explaining the underlying premise of the Due Process Clause, the court established that a threshold question necessary to establish a due process claim is whether a liberty or property interest has been deprived.<sup>10</sup> Despite Riverkeeper's arguments that the Pennsylvania Constitution creates a protected interest in a clean environment, the D.C. Circuit found this sort of interest unlike the sorts of rights to contract, work, learn, marry, worship, and be free of bodily restraint that typically characterize protected liberties.<sup>11</sup> The court further rationalized that Pennsylvania's constitutional rights to a clean environment have no ascertainable monetary value, do not convey a right to exclude, are too vague in terms of specific environmental quality, and otherwise are not sufficiently binding on the federal government to create a due process right.<sup>12</sup> In response to Riverkeeper's additional argument that its members own real property that may be affected by the relevant pipeline development, the D.C. Circuit held that eminent domain proceedings provide adequate due process.<sup>13</sup>

Despite the findings above, the D.C. Circuit further considered the creation of bias related to FERC's collection of fees and assessments, finding that FERC's limited interests in the costs recovered do not create undue prejudice.<sup>14</sup> Specifically, looking to several cases of government influence related to fees and fines, the court determined that FERC's Commissioners do not have a direct pecuniary interest in the costs because FERC does not retain the fees or assessments, but pays the costs back to the Treasury Department as part of FERC's annual budgeting processes.<sup>15</sup> The court also found that FERC's Commissioners do not have a significant influence over Congress so as to influence their salaries.<sup>16</sup>

With regard to FERC's practice of using tolling orders to satisfy statutory 30-day rehearing deadlines, the court found that such practice has been long upheld

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6. *Delaware Riverkeeper*, 243 F. Supp. 3d at 146.

7. *Delaware Riverkeeper*, 895 F.3d at 105-06.

8. *Id.* at 111.

9. *Id.* at 108, 110.

10. *Id.* at 107 (citing *Swarthout v. Cooke*, 562 U.S. 216 (2011)).

11. *Id.* at 108 (citing *Bd. of Regents of St. C. v. Roth*, 408 U.S. 564 (1972)).

12. *Delaware Riverkeeper*, 895 F.3d at 109-10.

13. *Id.* at 110-11.

14. *Id.* at 111-12.

15. *Id.*

16. *Id.* at 112 (assessing FERC's potential biases in light of *Tumey v. Ohio*, 273 U.S. 510 (1927); *Dugan v. Ohio*, 277 U.S. 61 (1928); and *Ward v. Vill. of Monroeville*, 409 U.S. 57 (1972)).

by the court.<sup>17</sup> The *Delaware Riverkeeper* order explained that Riverkeeper's claim that tolling orders were broadly impermissible would require a showing that each and every tolling order ever issued by FERC unconstitutionally deprived a party of due process with regard to specific rights at issue in that particular proceeding.<sup>18</sup> While the court left open the idea that specific claims of due process violation could succeed in individual proceedings based on the facts at issue there, taking into account the rights at issue, the reasons FERC stated for tolling, the complexity of the application, and the development allowed in the interim, it nonetheless denied Riverkeeper's broader claim that tolling orders were generally unconstitutional.<sup>19</sup>

## 2. Utility Workers Union of America Local 464 v. FERC

In *Utility Workers Union of America Local 464 v. FERC*, the D.C. Circuit dismissed petitions for review of FERC orders approving the results of two annual forward capacity auctions.<sup>20</sup> Petitioners, retail electricity customers in New England, claimed that high clearing prices in two capacity auctions increased the cost of their retail electricity service.<sup>21</sup> Petitioners alleged that the retirement of a generator, Brayton Point, constituted illegal market manipulation that affected the auctions.<sup>22</sup> In dismissing the petitions, the D.C. Circuit concluded that petitioners failed to establish standing; specifically, petitioners failed to establish causation between their electricity prices and FERC's actions.<sup>23</sup> The court stated that petitioners had to "make some showing that an unlawful Brayton Point retirement in early 2014 skewed the results of the auctions conducted in 2015 and 2016."<sup>24</sup> However, the court explained that petitioners had made only conclusory assertions to that effect.<sup>25</sup> While the court noted that there was some logic to petitioners' claim, it held that there was a missing link between the retirement of Brayton Point and auction prices because "petitioners challenge[d] successive forward capacity auctions exclusively by reference to events during [a prior auction]."<sup>26</sup>

## 3. Verso Corporation v. FERC

In *Verso Corporation v. FERC*,<sup>27</sup> the D.C. Circuit addressed FERC's authority to impose surcharges as part of its remedial powers under FPA section 206.<sup>28</sup>

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17. *Delaware Riverkeeper*, 895 F.3d at 113 (citing *Cal. Co. v. FPC*, 411 F.2d 720, 722 (D.C. Cir. 1969); *Kokajko v. FERC*, 837 F.2d 524, 526 (1st Cir. 1988); *Gen. Am. Oil Co. of Tex. v. FPC*, 409 F.2d 597, 599 (5th Cir. 1969)).

18. *Id.*

19. *Id.*

20. *Utility Workers Union of Am. Local 464 v. FERC*, 896 F.3d 573, 574-75 (D.C. Cir. 2018).

21. *Id.* at 575.

22. *Id.* at 575-76.

23. *Id.* at 577-79.

24. *Id.* at 577-78.

25. *Utility Workers*, 896 F.3d at 578.

26. *Id.* at 579.

27. *Verso Corp. v. FERC*, 898 F.3d 1 (D.C. Cir. 2018).

28. 16 U.S.C. § 824e (2012).

The surcharges at issue stemmed from tariff revisions to the Midcontinent Independent System Operator, Inc. (MISO)'s cost allocation methodology for system support resource (SSR) costs within the American Transmission Company (ATC) service area.<sup>29</sup> Under the tariff revisions, while most SSR costs were "shared by customers based on the load served," for the ATC area, SSR costs were allocated "pro rata among all customers."<sup>30</sup> MISO filed three SSR agreements under this approach between 2012 and 2014.<sup>31</sup> In 2014, the Public Service Commission of Wisconsin (PSCW) successfully challenged the pro rata allocation as unjust and unreasonable.<sup>32</sup> FERC found that this tariff provision was unjust and unreasonable because it failed to allocate costs in a manner commensurate with received benefits and directed the effectuation of refunds by re-allocating the SSR costs.<sup>33</sup> While FERC acknowledged "that it 'ha[d] established a policy of not ordering refunds in rate design and cost allocation cases,'" it also explained that its policy "is not a strict requirement in every cost allocation case," but could vary in light of equitable considerations.<sup>34</sup> FERC's reasoning was that the "primary bases disfavoring refunds include 'the unfairness that results from retroactive implementation of a new rate for both utilities and customers who cannot alter their past actions in light of that new rate, and [] the potential for under-recovery.'"<sup>35</sup> FERC concluded, however, that neither concern applied in this case, because no party had "identified any particular decisions made in reliance on the previous SSR cost allocation methodology," and MISO could calculate with accuracy the appropriate amount that should be assessed to each load-serving entity, thus warranting "a narrow exception to the Commission's general policy of not providing refunds in a cost allocation case."<sup>36</sup>

Petitioners, the customers subject to surcharges, challenged FERC's decision as arbitrary and capricious and having affected "an impermissible retroactive rate increase."<sup>37</sup> The D.C. Circuit denied the petitions, holding that FERC's ordering of surcharges was permissible "[b]ecause [s]ection 206 contemplates surcharges in cost-allocation cases," and thus the "FERC's orders here are within its remedial authority."<sup>38</sup> The D.C. Circuit also held that "because FERC explained valid reasons for departing from its usual policy of denying reallocation, that departure was not arbitrary or capricious."<sup>39</sup>

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29. *Verso*, 898 F.3d at 5.

30. *Id.* at 4.

31. *Id.* at 5.

32. *Id.* (quoting *Midcontinent Indep. Sys. Operator, Inc.*, 148 F.E.R.C. ¶ 61,071 (2014)).

33. *Id.* at 5-6.

34. *Verso*, 898 F.3d at 7 (citing *Mich. Elec. Transmission Co., LLC v. Midcontinent Indep. Sys. Operator, Inc.*, 156 F.E.R.C. ¶ 61,025 at PP 41, 43 (2016)).

35. *Id.* (citing 156 F.E.R.C. ¶ 61,025 at P 44).

36. *Id.* (citing 156 F.E.R.C. ¶ 61,025 at PP 45-47, 50-51).

37. *Id.*

38. *Id.* at 9-10.

39. *Verso*, 898 F.3d at 10.

## B. Other Circuit Court Decisions

### 1. Adorers of the Blood of Christ v. FERC

On July 25, 2018, the United States Court of Appeals for the Third Circuit (Third Circuit) denied the Adorers of the Blood of Christ's (Adorers) appeal of a district court decision dismissing their complaint under the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb-1.<sup>40</sup> The case arose from a 2017 FERC "decision to issue a certificate of public convenience and necessity" pursuant to section 7(c) of the NGA to "Transcontinental Gas Pipe Line Company, LLC (Transco), authorizing the company to construct" a pipeline that crossed land owned by the Adorers.<sup>41</sup> The certificate "granted Transco the right to take private property" by eminent domain,<sup>42</sup> and Transco ultimately condemned the Adorers' land.<sup>43</sup>

"The Adorers did not object, appeal or seek rehearing" of the condemnation order.<sup>44</sup> Instead, five months after the certificate order was issued, the Adorers filed a complaint with the United States District Court for the Eastern District of Pennsylvania raising a claim under the RFRA.<sup>45</sup> The district court promptly dismissed the Adorers' complaint, concluding that it lacked subject matter jurisdiction in light of the NGA's specific provisions giving the United States courts of appeals exclusive jurisdiction "to affirm, modify or set aside" FERC orders.<sup>46</sup>

"On appeal, the Adorers contend[ed] that the [d]istrict [c]ourt erred because their RFRA claim raise[d] a federal question, over which the court had jurisdiction pursuant to 28 U.S.C. § 1331."<sup>47</sup> The Third Circuit disagreed.<sup>48</sup> The Third Circuit explained that when it reviews "an order dismissing a claim for lack of subject matter jurisdiction, [it] exercise[s] plenary review over legal conclusions and review[s] [the] findings of fact for clear error."<sup>49</sup> The court determined that "the NGA's procedural regime" was controlling, and that jurisdiction was exclusive to the United States courts of appeals.<sup>50</sup> Moreover, it observed that the Adorers had not sought rehearing before FERC, and therefore, had "foreclosed judicial review of their substantive RFRA claims."<sup>51</sup> The court reasoned that the invocation of the court's general federal question jurisdiction did "not abrogate or provide an

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40. *Adorers of the Blood of Christ v. FERC*, 897 F.3d 187, 190 (3d Cir. 2018).

41. *Id.* at 190.

42. *Id.* at 192; 15 U.S.C. § 717f(c) (2011). Under section 717f(h), a certificate holder may acquire property it cannot acquire by contract or agreement by exercising a "right of eminent domain in the district court . . . which [the] property [is] located, or in the State courts." 15 U.S.C. § 717f(h) (2011).

43. *Adorers of the Blood of Christ*, 897 F.3d at 192.

44. *Id.*

45. *Id.*

46. *Id.* at 193; 15 U.S.C. § 717r(b) (2005).

47. *Adorers of the Blood of Christ*, 897 F.3d at 190.

48. *Id.*

49. *Id.* at 193.

50. *Id.* at 195.

51. *Id.* at 195-96.

exception to” the NGA’s “specific and exclusive jurisdictional provision.”<sup>52</sup> Accordingly, the Third Circuit “affirm[ed] the order of the [d]istrict [c]ourt.”<sup>53</sup>

## 2. Berkley v. Mountain Valley Pipeline

On July 25, 2018, the United States Court of Appeals for the Fourth Circuit (Fourth Circuit) affirmed a district court decision dismissing a group of landowners’ constitutional claims for lack of subject matter jurisdiction on the grounds that, under the NGA, such claims must be raised during the FERC review process.<sup>54</sup>

Specifically, on October 2017, FERC issued a certificate of public convenience and necessity for the Mountain Valley Pipeline project (Mountain Valley).<sup>55</sup> At the time of issuance, a group of landowners located along the proposed path of the pipeline already had filed a complaint against Mountain Valley, FERC, and FERC’s then-acting Chairman (defendants) in the United States District Court for the Western District of Virginia, “challenging the constitutionality of various provisions of the [NGA].”<sup>56</sup> “The [d]efendants moved to dismiss for lack of jurisdiction.”<sup>57</sup>

“In December 2017, the district court granted the [d]efendants’ motion to dismiss on two grounds.”<sup>58</sup> The court found the landowners’ claims to “inher[e]” to a FERC order and therefore to be “subject to the exclusive review provisions of the [NGA].”<sup>59</sup> In the alternative, even if the claims fell outside that statutory regime, the court concluded that Congress implicitly divested the district court of jurisdiction.<sup>60</sup>

The Fourth Circuit agreed, applying a two-step inquiry to analyze whether the district court had jurisdiction to hear the landowners’ claims: (1) “whether Congress’ intent to preclude district-court jurisdiction is ‘fairly discernable in the statutory scheme,’” and (2) whether the landowners’ “claims are of the type Congress intended to be reviewed within this statutory” scheme.<sup>61</sup>

With regard to the first step, the court found that certain aspects of the NGA “indicate[] that Congress intended to divest the district court of jurisdiction” over claims such as those brought by the landowners.<sup>62</sup> Specifically, the court con-

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52. *Adorers of the Blood of Christ*, 897 F.3d at 190.

53. *Id.* at 198.

54. *Berkley v. Mountain Valley Pipeline, LLC*, 896 F.3d 624, 627 (4th Cir. 2018).

55. *Mountain Valley Pipeline, LLC*, 161 F.E.R.C. ¶ 61,043 (2017), *order on reh’g*, 163 F.E.R.C. ¶ 61,197 (2018).

56. *Berkley*, 896 F.3d at 627.

57. *Id.* at 628.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Berkley*, 896 F.3d at 629 (citing *Bennett v. SEC*, 844 F.3d 174 (4th Cir. 2016); quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207, 212 (1994)).

62. *Id.*

cluded that the NGA “establishes an extensive review framework, including review before FERC and eventually by a court of appeals.”<sup>63</sup> The court also noted that the NGA specifically allows for district court jurisdiction over certain actions, indicating that Congress knew how to allow for district court jurisdiction but chose not to do so with regard to review of a certificate of public convenience and necessity.<sup>64</sup>

As to the second step of the analysis, the court considered three factors, and concluded that each factor weighed in favor of finding that Congress did not intend for district courts to have jurisdiction over claims such as those presented by the landowners.<sup>65</sup>

First, the court evaluated “whether the [NGA] provides for meaningful judicial review” in the present circumstances.<sup>66</sup> The landowners argued that because FERC could not rule on their claims, which were constitutional in nature and challenged the legitimacy of the statute itself, they were deprived of meaningful review by having to wait until those claims are reviewed by a court of appeals.<sup>67</sup> The court rejected this argument, relying on previous precedent<sup>68</sup> to conclude that “‘constitutional claims . . . [could] be meaningfully addressed in the [c]ourt of [a]ppeals,’ even if the relevant agency could not adjudicate them in the first instance.”<sup>69</sup> In addition, while acknowledging that, in some situations, FERC’s use of a tolling order could deny a plaintiff meaningful review, the court concluded that in this case, the landowners did not present sufficient evidence or arguments to support their claim of irreparable injuries.<sup>70</sup>

Next, the court analyzed whether the claims were “wholly collateral” to the NGA review scheme.<sup>71</sup> The court concluded that because the constitutional claims were the means by which the landowners sought to vacate FERC’s grant of the Mountain Valley certificate, rather than unrelated to any particular FERC action, those claims were not wholly collateral to the review scheme.<sup>72</sup>

Finally, the court considered whether FERC “expertise could be brought to bear on the questions presented.”<sup>73</sup> It concluded that, while unlikely, FERC had the ability, upon rehearing the landowners’ challenge, and in the future, to revoke Mountain Valley’s certificate based upon threshold questions within its expertise,

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63. *Id.*

64. *Id.* at 630.

65. *Id.* at 630, 633.

66. *Berkley*, 896 F.3d at 630.

67. *Id.* at 630.

68. *Id.*; *see generally* *Bennett v. SEC*, 844 F.3d 174 (4th Cir. 2016); *Thunder Basin Co. v. Reich*, 510 U.S. 200 (1994); *Elgin v. Dep’t of Treasury*, 567 U.S. 1 (2012).

69. *Berkley*, 896 F.3d at 630 (quoting *Thunder Basin*, 510 U.S. at 215).

70. *Id.* at 631-32.

71. *Id.* at 632.

72. *Id.*

73. *Id.* at 633.

even though it did not have authority to resolve the constitutional claims.<sup>74</sup> If FERC did so, the constitutional claims would be rendered moot.<sup>75</sup>

Based on its application of the two-step analysis, the court concluded that Congress intended to divest district courts of jurisdiction to hear the landowners' claims in favor of the statutory review scheme established by the NGA, and agreed with the district court that it lacked subject matter jurisdiction to hear those claims.<sup>76</sup> The U.S. Supreme Court denied *certiorari* of the decision in January 2019.<sup>77</sup>

### C. Other Court Decisions: *Bold Alliance v. FERC*

On September 28, 2018, the United States District Court for the District of Columbia issued a memorandum opinion dismissing seventeen constitutional and statutory challenges to the exercise of eminent domain by Atlantic Coast Pipeline, LLC<sup>78</sup> and Mountain Valley Pipeline, LLC<sup>79</sup> on the basis of their FERC-issued certificates of public convenience and necessity.<sup>80</sup> The district court found that it lacked subject matter jurisdiction over plaintiffs' claims.<sup>81</sup>

The district court found that "Congress could hardly have been more clear"<sup>82</sup> in granting the United States courts of appeals with exclusive jurisdiction to review FERC's orders, and that courts have consistently confirmed the exclusive nature of FERC's procedures.<sup>83</sup> The district court further analyzed two narrow exceptions to the appellate courts' exclusive jurisdiction over challenges to FERC certificates, but concluded that neither applied.<sup>84</sup> Specifically, the district court held that because the plaintiffs, as landowners, were "aggrieved" parties under the NGA who could raise their challenges in the appellate courts, "denial of review in the [d]istrict [c]ourt will [not] truly foreclose all judicial review."<sup>85</sup> Additionally, the court explained that "[t]he second exception to exclusive review involves 'a constitutional challenge that is exclusively directed to the source of putative agency authority,'"<sup>86</sup> such as a challenge to an agency's enabling statute<sup>87</sup> – did

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74. *Berkley*, 896 F.3d at 633.

75. *Id.*

76. *Id.*

77. *Berkley v. FERC*, 139 S. Ct. 941 (2019).

78. *Atlantic Coast Pipeline LLC*, 161 F.E.R.C. ¶ 61,042 (2017).

79. *Mountain Valley Pipeline, LLC*, 161 F.E.R.C. ¶ 61,043 (2017).

80. *Id.* at P 14.

81. *Bold All. v. FERC*, No. 17-cv-01822, slip op. at 4 (D.D.C. Sept. 28, 2018).

82. *Id.*

83. *Id.* (citing *Urban v. FERC*, No. 5:17-cv-1005, slip op at 5 (N.D. Ohio Dec. 19, 2017); *Berkley v. Mountain Valley Pipeline, LLC*, No. 7:17-cv-00357, slip op. at 1-3 (W.D. Va. Dec. 11, 2017)).

84. *Id.* at 4.

85. *Id.* at 4 (quoting *Telecomm. Res. & Action Ctr. v. FCC*, 750 F.2d 70, 78 (D.C. Cir. 1984)).

86. *Bold Alliance*, slip op. at 4 (quoting *Time Warner Entm't. Co., L.P. v. FCC*, 93 F.3d 957, 965 (D.C. Cir. 1996) (per curiam) (emphasis omitted)).

87. *Id.* (citing *Hunter v. FERC*, 569 F. Supp. 2d 12, 15 (D.D.C. 2008)).

not apply “because plaintiffs’ constitutional theories go to FERC’s *practice* of adjudicating claims – not to its power to do so.”<sup>88</sup> The court concluded that it lacked jurisdiction because the claims were “deeply intertwined with allegations that FERC’s practices deviate from the provisions of the [NGA].”<sup>89</sup> Because the court did not have jurisdiction, it did not consider whether plaintiffs’ claims were ripe or whether plaintiffs exhausted their administrative remedies.<sup>90</sup>

## II. FEDERAL ENERGY REGULATORY COMMISSION HEADLINES AND NOTABLE ADMINISTRATIVE ACTIONS

### A. *Update on Commissioners*

#### 1. Commissioner Bernard McNamee

On December 6, 2018, the Senate confirmed Bernard L. McNamee as a Commissioner of FERC.<sup>91</sup> Prior to joining FERC, “Commissioner McNamee served in a number of legal and policy positions at the state and federal level,” including as the U.S. Department of Energy’s (DOE) Executive Director of the Office of Policy and Deputy General Counsel for Energy Policy.<sup>92</sup> Prior to his DOE service, Commissioner McNamee practiced energy law with McGuireWoods LLP, in Richmond, Virginia, “primarily representing electric and natural gas utilities before state public utility commissions.”<sup>93</sup> Commissioner McNamee also “served as policy advisor on energy issues” for U.S. Senator Ted Cruz, worked at an energy think tank, and “served [for] four attorneys general in two states (Virginia and Texas),” and a Virginia governor.<sup>94</sup> He will serve out the remainder of a term that ends June 30, 2020.<sup>95</sup>

#### 2. Chairman Neil Chatterjee

On October 24, 2018, Commissioner Neil Chatterjee was named FERC Chairman.<sup>96</sup> Chairman Chatterjee previously served as Chairman between August and December 2017.<sup>97</sup> He will serve out the remainder of a term that ends in June 2021.<sup>98</sup>

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88. *Id.*

89. *Id.* at 11.

90. *Id.*

91. *Commissioner Bernard L. McNamee*, FED. ENERGY REG. COMM’N, <https://ferc.gov/about/com-mem/McNamee/McNamee-bio.asp>. (last updated Feb. 28, 2019).

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Chairman Neil Chatterjee*, FED. ENERGY REG. COMM’N, <https://ferc.gov/about/com-mem/chatterjee.asp>. (last updated Aug. 8, 2019).

97. *Id.*

98. *Id.*

### 3. Commissioner Kevin McIntyre

On January 2, 2019, Commissioner Kevin McIntyre died at the age of 58 after a battle with brain cancer.<sup>99</sup> Commissioner McIntyre joined FERC on December 7, 2017, and served as Chairman between his appointment and October 24, 2018.<sup>100</sup> Prior to joining FERC, Commissioner McIntyre was the co-leader of law firm Jones Day's energy practice.<sup>101</sup> In an official statement, Chairman Neil Chatterjee stated that "[d]uring his tenure at the Commission, Kevin exhibited strong leadership and an unmatched knowledge of energy policy and the rule of law."<sup>102</sup> "He exemplified what it means to be a true public servant each and every day, no matter the challenges that lie ahead of him."<sup>103</sup> On January 17, 2019, Chairman Chatterjee announced that the FERC Commission Meeting Room would be officially renamed in honor of Commissioner McIntyre.<sup>104</sup>

### 4. Commissioner Cheryl LaFleur

On January 31, 2019, Commissioner Cheryl LaFleur announced that she would not seek a third term with FERC and would leave in 2019.<sup>105</sup> Commissioner LaFleur first joined FERC in 2010 and was confirmed for a second term in 2014.<sup>106</sup> Prior to joining the Commission, Commissioner LaFleur spent more than 20 years in the electric and natural gas industries, both in private practice and as executive vice president and acting CEO of National Grid USA.<sup>107</sup> She has served in the roles of Commissioner, Chairman, and Acting Chairman, and was for most of 2017 FERC's only Commissioner.<sup>108</sup> Her retirement will leave the Commission with three Commissioners: Chairman Chatterjee, Commissioner Glick, and Commissioner McNamee.<sup>109</sup> Commissioner LaFleur stepped down from her role on August 30, 2019.<sup>110</sup>

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99. Rod Kuckro, *Commissioner Kevin McIntyre Dies*, E&E NEWS (Jan. 3, 2019, 11:13 AM), <https://www.eenews.net/stories/1060110859>.

100. *FERC Announces Passing of Chairman Kevin J. McIntyre*, FED. ENERGY REG. COMM'N (Jan. 3, 2019), <https://www.ferc.gov/media/news-releases/2019/2019-1/01-03-19.asp#.XUsOMOhKg2w>.

101. Kuckro, *supra* note 99.

102. *FERC Announces Passing of Chairman Kevin J. McIntyre*, FED. ENERGY REG. COMM'N (Jan. 3, 2019), <https://www.ferc.gov/media/news-releases/2019/2019-1/01-03-19.asp#.XUsOMOhKg2w>.

103. *Id.*

104. *FERC Commission Meeting Room to be Named for Chairman Kevin McIntyre*, FED. ENERGY REG. COMM'N (Jan. 17, 2019), <https://www.ferc.gov/media/news-releases/2019/2019-1/01-17-19.asp#.XUsQgehKg2w>.

105. *Statement of Commissioner Cheryl A. LaFleur*, FED. ENERGY REG. COMM'N (Jan. 31, 2019), <https://www.ferc.gov/media/statements-speeches/laflaur/2019/01-31-19-laflaur.asp#.XUsRnOhKg2w>.

106. *FERC Commissioner to Receive Top Prize in Energy Policy*, FED. ENERGY REG. COMM'N (Aug. 27, 2019), <https://www.ferc.gov/media/headlines/2019/2019-3/LaFleur-08-27-2019.pdf>.

107. *Id.*

108. *Id.*

109. Rod Kuckro & Jeremy Dillon, *LaFleur's exit will leave 3 commissioners – and anxiety*, E&E NEWS (July 18, 2019), <https://www.eenews.net/stories/1060753713>.

110. *Former FERC Commissioner Cheryl LaFleur joins ISO-NE Board of Directors; Barney Rush, Vickie VanZandt re-elected*, ISO NEWSWIRE (Sept. 13, 2019), <http://isonewswire.com/updates/2019/9/13/former-ferc-commissioner-cheryl-lafleur-joins-iso-ne-board-o.html>.

## B. Staffing Updates

### 1. Office of Energy Policy and Innovation

On March 7, 2019, Chairman Neil Chatterjee announced the appointment of Jignasa Gadani to the position of Director of the Office of Energy Policy and Innovation (OEPI).<sup>111</sup> Gadani previously served as OEPI's Acting Director and Deputy Director.<sup>112</sup> Gadani has also served "as Director, Division of Electric Power Regulation-East in the Office of Energy Market Regulation from 2010-2014, as an attorney advisor in the Office of the General Counsel's Energy Markets Division, and as a Legal Advisor to former Commissioner Philip D. Moeller."<sup>113</sup> Gadani joined FERC in 2001.<sup>114</sup> She earned a B.A. from DePaul University and a J.D., with a certificate in environmental and energy law, from Chicago-Kent College of Law, Illinois Institute of Technology.<sup>115</sup>

### 2. Chairman's Office

Effective March 15, 2019, FERC Chief of Staff Anthony Pugliese resigned from his position.<sup>116</sup> "Pugliese joined FERC in August 2017, and served under two Chairmen, Kevin McIntyre and Neil Chatterjee."<sup>117</sup> He had previously "served as Senior White House Advisor for the United States Department of Transportation."<sup>118</sup>

On April 18, 2019, Chairman Neil Chatterjee announced that Maria Farinella would replace Pugliese as Chief of Staff.<sup>119</sup> Farinella has served "as a senior attorney in the Office of the General Counsel's Energy Markets Division from 2009-2011 and as a senior legal advisor in the Office of the General Counsel's front office from 2011-2019."<sup>120</sup> Farinella also "served as a legal advisor to Chairman Joseph Kelliher from 2007-2009."<sup>121</sup> Farinella is a graduate of Smith College and American University's Washington College of Law.<sup>122</sup> Upon her appointment, Chairman Chatterjee said, "Maria's long-standing career as an energy attorney,

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111. *FERC Chairman Announces Two Senior Staff Appointments*, FED. ENERGY REG. COMM'N (Mar. 7, 2019), <https://www.ferc.gov/media/news-releases/2019/2019-1/03-07-19.asp#.XTIXtOhKjIU>.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *FERC Chief of Staff Anthony Pugliese Resigns*, FED. ENERGY REG. COMM'N (Mar. 20, 2019), <https://www.ferc.gov/media/news-releases/2019/2019-1/03-20-19.asp#.XTIeD-hKjIU>.

117. *Id.*

118. *Id.*

119. *Chairman Chatterjee Names Maria Farinella to Chief of Staff Position*, FED. ENERGY REG. COMM'N (Apr. 18, 2019), <https://www.ferc.gov/media/news-releases/2019/2019-2/04-18-19.asp#.XTIblehKjIU>.

120. *Maria Farinella, Chief of Staff - Biography*, FED. ENERGY REG. COMM'N, <https://www.ferc.gov/about/com-mem/chatterjee/farinella-bio.asp>. (last updated Apr. 22, 2019).

121. *Id.*

122. *Id.*

both at FERC for the past decade and in private practice, makes her uniquely qualified to fulfill this key role,” and he also said that he looks “forward to continuing to work with her as we tackle a number of big issues before us at FERC.”<sup>123</sup>

### 3. Dispute Resolution Services

FERC’s Dispute Resolution Services (DRS) joined the agency’s Office of the General Counsel (OGC) in 2019.<sup>124</sup> Previously, DRS was housed in FERC’s Office of Administrative Law Judges. Chairman Neil Chatterjee stated that “[t]his move to OGC will give DRS higher visibility, an expansion of opportunities to use dispute resolution and more effective use of FERC resources.”<sup>125</sup> DRS assists parties in resolving disputes related to matters under the Commission’s jurisdiction. DRS staff also manages the Commission’s Landowner Helpline.<sup>126</sup>

## C. FERC Budget

### 1. FERC Fiscal Year 2020 Budget Request and Fiscal Year 2018 Annual Performance Report

FERC sent its Fiscal Year (FY) 2020 budget request to Congress on December 4, 2018, as well as its FY 2018 Annual Performance Report.<sup>127</sup> FERC requested a FY 2020 appropriation of \$382,000,000<sup>128</sup> and 1,465 full-time equivalents (FTEs).<sup>129</sup> The budget request identified three primary goals for FY 2020: (1) “[e]nsure that rates, terms and conditions of jurisdictional energy services are just, reasonable and not unduly discriminatory or preferential;” (2) “[p]romote the development of safe, reliable, and secure infrastructure that serves the public interest;” and (3) “[a]chieve organizational excellence by using resources effectively, adequately equipping FERC employees for success, and executing responsive and transparent processes that strengthen public trust.”<sup>130</sup> The FY 2020 request reflected an increase of \$12,100,100, or 3.3 percent from the FY 2019 estimated budget.<sup>131</sup>

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123. *Chairman Chatterjee Names Maria Farinella to Chief of Staff Position*, *supra* note 119.

124. *FERC’s Dispute Resolution Service Gets New Home*, FED. ENERGY REG. COMM’N (June 18, 2019), <https://www.ferc.gov/media/news-releases/2019/2019-2/06-18-19.pdf>.

125. *Id.*

126. *Id.*

127. *Archives: Agency Budget, Performance and Financial Reports*, FED. ENERGY REG. COMM’N, <https://www.ferc.gov/about/strat-docs/requests-reports.asp> (last updated Mar. 18, 2019).

128. FED. ENERGY REG. COMM’N, FISCAL YEAR 2020 CONGRESSIONAL PERFORMANCE BUDGET REQUEST, FISCAL YEAR, 2018 ANNUAL PERFORMANCE REPORT II (2019), [HTTPS://WWW.FERC.GOV/ ABOUT/STRAT-DOCS/2019/FY20-BUDGET-REQUEST.PDF](https://www.ferc.gov/about/strat-docs/2019/FY20-BUDGET-REQUEST.PDF) [hereinafter 2020 BUDGET REQUEST]. Congress must approve the Commission’s budget; however, no net appropriation results, because “[t]he FERC recovers the full cost of its operations through annual charges and filing fees assessed on the industries it regulates as authorized by the Federal Power Act (FPA) and the Omnibus Budget Reconciliation Act of 1986. The Commission deposits this revenue into the Treasury as a direct offset to its appropriation, resulting in a net appropriation of zero.” *Id.*

129. 2020 BUDGET REQUEST, *supra* note 128, at iii.

130. *Id.* at i.

131. *Id.* at iv.

The table below compares the FERC's FY 2020 budget request with recent FY actual and estimated expenditures:<sup>132</sup>

	<b>FY 2017 Actual</b>	<b>FY 2018 Actual</b>	<b>FY 2019 Estimate</b>	<b>FY 2020 Request</b>
FERC Total Budget	\$341,563,000	\$367,600,000	\$369,900,000	\$382,000,000
Full-Time Equivalent Employees (FTEs)	1,455	1,428	1,465	1,465

Two-thirds of the FY 2020 FERC budget request is attributable to personnel expenses.<sup>133</sup> The next largest expense category is information technology, which accounts for twelve percent.<sup>134</sup> Most of the remainder is for building modernization, rent, and administrative expenses.<sup>135</sup>

By regulated industry, the FY 2020 budget request reflects the following allocation of resources: (1) electric industry, \$219,168,000 (832 FTEs); (2) hydroelectric regulation, \$84,565,000 (322 FTEs); (3) natural gas industry, \$71,786,000 (269 FTEs); and (4) oil pipeline regulation, \$10,982,000 (42 FTEs).<sup>136</sup> These allocations are generally consistent with prior fiscal year budget requests.<sup>137</sup>

## 2. FERC Fiscal Year 2018-2022 Strategic Plan

In September 2018, FERC adopted its Strategic Plan for fiscal years 2018-2022.<sup>138</sup> The Strategic Plan includes a message from then-Chairman Kevin McIntyre, in which he states that

[t]he nation is experiencing significant changes in energy supply due to a number of factors, such as the increased availability of domestic natural gas and the emergence and growth of new energy technologies. Both the nation's energy infrastructure and energy markets must adapt to these changes to ensure that consumers have access to economically efficient, safe, reliable, and secure energy at a reasonable cost.<sup>139</sup>

132. *Id.* at ii, v; FED. ENERGY REG. COMM'N, FISCAL YEAR 2019 CONGRESSIONAL PERFORMANCE BUDGET REQUEST, FISCAL YEAR, 2017 ANNUAL PERFORMANCE REPORT v (2018), <https://www.ferc.gov/about/strat-docs/2018/FY19-Budget-Request.pdf>.

133. 2020 BUDGET REQUEST, *supra* note 128, at iv.

134. *Id.*

135. *Id.*

136. *Id.* at vi.

137. *Id.*

138. FED. ENERGY REG. COMM'N, STRATEGIC PLAN FISCAL YEAR 2018-2022 (Sept. 2018), <https://www.ferc.gov/about/strat-docs/FY-2018-FY-2022-strat-plan.pdf> [hereinafter STRATEGIC PLAN FISCAL YEAR 2018-2022].

139. *Id.* at v.

The Strategic Plan “is ultimately focused on fulfilling FERC’s *mission* of Economically Efficient, Safe, Reliable, and Secure Energy for Consumers at a Reasonable Cost.”<sup>140</sup> The plan sets forth objectives that FERC will employ to meet three goals.<sup>141</sup> Furthermore, the plan identifies core functions to achieve the objectives.<sup>142</sup> FERC also conducted a situational assessment of each objective in the plan, identified factors likely to significantly impact the achievement of each objective, and developed strategic responses.<sup>143</sup> Moreover, the plan identifies performance measures to indicate progress toward an objective.<sup>144</sup>

Goal 1 of the Strategic Plan is to “[e]nsure that rates, terms, and conditions of jurisdictional services are just, reasonable, and not unduly discriminatory or preferential.”<sup>145</sup> The Commission established two objectives to achieve this goal. Objective 1.1 is to “[e]stablish Commission rules and policies that will result in just, reasonable, and not unduly discriminatory or preferential rates, terms, and conditions of jurisdictional service.”<sup>146</sup> Objective 1.2 is to “[i]ncrease compliance with FERC rules [and] detect and deter market manipulation.”<sup>147</sup>

Goal 2 of the Strategic Plan is to “[p]romote the development of safe, reliable, and secure infrastructure that serves the public interest.”<sup>148</sup> The Commission set forth two objectives to achieve this goal. Objective 2.1 is to “[f]acilitate benefits to the nation through the review of natural gas and hydropower infrastructure proposals.”<sup>149</sup> Objective 2.2 is to “[m]inimize risks to the public associated with FERC-jurisdictional energy infrastructure.”<sup>150</sup>

Goal 3 of the Strategic Plan is to promote “[m]ission support through organizational excellence.”<sup>151</sup> The Commission established two objectives to achieve this goal.<sup>152</sup> Objective 3.1 is to “[m]anage resources effectively through an engaged workforce.”<sup>153</sup> Objective 3.2 is to “[f]acilitate public trust and understanding of Commission activities by promoting transparency, open communication, and a high standard of ethics.”<sup>154</sup>

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140. *Id.* at x (emphasis in original).

141. *Id.*

142. STRATEGIC PLAN FISCAL YEAR 2018-2022, *supra* note 138, at x.

143. *Id.* at xi.

144. *Id.*

145. *Id.* at 1.

146. *Id.*

147. STRATEGIC PLAN FISCAL YEAR 2018-2022, *supra* note 138, at 5.

148. *Id.* at 9.

149. *Id.*

150. *Id.* at 13.

151. *Id.* at 21.

152. STRATEGIC PLAN FISCAL YEAR 2018-2022, *supra* note 138, at ix.

153. *Id.*

154. *Id.* at 26.

### 3. FERC Fiscal Year 2018 Agency Financial Report

FERC published its Fiscal Year (FY) 2018 Agency Financial Report in November 2018.<sup>155</sup> The report presents FERC's FY 2017 and 2018 audited annual financial statements, related notes, and program performance report.<sup>156</sup> In addition to a recitation of FERC's financial standing in FY 2018 as compared to FY 2017, the report includes the Commission's key initiatives and activities and organizational structure.<sup>157</sup> Notably, the report states that FERC carried out its mission in FY 2018 with 1,428 full time equivalent positions and an appropriation of \$367,600,000.<sup>158</sup> And FERC collected over \$375.5 million in offsetting receipts during FY 2018—more than \$7.8 million more than its statutory collections requirements.<sup>159</sup> Additional notable figures follow:<sup>160</sup>

Total	FY 2018 (\$ Million)	FY 2017 (\$ Million)
Appropriation	367.6	375
Costs	359	342.8
Assets	157.8	228.9
Liabilities	64.4	155.7

According to the report, as of September 30, 2018, FERC's financial condition "was sound with sufficient funds to meet program needs," and an audit of its FY 2018 financial statements showed "no material weaknesses or significant deficiencies in internal control over financial reporting."<sup>161</sup>

#### D. Rulemakings

##### 1. Order No. 852, Elimination of Form 80 and Revision of Regulations on Recreational Opportunities and Development at Licensed Hydropower Projects

On December 20, 2018, FERC issued Order No. 852, a Final Rule revising its regulations to remove 18 C.F.R. § 8.11 (2018), and thus eliminate the Licensed Hydropower Development Recreation Report – FERC Form No. 80, which "solicits information on the use and development of recreation facilities at hydropower projects licensed by the FERC under the Federal Power Act."<sup>162</sup> In addition, Order No. 852 removed from FERC's regulations 18 C.F.R. § 141.14, which

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155. FED. ENERGY REG. COMM'N, FISCAL YEAR 2018, AGENCY FINANCIAL REPORT (2018) <https://www.ferc.gov/about/strat-docs/2018/AFR-2018.pdf> [hereinafter FISCAL YEAR 2018, AGENCY FINANCIAL REPORT].

156. *Id.* at 2.

157. *Id.*

158. *Id.*

159. *Id.* at 26.

160. FISCAL YEAR 2018, AGENCY FINANCIAL REPORT, *supra* note 155 at 17-19.

161. *Id.* at 17.

162. Order No. 852, *Elimination of Form 80 and Revision of Regulations on Recreational Opportunities and Development at Licensed Hydropower Projects*, 165 F.E.R.C. ¶ 61,256 at PP 1, 6, 30 (2018).

approved licensee use of FERC Form 80 in the manner prescribed in 18 C.F.R. § 8.11.<sup>163</sup> Through Order No. 852, the FERC also revised its regulations at 18 C.F.R. §§ 8.1 and 8.2, to “modernize licensee public notice practices, clarify recreational signage requirements, and provide flexibility to assist licensees’ compliance with these requirements.”<sup>164</sup> As revised, sections 8.1 and 8.2 of the Commission’s regulations require licensees to publicize specific recreation use and availability information to the public for its licensed project through newspaper notices, project signage, its local office, and any existing licensee website.<sup>165</sup>

## 2. Order No. 858, Hydroelectric Licensing Regulations Under the America’s Water Infrastructure Act of 2018

On April 18, 2019, FERC issued Order No. 858, a Final Rule establishing a new, voluntary, expedited licensing process for original hydropower licenses for certain “qualifying facilities at existing nonpowered dams, and for closed-loop pumped storage projects”<sup>166</sup> pursuant to sections 3003 and 3004 of the America’s Water Infrastructure Act of 2018.<sup>167</sup> “Under the expedited licensing process, the [FERC] will seek to ensure that a final decision” on a license application “is issued no later than two years after [it] receives a completed license application.”<sup>168</sup> Order No. 858 was codified under a new part 7 to Title 18 of the Code of Federal Regulations.<sup>169</sup>

Under Order No. 858, a request to use the expedited licensing process must be filed along with the license application.<sup>170</sup> To qualify as a facility at an existing non-powered dam for the purposes of the expedited licensing process,

a facility must: (A) as of October 23, 2018, not be licensed under, or exempted from, the license requirements contained in Part I of the Federal Power Act; (B) be associated with a qualifying non-powered dam; (C) be constructed, operated, and maintained for the generation of electric power; (D) generate electricity by using any withdrawals, diversions, releases, or flows from the associated qualifying non-powered dam, including its associated impoundment or other infrastructure; and (E) not result, due to operation of the facility, in any material change to the storage, release, or flow operations of the associated qualifying non-powered dam.<sup>171</sup>

To qualify as a closed-loop pumped storage project under the expedited licensing process, the pumped storage project must “cause little to no change to existing surface and groundwater flows and uses” and must be considered unlikely to adversely affect threatened or endangered species or their designated critical

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163. *Id.* at P 31.

164. *Id.* at P 33.

165. *Id.* at P 37.

166. Order No. 858, *Hydroelectric Licensing Regulations Under the America’s Water Infrastructure Act of 2018*, 167 F.E.R.C. ¶ 61,050 at PP 1-2, 8 (2019) [hereinafter Order No. 858].

167. *Id.*

168. *Id.*

169. *Id.* at P 2.

170. Celeste M. Miller, *FERC Finalizes Expedited Hydro Licensing Process*, FED. ENERGY REG. COMM’N (Apr. 18, 2019), <https://www.ferc.gov/media/news-releases/2019/2019-2/04-18-19-H-1.asp#.XXxZCihKjZu>.

171. Order No. 858, *supra* note 166, at P 33.

habitat under the Endangered Species Act.<sup>172</sup> In addition, such projects must “utilize only reservoirs situated at locations other than natural waterways, lakes, wetlands, and other natural surface water features, and [must] rely only on temporary withdrawals from surface waters or groundwater for the sole purposes of initial fill and periodic recharge needed for project operation.”<sup>173</sup>

### 3. Order No. 859, Revisions to the Filing Process for Commission Forms

On June 20, 2019, FERC issued Order No. 859, a Final Rule revising its electronic filing format for certain data collections.<sup>174</sup> Order No. 852 adopts eXtensible Business Reporting Language (XBRL), a nonproprietary, open technology standard, as the new format that will be used for filing Form Nos. 1, 1-F, 2, 2-A, 3-Q electric, 3-Q natural gas, 6, 6-Q, 60 and 714.<sup>175</sup>

FERC states that it will proceed with the development and implementation of the XBRL standard as follows: FERC “will make available a draft of the XBRL taxonomy and other related documents,” after which FERC “staff will convene technical conference(s) to discuss the taxonomy and other related documents, any technical concerns, any issues related to the transition,” and an implementation schedule.<sup>176</sup> Following the technical conference(s), FERC “will continue to collect comments” and “will issue an order adopting the final taxonomy, protocols, and an implementation guide, and establishing an implementation schedule.”<sup>177</sup> “Industry participants will be afforded reasonable time to develop their software and the [FERC] will make available a platform for the testing of the filers’ submissions.”<sup>178</sup>

## E. Commission Decisions

### 1. ALLETE, Inc.

On June 20, 2019, FERC denied ALLETE, Inc.’s (ALLETE) request for clarification seeking a determination that 18 C.F.R. §§ 35.10(b) and (c) (2018) did not require ALLETE to provide a redlined comparison of its proposed reactive revenue requirement.<sup>179</sup> ALLETE argued that a redline would not have been useful, given that the redline would have been against wholly different documents.<sup>180</sup> FERC denied ALLETE’s request for clarification and required ALLETE to file a redline within 15 days of the order.<sup>181</sup> FERC found that ALLETE had an existing

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172. *Id.* at P 39.

173. *Id.* at P 31.

174. *See* Order No. 859, *Revisions to the Filing Process for Commission Forms*, 167 F.E.R.C. ¶ 61,241 (2019).

175. *Id.* at PP 1-4.

176. *Id.* at P 6.

177. *Id.*

178. *Id.*

179. *ALLETE, Inc.*, 167 F.E.R.C. ¶ 61,239 at P1 (2019).

180. *Id.* at P 4.

181. *Id.* at P 11.

tariff on file and was filing a revised rate.<sup>182</sup> Because ALLETE's filing was a revision to the revenue requirement, FERC found that section 35.10(b) applied and that ALLETE was required to file a redline.<sup>183</sup> FERC noted that "ALLETE's argument that such a redline 'would not be useful' is irrelevant," and that section 35.10(b) "does not permit a public utility to determine whether redlining provides benefits."<sup>184</sup> The Commission noted that even if the redlined rate schedules were "vastly different," providing a redline would still allow the Commission and interested parties to more easily identify changes.<sup>185</sup>

FERC also rejected ALLETE's alternative argument that FERC waived the requirements of section 35.10 by accepting ALLETE's filing.<sup>186</sup> ALLETE submitted a "catchall request of waivers" of any part of the Commission's regulations that might be deemed to require submittal of additional information, but the Commission found that the catchall request was never granted or addressed, and that the express terms of section 35.10 are not waived by the Commission's acceptance of a filing.<sup>187</sup>

## 2. Ambit Northeast, LLC

In *Ambit Northeast*, the Commission on rehearing affirmed its denial of a market-based rate applicant's claim of privilege and denied a related request for a stay of disclosure of its ownership and affiliate information.<sup>188</sup> With its application for market-based rate authority, Ambit disclosed that it was a wholly-owned subsidiary of a parent company, but filed as privileged the identity of those owners who hold more than 10 percent of the parent company.<sup>189</sup> A party then challenged Ambit's privilege claim. First, the Commission denied Ambit's request for a stay on the release of the information after it found that Ambit did not demonstrate that it would suffer a sufficient injury if the Commission released the names of its owners.<sup>190</sup> Next, the Commission relied on its discretion to carry out its jurisdictional responsibilities and denied Ambit's privilege claim over its upstream ownership information.<sup>191</sup> The Commission explained that Ambit's ownership information is central to the Commission's analysis whether to grant a request for market-based rate authority.<sup>192</sup> The Commission also clarified that Freedom of Information Act exemptions, specifically Exemptions 4 and 6, did not bar the release of this information. The Commission reasoned that Ambit's submission of

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182. *Id.* at P 13.

183. *Id.* at P 14.

184. 167 F.E.R.C. ¶ 61,239 at P 16.

185. *Id.*

186. *Id.* at P 18.

187. *Id.*

188. *Ambit Ne., LLC*, 167 F.E.R.C. ¶ 61,237 (2019).

189. *Id.* at P 3.

190. *Id.* at P 11.

191. *Id.* at P 16.

192. *Id.*

ownership and affiliate information was not voluntary in the context of its application, which required its submission.<sup>193</sup> Additionally, the Commission found that, on balance, Ambit's owner's "modest" privacy interest was outweighed by the public interest in disclosure where such disclosure enables the public to decide whether to participate in proceedings and understand what is relied on by the Commission.<sup>194</sup> The Commission added that its oversight does not end with approval of the application, and that on an ongoing basis disclosure of such information will allow the public to identify whether Ambit properly reported required information related to its market-based rate authority.<sup>195</sup>

### 3. Boyce Hydro Power, LLC

In *Boyce Hydro Power, LLC*,<sup>196</sup> FERC denied motions to stay an order revoking Boyce Hydro Power, LLC's (Boyce Hydro) license for the 4.8 megawatt (MW) Edenville Project. On September 10, 2018, FERC issued an order revoking Boyce Hydro's license for the Edenville Project in light of a "pattern of non-compliance," and ordering Boyce Hydro to permanently disable the project's generating equipment.<sup>197</sup> Boyce Hydro, as well as the Sanford Lake Preservation Association, the Wixom Lake Association, and the Gladwin County Board of District Commissioners (collectively, Lake Associations) filed motions to stay the order.<sup>198</sup> The Commission explained that it reviews requests for stay under the standard set forth in the Administrative Procedure Act—"the stay will be granted if the Commission finds that 'justice so requires,'" noting that it considers a number of factors in applying that test, including "whether the movant will suffer irreparable injury in the absence of a stay, whether the issuance of a stay would substantially harm other parties, and where the public interest lies."<sup>199</sup> The Commission further elaborated that a demonstration of irreparable injury alone would justify granting a stay, but "[i]n order to meet the requirement of irreparable injury for a stay, the injury must be both certain and great, actual and not theoretical."<sup>200</sup> "Economic loss alone does not constitute irreparable harm."<sup>201</sup>

FERC found that neither Boyce Hydro nor the Lake Associations had demonstrated irreparable harm.<sup>202</sup> Boyce Hydro argued that it would suffer harm because it would be required to operate and maintain the dam without offsetting power generation revenues, and that such harm would be irreparable because it would never recover those lost revenues.<sup>203</sup> The Commission rejected that assertion,

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193. 167 F.E.R.C. ¶ 61,237 at PP 19-20.

194. *Id.* at P 30.

195. *Id.* at P 29.

196. *Boyce Hydro Power*, 165 F.E.R.C. ¶ 61,027 (2018).

197. *Id.* at PP 3, 5 (discussing 164 F.E.R.C. ¶ 61,115 (2018) (Revocation Order)).

198. *Id.* at P 6.

199. *Id.* at P 8.

200. *Id.*

201. *Id.*

202. 165 F.E.R.C. ¶ 61,027 at P 9.

203. *Id.* at P 10.

finding that loss of revenue did not demonstrate irreparable harm justifying a stay.<sup>204</sup> The Commission explained that “[a]lthough monetary loss may constitute irreparable harm where the loss threatens the very existence of the movant’s business,” Boyce Hydro had not made such a claim in this case, and thus its claim was “purely [of] economic harm that does not support issuance of a stay.”<sup>205</sup> The Lake Associations alleged that they had undertaken efforts to acquire the project under the assumption that they would also acquire the project license.<sup>206</sup> Boyce Hydro explained that the revocation of the license would likely cause Lake Associations to cease their efforts to acquire the project.<sup>207</sup> FERC, however, declined to find that this circumstance demonstrated irreparable harm, noting that there was nothing in the record to suggest the transaction had gone past exploratory stages, and that nothing in the Revocation Order would prevent the Lake Associations or any other entity from acquiring the project and subsequently applying for a license to generate electricity.<sup>208</sup>

FERC also addressed whether a stay was warranted in the public interest,<sup>209</sup> in response to Boyce Hydro’s allegation that adverse public safety impacts would occur if a stay was not granted because “it would be required to pass flows over the spillways, where there is significant deterioration of the concrete spillway rollways.”<sup>210</sup> The Commission “disagree[d] that Boyce Hydro’s only recourse to the revocation of the project license is to pass flows in a manner that could potentially endanger the project works,” noting that the project’s turbines only pass 6.7 percent of the existing spillway capacity per second, and that if flows must pass through the powerhouse, modifications could be made to pass those flows.<sup>211</sup> FERC likewise disagreed that the public interest favored granting a stay, noting that “[f]or over 14 years, Boyce Hydro knowingly and willfully refused to comply with major aspects of its license and the Commission’s regulatory regime,” and reiterating its finding in the Revocation Order that while the Commission “do[es] not often revoke a license, [] the licensee ha[d] left [it] with no other way to vindicate the public interest here.”<sup>212</sup>

#### 4. City and County of Denver, Colorado

On November 15, 2018, FERC issued an order denying rehearing, upholding an earlier decision to deny motion for late intervention in a hydropower licensing proceeding.<sup>213</sup> The order relates to a 2016 request for modification of a hydro-

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204. *Id.* at P 11.

205. *Id.*

206. *Id.* at P 12.

207. 165 F.E.R.C. ¶ 61,027 at P 12.

208. *Id.* at P 13.

209. *Id.* at P 14.

210. *Id.* at P 15.

211. *Id.* at P 16.

212. 165 F.E.R.C. ¶ 61,027 at P 17.

213. *City and County of Denver, Colorado*, 165 F.E.R.C. ¶ 61,120 (2018).

power license filed by the City and County of Denver, Colorado (Denver Water).<sup>214</sup> Denver Water's filing was noticed in February 2017 with an intervention deadline set for April 3, 2017.<sup>215</sup> FERC thereafter issued a supplemental environmental impact assessment (EIA) in February 2018, and though a comment deadline was established in relation to the EIA, no new period for intervention was established.<sup>216</sup>

Save the Colorado submitted a motion for late intervention on March 26, 2018.<sup>217</sup> Save the Colorado argued that good cause existed to permit the late intervention under Rule 214 of FERC's Rules of Practice and Procedure because of changed factual circumstances not known at the time of the initial filing, namely FERC's issuance of the EIA.<sup>218</sup> FERC denied the motion on August 1, 2018, and on August 31, 2018, Save the Colorado filed a request for rehearing.<sup>219</sup>

In its request for rehearing, Save the Colorado made the following arguments. First, Save the Colorado argued that its motion to intervene was not untimely under 18 C.F.R. § 380.10(a).<sup>220</sup> Under this regulation, "[a]ny person who files a motion to intervene on the basis of a draft environmental impact statement will be deemed to have filed a timely motion."<sup>221</sup> Second, Save the Colorado argued that even if the motion is untimely, good cause exists under Rule 214 because it could not anticipate the fact that FERC would issue an EIA as part of the proceeding.<sup>222</sup>

FERC rejected both arguments.<sup>223</sup> With regard to the first argument, FERC found both that the argument was barred because it was not raised in Save the Colorado's motion to intervene, and that the cited regulation applies only to draft environmental impact statements (EIS), not EIAs.<sup>224</sup> With regard to the second argument, FERC asserted that an intervenor must choose whether the subject matter of a proceeding warrants intervention, not whether certain procedural steps that may be taken throughout a proceeding warrant intervention.<sup>225</sup> Specifically, the FERC stated that

[w]hen the Commission issues public notice of an application before it . . . it is up to interested entities to decide whether the application presents issues of sufficient concern to warrant intervening. . . . It is the nature of a proposal, not the procedures that the Commission follows to review it, on which an entity must base its decision.<sup>226</sup>

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214. Final Supplemental Environmental Assessment Amendment of Hydropower License (FERC issued Feb. 2019).

215. *Id.*

216. 165 F.E.R.C. ¶ 61,120 at P 6.

217. *Id.* at P 7.

218. *Id.*

219. *Id.* at PP 9-11.

220. *Id.* at PP 11-12.

221. 18 C.F.R. § 380.10(a) (2019).

222. 165 F.E.R.C. ¶ 61,120 at PP 11, 15.

223. *Id.* at P 14.

224. *Id.* at PP 12-14.

225. *Id.* at P 18.

226. *Id.* at PP 16-20.

#### 5. Nevada Hydro Company, Inc.

On September 20, 2018, FERC dismissed a petition from Nevada Hydro Company (Nevada Hydro) seeking a declaratory order that its Lake Elsinore Advanced Pumped Storage facility is a transmission facility consistent with FERC precedent and policy and thus entitled to cost-based rate recovery under the California Independent System Operator Corporation's (CAISO) Transmission Access Charge (TAC).<sup>227</sup> FERC found that Nevada Hydro's petition was premature because the facility at issue had not been studied in the CAISO transmission planning process.<sup>228</sup> Absent information concerning whether the facility at issue addressed a need through that process and how the facility would operate, FERC explained that it could not make a reasoned decision on whether the facility is a transmission project and thus eligible for cost recovery under the TAC.<sup>229</sup>

FERC further explained that “[r]equiring [the facility] to be reviewed through the CAISO [transmission planning process] is consistent with the Commission’s policy that regional transmission planning processes should identify transmission needs and solutions in a coordinated, nondiscriminatory process that is open to all interested stakeholders.”<sup>230</sup> FERC also emphasized that it addresses the classification of electric storage resources on a case-by-case basis.<sup>231</sup> Finally, FERC noted that if CAISO ultimately identifies Nevada Hydro’s facility as a more efficient or cost-effective solution to resolving identified transmission needs, then Nevada Hydro would have to demonstrate to FERC in a FPA section 205<sup>232</sup> filing that it is entitled to cost-based rate recovery through the CAISO TAC.<sup>233</sup>

#### 6. Utah Board of Water Resources

On September 20, 2018, FERC denied a petition for a declaratory order on jurisdiction filed by the Utah Board of Water Resources (Utah Board) and the Washington County Water Conservancy District (together, Petitioners).<sup>234</sup> Petitioners asked the Commission to find that the Commission’s licensing jurisdiction under the FPA extended to all of the project facilities identified in the license application, including 89 miles of pipeline that would deliver water from a regulating tank to the generating units.<sup>235</sup> Examining FPA sections 3(11) and (12), the Commission explained that the jurisdictional issue turned on “whether the pipeline segments connecting the generating facilities are project works that are part of a complete unit of development.”<sup>236</sup> The Commission rejected the Petitioners’ equitable

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227. *Nevada Hydro Co., Inc.*, 164 F.E.R.C. ¶ 61,197 at P 1 (2018).

228. *Id.* at P 22.

229. *Id.*

230. *Id.* at P 23.

231. *Id.* at P 24.

232. 16 U.S.C. § 824d (2012).

233. 164 F.E.R.C. ¶ 61,197, at P 25.

234. *Utah Bd. of Water Res.*, 164 F.E.R.C. ¶ 61,203 at P 1 (2018).

235. *Id.* at PP 1-2.

236. *Id.* at PP 29-30.

argument that the Utah Board had relied on Commission staff's apparent acceptance of the facilities as defined in the application, and stated that the FPA was the basis for the Commission's jurisdictional determination.<sup>237</sup> The Commission then explained that the Petitioners failed to sufficiently address cases demonstrating the Commission's longstanding practice "to license only discrete hydropower developments on or along large water conveyance systems, and not to license the entire water conveyance system itself."<sup>238</sup> The Commission found that its licensing jurisdiction was "limited to the discrete hydroelectric facilities to be located in and along the water delivery pipeline of [the project], and [did] not extend to the water delivery pipeline itself."<sup>239</sup>

#### *F. Administrative Litigation: FERC Administrative Law Judges*

##### 1. Patricia M. French

On October 1, 2018, then-Chairman Kevin McIntyre appointed Patricia M. French as a FERC Administrative Law Judge (ALJ).<sup>240</sup> Prior to her appointment, Judge French had been serving as an ALJ with the Social Security Administration's Office of Disability Adjudication and Review.<sup>241</sup> Prior to that, Judge French was a shareholder in Bernstein Shur Sawyer & Nelson LLC's Energy and Environmental Practice Group.<sup>242</sup>

##### 2. Stephanie Nagel

On September 18, 2018, then-Chairman Kevin J. McIntyre appointed Stephanie Nagel as a FERC Administrative Law Judge (ALJ).<sup>243</sup> Prior to her appointment at FERC, Judge Nagel

had been an Administrative Law Judge with the Social Security Administration, conducting hearings on claims for disability benefits. Prior to that, [Judge Nagel] was an attorney advisor in the U.S. International Trade Commission's Office of the Administrative Law Judges, and served as principal advisor to ITC Vice Chairman Dean Pinkert on intellectual property litigation issues.<sup>244</sup>

##### 3. Andrew Satten

On April 1, 2019, FERC Chairman Neil Chatterjee appointed Andrew Satten as a FERC Administrative Law Judge (ALJ).<sup>245</sup> Judge Satten first joined FERC's

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237. *Id.* at P 36.

238. *Id.* at P 38.

239. 164 F.E.R.C. ¶ 61,203 at P 67.

240. News Release, *Chairman Appoints Patricia French as New Administrative Law Judge*, FED. ENERGY REG. COMM'N (Oct. 1, 2018), <https://www.ferc.gov/media/news-releases/2018/2018-4/10-01-18.asp>.

241. *Id.*

242. *Id.*

243. News Release, *Chairman Appoints Stephanie Nagel as New Administrative Law Judge*, FED. ENERGY REG. COMM'N (Sept. 18, 2018), <https://www.ferc.gov/media/news-releases/2018/2018-3/09-18-18.asp>.

244. *Id.*

245. News Release, *FERC Chairman Appoints Andrew Satten as New Administrative Law Judge*, FED. ENERGY REG. COMM'N (Apr. 1, 2019), <https://www.ferc.gov/media/news-releases/2019/2019-2/04-01-19.asp>.

Office of Administrative Law Judges and Dispute Resolution (OALJDR) in 2012.<sup>246</sup> Prior to his judicial appointment, Judge Satten served as OALJDR's Supervisory Attorney-Adviser. Since 2014, Judge Satten also has served as an adjunct professor at The George Washington University Law School.<sup>247</sup>

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246. *Id.*

247. *Id.*

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