

## REPORT OF THE FERC PRACTICE COMMITTEE

This report covers significant Federal Energy Regulatory Commission (FERC) practice and procedural issues from July 1, 2014, through June 30, 2015. The report includes summaries of Appellate Court decisions, major FERC orders and rulemakings, as well as administrative actions.

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## I. NOTED PROCEDURAL HOLDINGS FROM THE FEDERAL COURTS OF APPEALS

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 FERC in that proceeding 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 Commission 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), which 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. Gunpowder Riverkeeper v. FERC, No. 14-1062 (D.C. Cir. July 21, 2015)

*Gunpowder Riverkeeper v. FERC* sought review of a conditional certificate that authorized Columbia Gas Transmission, L.L.C. (Columbia) to begin construction only after obtaining all necessary permits and then further authorization from the FERC.<sup>4</sup> However, “issuance of the . . . certificate enabled Columbia [to] immediately . . . exercise . . . eminent domain to obtain the necessary right-of-way” and Gunpowder Riverkeeper challenged, claiming that the order violated the National Environmental Policy Act (NEPA) and the Clean Water Act (CWA).<sup>5</sup> After finding that Gunpowder Riverkeeper met the standards for standing under Article III of the U.S. Constitution, the court performed a “zone of interests” analysis to determine whether Gunpowder Riverkeeper had a valid cause of action to proceed to the merits of its claim.<sup>6</sup> The U.S. Court of Appeals for the District of Columbia (D.C. Circuit) found that “[a]lthough the property interests of [the] neighboring landowners arguably fall within the zone of interests the NGA protects, . . . the zone of interests of the NGA does not encompass injuries arising out of violations of . . . the CWA or NEPA.”<sup>7</sup> The court proceeded to analyze whether Gunpowder Riverkeeper’s interests fell within the zone of

1. 16 U.S.C. § 825l(b) (2011); Natural Gas Act 15 U.S.C. § 717r(b) (2011).

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. *Gunpowder Riverkeeper v. FERC*, No. 14-1062, 2015 U.S. App. LEXIS 12532, at \*3 (D.C. Cir. July 21, 2015).

5. *Id.* at \*3-4; 15 U.S.C. § 717f(h) (2011); 42 U.S.C. § 4332(2)(C) (2011); 33 U.S.C. § 1341(a)(1) (2011).

6. *Id.* at \*4-5; “A member of Gunpowder against whom eminent domain proceedings have been instituted or threatened would have constitutional standing” and as “an association [acting] on behalf of its . . . members,” Gunpowder Riverkeeper has standing as well. *Id.* at \*7-9 (citing *Natural Res. Def. Council v. EPA*, 755 F.3d 1010, 1018 (D.C. Cir. 2014)).

7. *Id.* at \*10 (quoting *Moreau v. FERC*, 982 F.2d 556, 564 & n.3 (D.C. Cir. 1993)).

interests protected by NEPA or the CWA.<sup>8</sup> The court concluded that Gunpowder Riverkeeper did not come within the zone of interests protected by either statute because it claimed only economic harm and failed to argue that its members would suffer any environmental harm and expressly disclaimed the need to do so.<sup>9</sup> Accordingly, the court denied standing and dismissed the petition for review.<sup>10</sup>

2. Louisiana Public Service Commission v. FERC, 606 F. App'x 1 (D.C. Cir. 2015)

On March 13, 2015, the D.C. Circuit issued an unpublished opinion in *Louisiana Public Service Commission v. FERC*, dismissing in part and denying in part the Louisiana Public Service Commission's (LPSC) petition for review.<sup>11</sup> The court also dismissed Entergy Services, Inc.'s (Entergy) petition for review.<sup>12</sup>

The court denied LPSC's objection to FERC's depreciation ruling regarding two nuclear plants because it was brought in the wrong forum.<sup>13</sup> The LPSC also pressed its claim before the FERC in a proceeding under 16 U.S.C. § 824e(b), which the court stated was the appropriate forum.<sup>14</sup> The court found that the LPSC waived a challenge to the energy ratio definition approved in the FERC formula rate orders by not raising the claim in the initial compliance proceedings.<sup>15</sup>

The LPSC argued that the FERC improperly excluded accumulated deferred income taxes from the bandwidth formula in the proceeding below.<sup>16</sup> The court stated, "[t]he Federal Power Act bars us from considering any objection not urged before the Commission on an application for rehearing, absent reasonable grounds for the failure."<sup>17</sup> The court found that the LPSC did not have a reasonable excuse for failing to seek a rehearing.<sup>18</sup> The court held that the FERC reasonably interpreted a utility contract to find that "bandwidth payments . . . [were] not solely purchased energy expenses."<sup>19</sup> Finally, the court denied Entergy's challenge to the FERC's decision to include interest in its bandwidth remedy payments, stating that it was reasonable and within FERC's broad "remedial powers . . . to requir[e] interest to provide complete recovery."<sup>20</sup>

3. Midland Power Cooperative v. FERC, 774 F.3d 1 (D.C. Cir. 2014)

The FERC issued an order directing Midland Power Cooperative (Midland Power) to reconnect to Gregory and Beverly Swecker's wind generator after the cooperative had it disconnected.<sup>21</sup> After the FERC denied rehearing, Midland

8. *Id.* at \*8-13.

9. *Id.* at \*12-14.

10. *Gunpowder Riverkeeper*, U.S. App. LEXIS 12532, at \*14.

11. Louisiana Pub. Serv. Comm'n v. FERC (*La. PSC*), 606 F. App'x 1, 2 (D.C. Cir. 2015).

12. *Id.*

13. *Id.* at 4.

14. *Id.*

15. *Id.* at 4-5.

16. *La. PSC*, 606 F. App'x at 5.

17. *Id.*

18. *Id.*

19. *Id.* at 5-6.

20. *Id.* at 6.

21. *Swecker v. Midland Power Coop.*, 137 F.E.R.C. ¶ 61,200 at P 1 (2011).

Power sought review from the D.C. Circuit.<sup>22</sup> The central issue in this case was whether the appellate court had jurisdiction. The D.C. Circuit stated that it did not.<sup>23</sup>

Midland Power offered two avenues for jurisdiction: the FPA's provision for review and the Public Utility Regulatory Policies Act's (PURPA) provision on enforcement.<sup>24</sup> Under the FPA, the Court of Appeals can take review of "[a]ny party to a proceeding under this *chapter* aggrieved by an order issued by the Commission . . ."<sup>25</sup> However, the Statutes at Large use the word "Act" instead of "chapter."<sup>26</sup> "The United States Statutes at Large, [commonly] referred to as the Statutes at Large," is the official source for the laws and resolutions passed by Congress.<sup>27</sup> "The Statutes at Large is . . . published [under the direction of] the Office of the Federal Register" through the Congressional Printing Management Division and the U.S. Government Printing Office, and it is legal and permanent evidence of all the laws enacted during a session of Congress.<sup>28</sup> The Statutes at Large controls when the United States Code conflicts with it.<sup>29</sup> Because the Statutes at Large limits review to orders issued under the FPA, Midland Power did not qualify as an aggrieved party.<sup>30</sup>

PURPA states that "the petitioner may bring an action in the appropriate United States district court to require such . . . utility to comply with such requirements . . ."<sup>31</sup> Since the FERC was not seeking to enforce the original order, nor was it seeking to promulgate a general rule as to utility disconnections, the district court had exclusive jurisdiction.<sup>32</sup> The case was dismissed.<sup>33</sup>

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22. *Midland Power Coop. v. FERC*, 774 F.3d 1 (D.C. Cir. 2014); Order Denying Requests for Rehearing, *Swecker v. Midland Power Coop.*, 142 F.E.R.C. ¶ 61,207 (2013).

23. *Midland Power Coop.*, 774 F.3d at 2.

24. *Id.* at 3 (citing Federal Power Act (FPA) § 313(b), 16 U.S.C. § 8251(b) (2011)); *See also* Public Utility Regulatory Policies Act (PURPA) § 210, 16 U.S.C. § 824a-3(h) (2011).

25. 16 U.S.C. § 8251(b) (emphasis added).

26. *Midland Power Coop.*, 774 F.3d at 3 ("But as enacted in the Statutes at Large, § 313 uses the word 'Act' where the codifiers used the word 'chapter.'" (citing FPA § 313(b), 49 Stat. 860 (1935) ("Any party to a proceeding under this Act aggrieved by an order . . ."))).

27. *United States Statutes at Large*, U.S. GOV'T PUBL'G OFFICE, <http://www.gpo.gov/fdsys/browse/collection.action?collectionCode=STATUTE>.

28. *Id.*

29. *Midland Power*, 774 F.3d at 3 ("In cases, like this, where the two versions conflict, the rule is that the Statutes at Large version controls. 'Though the United States Code is "prima facie" evidence that a provision has the force of law, 1 U.S.C. § 204(a), it is the Statutes at Large that provides the "legal evidence of laws," § 112 . . .'" (quoting *United States Nat'l Bank of Ore. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 (1993))).

30. *Midland Power Coop.*, 774 F.3d at 3.

31. 16 U.S.C. § 824a-3(h)(2)(B).

32. *Midland Power Coop.*, 774 F.3d at 7-8.

33. *Id.* at 8.

4. *Midland Cogeneration Venture Limited Partnership v. FERC*, No. 12-1224 (D.C. Cir. Feb. 3, 2015) (per curiam)

The D.C. Circuit dismissed consolidated challenges to five FERC orders on the grounds that the petitioner failed to properly seek rehearing of the orders.<sup>34</sup> The lawsuit centered on two FERC orders—the Facilities Agreement Order and the Agency Agreement Order—and related orders addressing requests to rehear and/or clarify these agreements.<sup>35</sup> With regard to the Facilities Agreement Order, Midland Cogeneration Venture Limited Partnership (Midland Cogeneration) failed to seek rehearing on the initial order but instead challenged the order clarifying the agreement.<sup>36</sup> The court found that Midland Cogeneration was therefore barred from seeking judicial review of the original order, noting that “we are generally prohibited from exercising jurisdiction over collateral attacks on prior FERC orders.”<sup>37</sup> The court also lacked jurisdiction to hear Midland Cogeneration’s claims relating to the Agency Agreement Order.<sup>38</sup> Although Midland Cogeneration sought rehearing of the Agency Agreement Order, it did so on other grounds.<sup>39</sup>

5. *Minisink Residents for Environmental Preservation & Safety v. FERC*, 762 F.3d 97 (D.C. Cir. 2014), petition for rehearing en banc denied Oct. 20, 2014

On August 15, 2014, the D.C. Circuit issued its opinion in *Minisink Residents for Environmental Preservation & Safety v. FERC*.<sup>40</sup> The court refused to revoke a certificate of public convenience and necessity issued to Millennium Pipeline Company, L.L.C. by the FERC for a natural gas compressor station, despite the opposition of a group of New York State residents who objected to its environmental impact.<sup>41</sup> The court held that the FERC met its obligation to consider alternative locations and gave especially thorough attention to the alternative favored by petitioners.<sup>42</sup> The court dismissed all of the petitioners’ challenges and found that the FERC’s decisions “were both reasonable and reasonably explained.”<sup>43</sup> The court recognized the FERC’s duty to consider “logical alternatives” that may better serve the public interest, but added that “[the] FERC’s obligation to consider alternatives . . . is not boundless.”<sup>44</sup>

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34. *Midland Cogeneration Venture Ltd. P’ship v. FERC*, No. 12-1224, slip op. at 1-2 (D.C. Cir. Feb. 3, 2015) (per curiam).

35. *Id.*

36. *Id.* at 2.

37. *Id.*

38. *Id.*

39. *Midland Cogeneration Venture*, *supra* note 34, at 2 (the rehearing of the Agency Agreement Order on other grounds was also dismissed for lack of jurisdiction); *see, e.g., Michigan Elec. Transmission Co.*, 133 F.E.R.C. ¶ 61,238 (2010), *reh’g denied*, 138 F.E.R.C. ¶ 61,203 (2012).

40. *Minisink Residents for Env’tl. Pres. & Safety v. FERC*, 762 F.3d 97 (D.C. Cir. 2014), *pet. for reh’g en banc denied*.

41. *See generally id.*

42. *Id.* at 106-07.

43. *Id.* at 101.

44. *Id.* at 107, 111 & n.9.

6. *NO Gas Pipeline v. FERC*, 756 F.3d 764 (D.C. Cir. 2014), rehearing en banc denied Sept. 8, 2014

The D.C. Circuit dismissed the petitions of Jersey City and several environmental groups, finding that the court lacked jurisdiction to hear the case.<sup>45</sup> “The [FERC] entered an order granting a certificate of public convenience and necessity for the construction of a natural gas pipeline connecting New York and New Jersey.”<sup>46</sup> The environmental group petitioners claimed that construction of the pipeline would decrease air quality by releasing dangerous levels of radon into the air.<sup>47</sup> The court dismissed the claims of the environmental group petitioners based on their lack of standing.<sup>48</sup> The court held that the environmental group petitioners failed to show that they suffered an injury in fact, and additionally failed to show that such an injury was caused by the construction of the pipeline.<sup>49</sup> The court dismissed Jersey City’s claims because it failed to demonstrate how it has been injured and did not challenge any part of the FERC’s ruling either as to its reasoning, its findings, or any decision in the administrative proceeding.<sup>50</sup>

7. *Public Service Electric & Gas Co. v. FERC*, 783 F.3d 1270 (D.C. Cir. 2015)

Fourteen electrical transmission companies operating as members of PJM Interconnection, L.L.C., a regional transmission organization, filed a petition for review of the FERC’s orders.<sup>51</sup> In its orders, the FERC held that those companies did not have a right of first refusal for proposed transmission upgrades or expansions.<sup>52</sup>

This case dealt with whether the fourteen electrical transmission companies had a live controversy.<sup>53</sup> To satisfy the firmly established Article III case or controversy requirement, at the time the court hears the case, “there must be a live controversy.”<sup>54</sup> Here, the FERC had already instructed the electrical transmission companies to remove language from their governing agreements giving them the right of first refusal.<sup>55</sup> Therefore, any interpretation of language that was removed in accordance with the FERC’s orders would be an impermissible advisory opinion.<sup>56</sup> Advisory opinions, in the history of legal application, are unconstitutional.<sup>57</sup> Because the court was left interpreting superseded language

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45. *NO Gas Pipeline v. FERC*, 756 F.3d 764, 766 (D.C. Cir. 2014), *reh’g en banc denied*.

46. *Id.* at 765-66.

47. *Id.* at 766-67.

48. *Id.* at 767-68.

49. *Id.* at 767.

50. *NO Gas Pipeline*, 756 F.3d at 766, 768-70.

51. *Primary Power, LLC*, 131 F.E.R.C. ¶ 61,015 (2010), *order on reh’g*, 140 F.E.R.C. ¶ 61,052 (2012); *Central Transmission, LLC v. PJM Interconnection, LLC*, 131 F.E.R.C. ¶ 61,243 (2010), *reh’g denied*, 140 F.E.R.C. ¶ 61,053 (2012).

52. 140 F.E.R.C. ¶ 61,052 at P 65; 140 F.E.R.C. ¶ 61,053 at P 17.

53. *Pub. Serv. Elec. & Gas Co. v. FERC*, 783 F.3d 1270, 1274 (D.C. Cir. 2015).

54. *Id.* (quoting *Sosna v. Iowa*, 419 U.S. 393, 402 (1975)).

55. 140 F.E.R.C. ¶ 61,052 at P 65; 140 F.E.R.C. ¶ 61,053 at P 17.

56. *Pub. Serv. Elec.*, 783 F.3d at 1274.

57. *Id.* (citing *Flast v. Cohen*, 392 U.S. 83, 96 (1968)); *see also Muskrat v. United States*, 219 U.S. 346, 356 (1911); *DaimlerChrysler Corp v. Cuno*, 547 U.S. 332, 341 (2006).

that no longer presents a “live controversy between adverse parties,” this case was dismissed.<sup>58</sup>

8. *Smith Lake Improvement & Stakeholders Ass’n v. FERC*, 768 F.3d 1 (D.C. Cir. 2014), amended en banc, No. 13-1074 (D.C. Cir. Jan. 30, 2015)

The D.C. Circuit denied rehearing of its September 2014 order dismissing a petition filed by the Smith Lake Improvement and Stakeholders Association (Association) in a hydroelectric relicensing proceeding.<sup>59</sup> The Association, comprised of lakeshore property owners, objected to the FERC’s issuance of a new license authorizing Alabama Power Company’s Warrior River Project to operate under existing lake levels.<sup>60</sup> The FERC issued an order denying the rehearing request on the merits.<sup>61</sup> The Association then filed a second rehearing request, which the FERC summarily denied, based on the fact that the rehearing order did not significantly modify the license order.<sup>62</sup> The Association then filed its petition for judicial review, 124 days after the first rehearing order.<sup>63</sup>

In September 2014, the D.C. Circuit held that a second request for rehearing does not toll the 60-day period for initiating judicial review under the FPA unless the initial rehearing order modified the final order in a “significant way.”<sup>64</sup> Thus, because the FERC’s order denying rehearing in this case did not substantially change the license order, the Association missed the statutory deadline for appealing the decision.<sup>65</sup> The January 30 order amended the court’s original opinion to clarify that when a petitioner is uncertain as to whether a rehearing order significantly modifies the prior order, the “safer course” is to file a petition for review in the D.C. Circuit.<sup>66</sup>

9. *Turlock Irrigation District v. FERC*, 786 F.3d 18 (D.C. Cir. 2015)

On May 15, 2015, the D.C. Circuit clarified the requirements of standing to seek judicial review of a FERC decision. In *Turlock Irrigation District v. FERC*, the court ruled that the Tuolumne River Trust and other conservation groups (collectively, the Trust), which argued on appeal that the FERC erred by not recognizing that it had licensing jurisdiction over the La Grange Hydroelectric Project for four reasons instead of three, did not have standing.<sup>67</sup> The court found that the Trust did not suffer an injury in fact because it “received exactly what it

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58. *Pub. Serv. Elec.*, 783 F.3d at 1275.

59. *Smith Lake Improvement & Stakeholders Ass’n v. FERC*, 768 F.3d 1 (D.C. Cir. 2014), amended en banc, No. 13-1074, slip op. at 7 (D.C. Cir. Jan. 30, 2015).

60. *Smith Lake Improvement*, 768 F.3d at 2.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Smith Lake Improvement*, 768 F.3d at 3-4.

66. *Id.* at 4; *Smith Lake Improvement & Stakeholders Ass’n v. FERC*, No. 13-1074, slip op. at 7 (D.C. Cir. Jan. 30, 2015).

67. *Turlock Irrigation Dist. v. FERC*, 786 F.3d 18, 23 (D.C. Cir. 2015) (“Unlike Becket, the Trust does not speak of ‘do[ing] the right deed for the wrong reason.’ . . . Rather it accuses the Commission of doing the right thing for too few reasons. This does not establish standing.” (citing T.S. ELIOT, *MURDER IN THE CATHEDRAL* act 1)).

sought.”<sup>68</sup> The court further ruled that the Trust’s argument that it would be required to expend twice the resources to participate actively in both the La Grange proceeding and a related licensing proceeding for the Don Pedro Project fails to satisfy the Article III requirement of injury in fact.<sup>69</sup> The court rejected an alternative argument by the Trust as conjectural and speculative that decline in the fish population will lead to a decline in tourism revenue and would adversely affect its members.<sup>70</sup> The court also declined to accept the Trust’s associational standing argument that the decline in fish population will diminish its members’ ongoing use and enjoyment of the river for fly fishing because it could not demonstrate that any member meets the three elements of the *Lujan* test.<sup>71</sup>

### B. Other Circuit Court Decision

#### 1. New York v. FERC, 783 F.3d 946 (2d Cir. 2015)

In *New York v. FERC*, the U.S. Court of Appeals for the Second Circuit denied a petition for review of FERC Order Nos. 773 and 773-A.<sup>72</sup> In ruling that the FERC was entitled to *Chevron* deference to interpret its regulatory jurisdiction to define the “bulk power system” under the FPA and Electricity Modernization Act of 2005, the court found that one argument by petitioners, that the “FERC permits only facility owners, not state regulators acting on behalf of a facility, to petition for an individualized assessment of jurisdiction[,]” is not properly before the court because petitioners did not raise the argument before the FERC.<sup>73</sup> Specifically, the court found that New York never made the argument and “offers no ‘reasonable ground for [its] failure to do so’” as required by the FPA.<sup>74</sup> The court concluded that the statutory exhaustion requirement precluded it from considering the claim for the first time on appeal.<sup>75</sup>

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68. *Turlock Irrigation Dist.*, 786 F.3d at 23; *see also id.* (citing *Exxon Mobil Corp v. FERC*, 571 F.3d 1208, 1219 (D.C. Cir. 2009); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

69. *Turlock Irrigation Dist.*, 786 F.3d at 24 (citing *Nat’l Ass’n of Home Builders v. EPA*, 667 F.3d 6, 12 (D.C. Cir. 2011); *Center for Law & Educ. v. Dep’t of Educ.*, 396 F.3d 1152, 1162 n.4 (D.C. Cir. 2005); *Nat’l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995); *Sierra Club v. Morton*, 405 U.S. 727, 739-40 (1972)).

70. *Turlock Irrigation Dist.*, 786 F.3d at 23-24.

71. *Id.* at 25. *Lujan* requires a showing of (i) “an actual or imminent injury in fact,” (ii) that is “fairly traceable to the challenged agency action,” and (iii) that “will likely be redressed by a favorable decision.” *Lujan*, 504 U.S. at 560.

72. *See generally*, *New York v. FERC* 783 F.3d 946 (2d Cir. 2015); Order No. 773, *Revisions to Electric Reliability Organization Definition of Bulk Electric System*, 141 FERC ¶ 61,236 (2012) (to be codified at 18 C.F.R. pt. 40), *order on reh’g and clarification*, Order No. 773-A, 143 FERC ¶ 61,053, 78 Fed. Reg. 29,209 (2013), *order denying reh’g*, 144 FERC ¶ 61,174 (2013).

73. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984); 16 U.S.C. § 824o (2011); Electricity Modernization Act of 2005, Pub. L. No. 109-58, tit. XII, 119 Stat. 594, 941-86; *New York*, 783 F.3d at 957-58.

74. *New York v. FERC* 783 F.3d at 958 (quoting 16 U.S.C. § 8251(b) (2011)).

75. *Id.* at 958.



## II. FERC HEADLINES AND NOTABLE ADMINISTRATIVE ACTIONS

### A. *Appointments*

#### 1. Commissioner Bay Assumes Chairmanship

On April 15, 2015, Commissioner Norman C. Bay was named as Chairman of the FERC.<sup>76</sup> Chairman Bay became a Commissioner in August 2014, and his term expires June 30, 2018.<sup>77</sup> From July 2009 to July 2014, Chairman Bay was the Director of the FERC's Office of Enforcement.<sup>78</sup>

#### 2. Commissioner Colette D. Honorable

On December 16, 2014, the Senate confirmed Colette Honorable as a Commissioner at the FERC.<sup>79</sup> Commissioner Honorable served as Chairman of the Arkansas Public Service Commission beginning in 2011 and is the former president of the National Association of Regulatory Utility Commissioners.<sup>80</sup> She will serve out the remainder of a term that ends in June 2017.<sup>81</sup>

### B. *Rulemakings and Policy Statements*

#### 1. Open Access and Priority Rights on Interconnection Customer's Interconnection Facilities, Order No. 807, Docket No. RM14-11-000

In Order No. 807, the FERC revised part 35 of its regulations to grant public utilities that own, control, or operate Interconnection Customer's Interconnection Facilities (ICIF) a blanket waiver from Open Access Transmission Tariff, Open Access Same-Time Information System, and Standards of Conduct requirements.<sup>82</sup> The blanket waiver is available to electric utilities, non-public utilities with a reciprocity obligation, and to public utilities that do not sell electricity.<sup>83</sup> However, the blanket waiver will only be applicable to a public utility that does not sell electricity if and when the entity files an informational statement with the FERC declaring that it "commits to comply with and be bound by the obligations and procedures applicable to electric utilities under section 210 of the FPA."<sup>84</sup>

The FERC additionally: (1) directed third parties "seeking interconnection and transmission service over ICIF that are subject to the blanket waiver" to use the procedures set forth in sections 210, 211, and 212 of the FPA; and (2) adopted

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76. *Chairman Norman C. Bay Biography*, FED. ENERGY REGULATORY COMM'N, <http://www.ferc.gov/about/com-mem/bay/bay-bio.asp> (last updated Sept. 17, 2015).

77. *Id.*

78. *Id.*

79. *News Release: Senate Confirms Honorable to FERC*, FED. ENERGY REGULATORY COMM'N (Dec. 17, 2014), <http://www.ferc.gov/media/news-releases/2014/2014-4/12-17-14.asp#.VbpGxv13bKM>.

80. *Id.*

81. *Id.*

82. Order No. 807, *Open Access and Priority Rights on Interconnection Customer's Interconnection Facilities*, F.E.R.C. STATS. & REGS. ¶ 31,367 (2015), 80 Fed. Reg. 17,654 (2015) (to be codified at 18 C.F.R. pt. 35).

83. *Id.* at PP 73, 82.

84. *Id.* (quoting section 35.28(d)(2) of Commission regulations for an informational statement).

a five-year safe harbor period that will commence on the ICIF's commercial operation date during which there is a rebuttable presumption "that the eligible ICIF owner has definitive plans to use its capacity without having to make a demonstration through a specific plans and milestones showing."<sup>85</sup>

2. Policy Statement on Hold Harmless Commitments, Docket No. PL15-3-000

On January 22, 2015, the FERC issued a proposed policy statement on hold harmless commitments that are offered as ratepayer protections by applicants seeking authorization for mergers, acquisitions, and dispositions subject to FERC approval under section 203 of the FPA.<sup>86</sup> The FERC proposes to (i) "clarify the scope . . . of the costs that should be subject to hold harmless commitments"; (ii) "clarify that applicants offering hold harmless commitments must implement [certain] controls and procedures to track the costs from which customers will be held harmless"; (iii) "no longer accept hold harmless commitments that are limited in duration"; and (iv) "clarify that applicants may demonstrate that, under certain circumstances, transactions" need not include hold harmless commitments.<sup>87</sup> Several industry associations and utilities filed comments on the proposal on March 30, 2015. The FERC has thus far not taken any further action in the proceeding.

C. *Administrative Litigation and Settlements*

1. Procedures for Handling Exhibits; Developing the Electronic Hearing Record in FERC Hearings Before an ALJ, Issued by Chief ALJ

The FERC has revised the rules for submission of evidence in hearing proceedings to accommodate a shift towards new electronic hearing procedures, following a notice from the Chief Administrative Law Judge (ALJ).<sup>88</sup> The Notice proposed changes for handling exhibits and developing the electronic hearing record in proceedings before ALJs. On June 18, 2015, the FERC issued Order No. 811, which became effective when it was published in the *Federal Register* on June 24, 2015.<sup>89</sup> The Final Rule amended Rule 508 of the FERC's Rules of Practice and Procedure by eliminating the requirement that participants in FERC trial-type evidentiary hearings must provide paper copies of all exhibits introduced as evidence.<sup>90</sup> The Final Rule formalized a transition that previously began towards submitting pre-filed testimony and exhibits electronically, while allowing individual judges to continue to request additional paper copies of filings. Pursuant to the Final Rule, exhibits not previously disclosed are still required to be provided to the participants. Additionally, the participants are now required to

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85. *Id.* at PP 1, 138.

86. Proposed Policy Statement, *Policy Statement on Hold Harmless Commitments*, 150 F.E.R.C. ¶ 61,031 (2015) (to be codified at 18 C.F.R. pt. 33).

87. *Id.* at P 1.

88. Procedures for Handling Exhibits and Developing the Electronic Hearing Record (FERC issued Dec. 12, 2014).

89. Order No. 811, *Revised Exhibit Submission Requirements for Commission Hearings*, F.E.R.C. STATS. & REGS. ¶ 31,369 (2015), 80 Fed. Reg. 36,234 (2015) (to be codified at 18 C.F.R. pt. 385).

90. 18 C.F.R. § 385.508 (2015); Order No. 811, *supra* note 89, at P 6.

file (via e-Filing) a Joint Exhibit List and official copies of each exhibit offered and admitted into evidence within seven days of the end of the hearing.<sup>91</sup> Participants in FERC hearings are still permitted to provide paper copies, and are subject to the rules of individual judges, which may vary as to paper copies.

In addition to the Notice, there is another evolution beginning in FERC hearing practice towards fully electronic and paperless hearings. This new process involves the use of a secure network and software platform that facilitates the real-time entering of exhibits into the record electronically in the hearing room.<sup>92</sup> Additionally, participants and witnesses are able to immediately view the exhibits entered into the record. This new process has been used once, and in the coming months more judges anticipate participating in its development.<sup>93</sup>

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91. *Id.* at P 5.

92. In July 2015, an internal presentation was made to the Office of Administrative Law Judges and Dispute Resolution by the FERC's IT Operations Division demonstrating the initial version of the new paperless software and procedures.

93. On March 30, 2015, in Docket No. IN13-15-000, Judge Carmen A. Cintron became the first FERC ALJ to preside over a paperless hearing. Judge Cintron worked with the FERC's IT Operations Division to develop and test an entirely electronic format using new real-time technological solutions securely deployed in the hearing room.

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