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James J. Hoecker

Author Contact Information:
James J. Hoecker
Husch Blackwell LLP
Washington, D.C.

James.Hoecker@huschblackwell.com
202.378.2300

FEDERAL ENERGY UPDATE

HUSCH BLACKWELL LLP

The following material provides a summary of recent developments in federal electric power and natural gas regulation. In the past year, the Supreme Court has decided an unprecedented batch of three FERC-related cases under the Federal Power Act (FPA) and the Natural Gas Act (NGA), an indication of active litigation in several appellate courts. Although not as substantial as the Energy Policy Acts of 2005 and 2007, energy-related bills have once again been actively pursued in the Congress. The Department of Energy (DOE), the Federal Energy Regulatory Commission (FERC), the Commodities and Futures Trading Commission (CFTC), and the Environmental Protection Agency (EPA) have all issued rules that seek either to modify company practices or behaviors or to promote new business models, markets, market entrants, or encourage infrastructure planning and increased resource development. On the whole, the last twelve months may serve as a prelude to fundamental changes in domestic energy production, delivery, and consumption in the coming decade.

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FEDERAL ENERGY UPDATE

I. Supreme Court Trilogy of FERC Cases

A. Preemption: State Anti-Trust Law

The Supreme Court recently held that state antitrust claims are not preempted by the Natural Gas Act (NGA).[1] In *Oneok v. Learjet*, natural gas customers who purchased natural gas directly from interstate pipelines sued the pipelines, alleging that the pipelines had reported false information to the natural gas indices and engaged in behavior that violated state antitrust laws, causing the customers to overpay. The pipelines removed the claim to federal district court, arguing in a motion for summary judgment that the customer's state law antitrust claims were preempted by NGA Section 5(a).[2] The federal district court granted the motion for summary judgment, which the Ninth Circuit reversed.

In ruling against the pipelines, the Supreme Court reasoned that the NGA was drafted to preserve state power. The Court stated that state antitrust laws target practices that affect retail prices; retail prices are firmly in the state's jurisdiction. The Court affirmed the Ninth Circuit's reversal of summary judgment for the pipelines.

B. Preemption: Resource Adequacy

In *Hughes v. Talen Energy Marketing, LLC*, the Supreme Court held that a state regulatory program was preempted by the Federal Power Act (FPA).[3] Wholesale power generators sued the State of Maryland because its regulatory program authorized construction of a new power plant and required the plant to enter into a twenty-year pricing contract with PJM Interconnection. The state program guaranteed the generator's energy price. The wholesale generators argued that Maryland's program was preempted by the FPA.

In ruling for the wholesale generators, the Supreme Court reasoned that Maryland's program upset the division of authority between state and federal regulators that FPA Section 201 established. FPA Section 201 grants the FERC jurisdiction over rates for and affecting wholesale prices and it grants the states jurisdiction over retail sales. The Supreme Court stated that Congress intended for Federal law to grant exclusive authority over wholesale rates to FERC. It reasoned that Maryland's program was preempted because it disregarded the interstate wholesale rate required by FERC.

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[1] *Oneok v. Learjet*, 135 S. Ct. 1591 (2015).

[2] NGA Section 5(a) authorizes FERC to determine and fix just and reasonable rates that may be charged by companies who transport or sell natural gas.

[3] *Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288 (2016).

C. Jurisdiction: Demand Response

In *FERC v. Electric Power Supply Association*, the Supreme Court evaluated federal and state jurisdiction over wholesale demand response pricing and held that FERC has authority to regulate pricing of wholesale demand response service.[4] The Court stated, "The FPA delegates responsibility to FERC to regulate the interstate wholesale market for electricity–both wholesale rates and the panoply of rules and practices affecting them."[5] FERC's Order No. 745 established the rules and practices for demand response (DR).[6] Demand response involves programs that curtail power consumption by consumers in response to market operators, but FERC calculated demand response compensation at the wholesale level.[7] The Electric Power Supply Association sued FERC, asserting that Order No. 745 exceeded FERC's jurisdiction by infringing on the states' retail jurisdiction.

The Supreme Court reasoned that the Federal Power Act Section 201 grants FERC authority over wholesale electric sales, and the Federal Power Act Section 205 requires that all rates and charges in connection with wholesale sales – and the rules "affecting" wholesale rates and charges – must be just and reasonable. The Court determined that the rates and charges for demand response services affect wholesale rates. While transactions in the wholesale market have consequences for the retail market, the Court found that effect legally inconsequential. Additionally, the Court held that FERC was not arbitrary and capricious in selecting the demand response pricing model because FERC engaged in reasoned decision making when selecting the formula.

II. Appellate Court Developments

A. Electric Power Contract and Tariff Issues

1. Order No. 1000-Rights of First Refusal

Transmission owners and incumbents separately petitioned the D.C. Circuit and the Seventh Circuit to determine whether *Mobile-Sierra's* just and reasonable presumption[8] applied

[4] *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760 (2016).

[5] *Elec. Power Supply Ass'n*, 136 S. Ct. 760 (2016).

[6] *Demand Response Compensation in Organized Wholesale Energy Markets*, 135 FERC ¶ 61,187 (Mar. 15, 2011). FERC Order No. 719 required wholesale market operators to receive demand response bids from aggregators of electricity consumers, except when the state regulatory authority overseeing those users' retail purchases bars demand response participation.

[7] Order No. 745 established a locational marginal price (LMP) for DR and set forth a "net benefits" test. The LMP calculation compensated demand response providers the same amount for conserving energy as generators that would otherwise produce it.

[8] The core *Mobile-Sierra* doctrine provides that freely negotiated, rate-related contract terms for wholesale energy are presumed just and reasonable, and FERC cannot set aside the rate unless it is contrary to the public interest. *United Gas Pipeline Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956). The contract term must be the product of adversarial negotiations between sophisticated parties pursuing independent interests.

to the right of first refusal (ROFR) provision in Southwest Power Pool's (SPP) and Midcontinent Independent Service Operator's (MISO) RTO membership agreements.[9] In *MISO Transmission Owners v. FERC*, the Seventh Circuit held that the *Mobile-Sierra* doctrine protection does not apply to the right of first refusal (ROFR) in the Regional Transmission Owners Agreement because the negotiating parties did not have classically adversarial interests – rather, the negotiating parties sought to protect themselves from third-party competition.[10] Similarly, in *Oklahoma Gas & Electric Co. v. FERC*, the D.C. Circuit held that the *Mobile-Sierra* doctrine does not require FERC to extend the just-and-reasonable presumption to the ROFR in the SPP owner's agreement.[11] As a result of that ruling, incumbent utilities cannot assert a right of first refusal to build new transmission facilities in their service areas.

2. Refund Authority

The D.C. Circuit evaluated FERC's retroactive refund authority. In *Xcel Energy Services v. FERC*, the D.C. Circuit held that FERC has broad remedial authority under Section 309 of the FPA to remedy legal errors involving consumer protections mandated by Congress under Section 205 of the FPA.[12] SPP filed a tariff revision to implement the formula rate of a non-jurisdictional electric cooperative participating transmission owner, Tri-County Electric Cooperative (Tri-County). The Commission allowed the rates to go into effect without suspension and a full FPA Section 205 review, and without a voluntary refund commitment from Tri-County. Xcel challenged FERC's orders and petitioned for $1.4 million in refunds, alleging that FERC erred in accepting and allowing the SPP tariff revisions to go into effect without a refund commitment by Tri-County. On rehearing, FERC acknowledged that it erred but held that it lacked authority to order refunds from Tri-County. Xcel appealed to the D.C. Circuit and argued that FERC's determination that it lacked authority to provide retroactive relief was in error. Specifically, the D.C. Circuit held that FERC's failure to adhere to the FPA Section 205 consumer protection mandate was legal error, which rendered FERC's order accepting the rate in

[9] *Oklahoma Gas & Electric Co. v. FERC*, Case No. 14-1281 (D.C. Cir. 2016); *MISO Transmission Owners v. FERC*, 819 F.3d 329 (7th Cir. 2016). FERC's Order No. 1000 removed incumbent utilities' ROFR. *Order No. 1000*, 136 FERC ¶ 61,051 (2011). Incumbent utilities strongly opposed its removal. The factual similarity and appellate timing of these two ROFR cases created the potential for a Federal Circuit split. In fact, at oral argument for *Oklahoma Gas & Electric Co. v. FERC*, D.C. Circuit Judge Millett recognized this potential. However, both circuits upheld FERC's removal of the ROFR, which supports the transition towards increasing competition in transmission development through Order No. 1000.

[10] *MISO Transmission Owners v. FERC*, 819 F.3d 329 (7th Cir. 2016).

[11] *Oklahoma Gas & Electric Co. v. FERC*, Case No. 14-1281 (D.C. Cir. 2016). In a second July 1 ruling, the D.C. Circuit issued a per curium holding that American Transmission Systems Inc., a transmission subsidiary of FirstEnergy Corp., had not properly preserved its ROFR on rehearing. *American Transmission Sys. Inc. v. FERC*, Case No. 14-1085 (D.C. Cir. 2016). The Court wrote, "[P]etitioners have preserved no argument that either one of their agreements actually contained a right of first refusal for the *Mobile-Sierra* doctrine to protect. That leaves this court without jurisdiction." *Id.*

[12] *Xcel Energy Services v. FERC*, 815 F.3d 947 (D.C. Cir. 2016).

SPP's revised tariff *ultra vires*, and remanded the case to the Commission. On remand, FERC ordered SPP to bill Tri-County for the amounts SPP collected under Tri-County's formula rate.[13]

3. Short-Term Spot Sale Contracts

The State of California challenged FERC's application of the *Mobile-Sierra* presumption to short-term bilateral spot sale contracts. In *California ex rel. Harris v. FERC*, the Seventh Circuit upheld FERC's application of the *Mobile-Sierra* presumption to short-term spot sale contracts with unusually high prices.[14] The court reasoned that the spot contract's short-term nature and the high pressure it places on the buyer did not render the *Mobile-Sierra* presumption inapplicable. The court recognized that, while long-term energy contracts play a special role in stabilizing energy markets, the *Mobile-Sierra* doctrine does not rest on the stabilizing force of contracts but instead on the ability of competent parties to engage in free negotiation.

B. Natural Gas Facilities

1. LNG Exports and Facility Construction

Environmental groups challenged FERC's authorization of LNG export facility construction, and the DOE's authorization of LNG exportation.[15] The petitioners alleged that the federal agencies violated the National Environmental Protection Act (NEPA).[16] FERC has jurisdiction over LNG facility construction and operation, and the DOE has jurisdiction over LNG exports.[17]

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[13] The Commission has initiated a paper hearing to determine whether or not to require non-public utility transmission owners in MISO and SPP to make the same refund commitments that public utility transmission owners make. *Order Institution Section 206 Proceeding and Commencing Paper Hearing Procedures and Establishing Refund Effective Date re: Southwest Power Pool, Inc.*, FERC Docket No. EL16-91 (July 21, 2016). The proceeding seeks to "close a regulatory gap" between the refund obligations that apply to public utility transmission owners and non-public utility transmission owners. S&P Global Platts, Inside FERC, *FERC to Weigh New Refund Requirements for Non-Public Utilities in MISO, SPP*, at 4 (July 25, 2016).

[14] *California ex rel. Harris v. FERC*, 809 F.3d 491 (9th Cir. 2015). The lawsuit stemmed from the California and western energy crisis of 2000-2001.

[15] *Sierra Club and Galveston BayKeeper v. FERC*, Case No. 14-1275 (D.C. Cir. 2016); *Sierra Club v. Dept. of Energy*, Case No. 15-1489 (D.C. Cir. 2016). As of this writing, the DOE has received ninety-eight applications for LNG export approval. Of those applications, fifty-two are to Free Trade countries and forty-six are to Non-Free Trade countries. Forty-eight of the fifty-two Free Trade country applications have been approved while four are pending approval. Among applications of Non-Free Trade countries, eighteen applications have been approved while twenty-eight applications remain under review. As of this writing, there are twelve existing LNG import terminals in the U.S. and there are two LNG export terminals in the U.S. FERC has approved four LNG import terminals, and authorized ten LNG export terminals. Two additional LNG import terminals have been proposed to FERC, and seventeen additional LNG export terminals have been proposed to FERC.

[16] *Id*.

[17] In the early part of this decade, the increase in natural gas "fracking" resulted in surplus deliverability that placed demands on the pipeline system and impacted the flow of natural gas on the interstate pipeline grid. The increased volume allowed natural gas pipeline subscribers to sign long-term capacity contracts. These long-term capacity

a. FERC's NEPA Review

In *Sierra Club and Galveston BayKeeper v. FERC*, the petitioners alleged that FERC violated NEPA for failing to consider the following: (1) indirect environmental effects of possible increase in domestic gas production, and (2) cumulative environmental effects of local LNG projects and other national projects.[18] The D.C. Circuit held that the environmental groups had standing, but that FERC's NEPA review did not rise to the level of arbitrary and capricious error. The court stated that the groups' challenge is properly raised against the Department of Energy's order authorizing Freeport to export natural gas.

In *Sierra Club v. FERC*, the petitioner alleged that FERC violated NEPA when it authorized an increase in production capacity at Sabine Pass LNG's terminal in Cameron Parish, Louisiana.[19] The Sierra Club advanced the same arguments in the companion case, *Sierra Club and Galveston BayKeeper v. FERC*. Specifically, it argued that the Commission failed to consider (1) indirect environmental effects of possible increase in domestic gas production, and (2) cumulative environmental effects of local LNG projects and other national projects. The D.C. Circuit dismissed those arguments on the merits "for largely the same reason" in *Sierra Club and Galveston BayKeeper v. FERC*. Additionally, the D.C. Circuit held that it did not have jurisdiction to evaluate the "cumulative effects" argument because the Sierra Club did not exhaust all administrative remedies.

b. DOE's NEPA Review

In *Sierra Club v. Dept. of Energy*, the petitioners alleged that the DOE failed to take a "hard look" under NEPA at greenhouse gas emissions and other impacts that might result from increased domestic natural gas production and from foreign consumption of U.S. exported

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contracts provided financial security to interstate natural gas pipelines, allowing them to build new pipelines and expand existing lines. Additionally, interstate pipelines were willing to physically reverse the historic direction of natural gas flows in order to serve markets in the Midwest and to reach LNG liquefaction facilities and export terminals. Today, the level of activity for new pipeline infrastructure and upgrades has since dropped off dramatically. At current prices, there is not enough natural gas production to support the level of pipeline infrastructure build-out and upgrades that existed in the early part of this decade. Robert Grattan, Houston Chronicle, *Natural Gas Production Likely to Drop This Year*, Dec. 31, 2015 ("[T]he financial strain of 12 months of $2 natural gas, weak demand and biting cuts to budgets . . . may overwhelm drillers' efforts to keep the gas flowing."); Joseph DiStefano, Philadelphia Inquirer, *Pa. Natural Gas Production In Decline*, June 16, 2016 ("Marcellus Shale gas production has declined for a second straight month[.]").

Despite the reduction in certificate application, FERC continues to receive NGA Section 7 applications for "Major Pipeline Project" facility construction and operation. The Commission has jurisdiction over interstate natural gas pipeline construction, and the direction of interstate natural gas flows under Section 7 of the Natural Gas Act. These projects are fueled by the potential to export LNG. The DOE receives applications for LNG export authority pursuant to NGA Section 3.

[18] *Sierra Club and Galveston BayKeeper v. FERC*, Case No. 14-1275 (D.C. Cir. 2016). Similar arguments were made in *Delaware Riverkeeper Network, et al. v. FERC*, 753 F.3d 1304 (D.C. Cir. 2014).

[19] *Sierra Club v. FERC*, Case No. 14-1249 (D.C. Cir. 2016).

LNG.[20] The Sierra Club argued that the DOE must consider the upstream and downstream GHG impacts from LNG exports.[21] As of August 2016, both the DOE and Sierra Club have filed briefs, but oral argument has not been scheduled.

c. Non-Discriminatory Service

In *BP Energy Co. v. FERC*, the D.C. Circuit held that the Commission did not justify its determination that Dominion Cove Point LNG did not act in an unduly discriminatory manner when it agreed to shorten the contract term of a non-open-access customer's terminal services contract (Statoil) without offering a corresponding "turn back" option to open-access customers such as BP Energy.[22] Dominion Cove Point LNG offered a "turn back" agreement to Statoil in order to free up pipeline capacity to facilitate its proposed conversion project. The Commission argued that the shortened contract term did not impact BP Energy's contract with Dominion Cove Point LNG. Additionally, the Commission argued that the prohibition on "undue discrimination" does not apply to the matter because BP and Statoil are not similarly situated, and do not require equivalent treatment.[23] The court remanded the case to FERC for further explanation of why the "turn back" agreement was not unduly discriminatory.

2. Pipeline Permitting

In *Constitution Pipeline v. New York State Department of Environmental Conservation*, Constitution Pipeline appealed New York State's denial of Clean Water Act Section 401 certification for its interstate pipeline project.[24] FERC authorized the pipeline,[25] but New York's application of the Clean Water Act has stopped the project. Constitution Pipeline argued that that the New York Department of Environmental Conservation's decision was arbitrary and capricious, and an impermissible challenge to FERC's order approving the project. Industry

[20] *Sierra Club v. Dept. of Energy*, Case No. 15-1489 (D.C. Cir. 2016).

[21] The argument that the relevant agency must consider GHG impacts is not unique to LNG cases. It appears in challenges to pipeline infrastructure and fossil fuel facilities applications.

[22] *BP Energy Co. v. FERC*, Case No. 15-1205 (D.C. Cir. 2016).

[23] BP Energy and Statoil received terminal service pursuant to different regulatory schemes, each with separate protections.

[24] *Constitution Pipeline v. New York State Department of Environmental Conservation*, Case No. 16-1568 (2nd Cir. 2016). New York State Department of Environmental Conservation (NYSDEC) denied Constitution's application for a Water Quality Certification on the grounds that Constitution failed to address significant water resource impacts and failed to sufficiently demonstrate compliance with New York's water quality standards. *Joint Application, Notice of Denial Permit No. 0-9999-00181/00024*, NYSDEC (Apr. 22, 2016). FERC previously prepared an Environmental Impact Statement (EIS), required by NEPA, and found that the project would result in some adverse environmental impacts, but those impacts would be mitigated by measures adopted as conditions of the Order. *Constitution Pipeline Co.*, 149 FERC ¶ 61,199 (2014).

[25] *Constitution Pipeline Co.*, 154 FERC ¶ 61,046 (Jan. 28, 2016) (Order Denying Rehearing). FERC has approved sixty "Major Onshore Pipeline Projects" in 2015–2016, with forty-four Major Pipeline Project applications pending. The Commission has directed FERC Staff to actively participate in projects that utilize the pre-filing process. The increase in staff resources is intended to identify and resolve stakeholder concerns prior to the filing of a NGA Section 7 certificate application with the Commission.

trade groups representing national natural gas producers, transporters, and industrial customers filed amicus briefs in support of Constitution Pipeline. These intervenors called for scrutiny of the State's denial of Clean Water Act Section 401 certification, arguing that New York State exceeded the limited authority provided by Section 401.[26] The case has not been resolved.

C. Oil Pipeline Income Tax Allowance

In *United Airlines v. FERC*, the D.C. Circuit vacated FERC's grant of an income tax allowance to a partnership pipeline.[27] SFPP, a limited partnership common-carrier oil pipeline, filed for a rate increase.[28] In ruling for the shippers, the D.C. Circuit reasoned that under the Commission's current policy the combination of the discounted cash flow return on equity and the tax allowance may result in double recovery of taxes for partnership pipelines.[29] Under the Commission's current tax allowance policy, a partner in a partnership pipeline receives a higher after tax return than a shareholder in a corporate pipeline.[30] The court identified this as an inequitable return, and remanded the case to FERC to justify how rates with the income tax allowance are just and reasonable.[31]

D. Hydroelectric Power Municipal Preference

The D.C. Circuit evaluated FERC's application of the FPA's "municipal preference" for hydroelectric resource development under FPA Section 7(a).[32] In *Western Minnesota Municipal Pwr. Agency v. FERC*, the D.C. Circuit held that Section 7(a) of the FPA unambiguously requires FERC to give preference to states and municipalities in awarding hydropower projects. The court rejected FERC's argument that FPA Section 7(a) only applies to hydropower projects in the vicinity of the municipality. FERC received two bids for a hydroelectric project—one from a municipality as defined in the FPA and one from a non-municipal entity. FERC held a

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[26] S&P Global Platts, Inside FERC, *Industry Groups Join Constitution Challenge of NY Denial of Water Permit for Pipeline Project*, at 4 (July 25, 2016).

[27] *United Airlines, Inc. et al. v. FERC*, Case No. 11-1479 (D.C. Cir. 2016) ("*United Airlines*").

[28] Several shippers protested the rate increase by raising challenges to SFPP's cost of service, arguing that a tax allowance results in "double recovery" of taxes to SFPP's partners.

[29] *United Airlines,* Case No. 11-1479, at 18. The court pointed to *Hope Natural Gas Co.'s* requirement that "the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks[.]" *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944).

[30] *United Airlines,* Case No. 11-1479 (D.C. Cir. 2016).

[31] Although *United Airlines* arose in an oil pipeline context, there is potential for the income tax allocation principles announced in the case to be applied in natural gas or electric rate cases where FERC has provided similar grounds for its tax allowance policies. The ruling could be applied to any master limited partnership (MLP), limited partnership (LP), limited liability company (LLC), or Real Estate Investment Trust (REIT). It is important for gas and electric entities to take this decision into account when considering corporate structure options for FERC-regulated assets as the disallowance of an income tax allowance significantly affects the bottom line.

[32] *Western Minnesota Municipal Pwr. Agency v. FERC*, 806 F.3d 588 (D.C. Cir. 2015).

lottery, and awarded the bid to the non-municipal entity.[33] The municipality challenged FERC's decision to conduct a lottery and its award of the project.

III. Legislative Developments

A. North American Energy Security and Infrastructure Act

H.R. 8 contains seven titles that cover the following areas: (i) modernizing and protecting infrastructure, (ii) energy security and diplomacy, (iii) energy efficiency and accountability, (iv) changing crude oil market conditions, (v) "other matters," (vi) promoting renewable energy with shared solar, and (vii) marine hydrokinetic energy.[34] The bill proposes to streamline petroleum and LNG export permitting.[35] It authorizes FERC to limit environmental reviews of natural gas pipeline applications. H.R. 8 passed the House and was received in the Senate, where it was referred to the Committee on Energy and Natural Resources.

B. Energy Policy Modernization Act

S. 2012 contains five titles: (i) efficiency, (ii) infrastructure, (iii) supply, (iv) accountability, and (v) conservation reauthorization.[36] The bill includes grid modernization and research and development programming for cyber security provisions. It provides funding for research on LNG, clean coal, methane hydrate exploration, and nuclear fusion and fission. This bill streamlines the DOE's review of LNG export applications, and designates FERC as the lead agency for all federal authorizations and NEPA compliance related to natural gas transportation. It grants original and exclusive jurisdiction to the relevant federal circuit court over any civil action for the review of a DOE order on an LNG export application. The bill requires the DOE to initiate public-private partnerships for the purposes of grid modernization. It directs the DOE to partner with states and RTOs to facilitate regional electric distribution plans by developing open source tools for planning and operations. It requires Transmission Organizations to submit a report to FERC that evaluates the available capacity resources and the impact that those resources have on wholesale electric prices. The bill establishes a working group on energy markets to investigate the effects of financial investment in energy commodities. The Senate and the House passed S. 2012, but the House made changes that sent the bill back to the Senate on May 25, 2016.

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[33] By holding a lottery, FERC reversed several years of Commission precedent affording preference in preliminary permit applications to states and municipalities.

[34] *North American Energy Security and Infrastructure Act of 2015*, HR. 8, 114th Congress (2015-2016).

[35] HR. 8 limits the DOE's review of natural gas export applications to thirty days after the relevant federal agency completes NEPA review. S. 2012 limits the same DOE review to forty-five days.

[36] *Energy Policy Modernization Act*, S. 2012, 114th Congress (2015-2016).

C. Securing Energy Infrastructure Act

S. 3018 tasks DOE with implementing a "pilot program to identify security vulnerabilities of certain entities in the energy sector."[37] The Senate Committee on Energy and Natural Resources' bill proposes to create a $10 million, two-year pilot program. Under the proposed program, the DOE's National Laboratories would be required to: (i) study new classes of energy security vulnerabilities, and (ii) research and implement technology and standards to defend critical energy control systems.

D. Fixing America's Surface Transportation Act

The Fixing America's Surface Transportation Act ("FAST Act") was signed into law on December 4, 2015.[38] The law establishes an interagency council to facilitate coordination between federal agencies. It requires "streamlining" infrastructure projects that involve investment greater than $200 million, including pipeline and electric transmission projects. The law creates permitting timetables and modifies certain NEPA requirements in order to streamline federal permitting for "covered projects."[39]

IV. Federal Agency Developments

A. DOE: Quadrennial Energy Review

The DOE is conducting the Quadrennial Energy Review (QER). The first installment is publicly available,[40] and the second installment ("QER 2.0") will be available by the end of 2016. President Obama's Climate Action Plan tasked the DOE with developing four installments of the QER to ensure that Federal energy policy appropriately corresponds to the country's economic, security, and climate goals as the nation's energy landscape dramatically changes.[41] To develop the QER, the DOE's policy arm – the Office of Energy Policy and Systems Analysis (EPSA) – has conducted analytical and stakeholder processes in six regions, analyzed market trends and technical data, and solicited public comment. The QER is based on a "systems approach" to analytical processes, and evaluates all sources of energy. Pursuant to the Climate Action Plan, the EPSA conducts granular analyses of key energy sub-sectors each year for four years. Unlike other Federal reports, the final QER installment will synthesize the previous three reports to provide a complete policy analysis on what the Obama Administration considers the likely energy future.

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[37] *Securing Energy Infrastructure Act*, S.3018, 114th Congress (2015-2016).

[38] *Fixing America's Surface Transportation Act*, Pub. L. 114-94, 129 Stat. 1312 (Dec. 4, 2015).

[39] "The term 'covered project' means any activity in the United States that requires authorization or environmental review by a Federal agency involving construction of infrastructure for renewable or conventional energy production, electricity transmission, surface transportation, aviation, ports and waterways, water resource projects, broadband, pipelines, manufacturing, or any other sector[.]" *Id.* at § 41001(6)(B).

[40] DEPARTMENT OF ENERGY, THE FIRST INSTALLMENT OF THE QUADRENNIAL ENERGY REVIEW (2015).

[41] Office of the Press Secretary, The White House, *Presidential Memorandum: Establishing a Quadrennial Energy Review* (January 9, 2014).

The first installment of the QER focused on transmission and distribution and storage (TS&D), as well as natural gas resources. It would strengthen current infrastructure systems by increasing coordination between federal agencies, federal and local governments, and the public and private sectors. It covered the power grid, rail infrastructure, barge transportation, processing, and import/export activities. Additionally, the first installment raised issues, such as the interdependence of energy sub-sectors and the dependency of critical infrastructure and economic activity on electricity.

The DOE is currently developing QER 2.0. The second installment specifically focuses on the nation's electric system. It will provide detailed evaluation of electricity TS&D, but it will also evaluate generation and end use. It will evaluate the actions and roles of all actors that supply electricity. QER 2.0 will analyze all of the following: fuel choices, distributed and centralized generation, evolving business models in the electric industry, physical and cyber vulnerabilities, residential and commercial customer expectations, and policy at all levels of government. The DOE concluded its stakeholder comment process for QER 2.0 in May 2016. QER 2.0 is due at the end of 2016.[42]

B. EPA: Environmental Developments

1. Clean Power Plan

The EPA has mandated greenhouse gas emissions reductions that all states must meet by 2030. The Clean Power Plan would mitigate emissions from electric generation, with a target reduction of 30% from 2005 levels by 2030. The rule is targeted at electric generation and does not address electric transmission.[43] States are responsible for implementing the Clean Power Plan, including Texas, although states have appealed the rule and refused to formulate compliance plans in some cases. The rule reduces emissions by setting carbon dioxide emission performance rates at the best system of emission reduction (BSER). BSER is applicable to existing fossil fuel electric generating units and stationary combustion turbines.[44] BSER consists of three approaches to mitigation: (1) improve the heat rate of existing coal-fired power plants, (2) substitute natural gas generation for coal-fired power plants, and (3) install new renewable generation to offset coal-fired power plants. EPA did not address the electric transmission infrastructure implications of its rule.[45]

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[42] A briefing memo on QER 2.0 is available at: http://energy.gov/sites/prod/files/2016/02/f29/Second%20Installment%20Briefing%20Memorandum_0.pdf

[43] Comments of WIRES on Carbon Pollution Emission Guidelines for Electric Utility Generating Units, EPA Docket No. EPA-HQ-OAR-2013-00602 (Dec. 1, 2014) ("[T]he EPA has yet to fully consider either the importance or the magnitude of the transmission investment that will be required in most regions if its proposed emissions reduction targets are to be met within the timeframe that the EPA anticipates."); Preliminary Comments of WIRES for the February 19 Technical Conference in Washington, FERC Docket No. AD15-4 (Feb. 19, 2015).

[44] *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 80 Fed. Reg. 64,622 (Oct. 23, 2016).

[45] *See* Footnote 43.

States can demonstrate compliance with the Clean Power Plan through a mass-based or rate-based program. Under a mass-based compliance approach, the EPA allocates a carbon allowance to the state, and the state allocates the allowance through its compliance program. States that opt for mass-based compliance can trade carbon dioxide allowances with other mass-based states. Under the rate-based approach, states must reach EPA's pre-set nation-wide reduction rates. States complying through a rate-based compliance approach may either buy emission reduction credits,[46] or require intra-state trading of emission reduction credits among affected units.

The CPP is very controversial, especially in states that are heavily reliant on fossil energy.[47] The Supreme Court issued a stay of the final rule in February 2016, pending review by the D.C. Circuit.[48] Briefs were subsequently filed, and oral argument before a three-judge panel was scheduled for June 2, 2016. The D.C. Circuit subsequently rescheduled oral argument for September 27, 2016, for an *en banc* proceeding.

2. NEPA Review

The White House Council on Environmental Quality released guidance to assist federal agencies in their consideration of the effects of greenhouse gas emissions and climate change when conducting a National Environmental Policy Act (NEPA) analysis of proposed federal actions.[49] The guidance asserts that the effects of climate change fall squarely within NEPA's purview. The guidance directs federal agencies to apply the guidance to all new proposed agency actions when a NEPA review is initiated.

C. FERC Electric

1. Return on Equity for Electric Transmission

a. Opinion No. 531

Opinion No. 531[50] refocuses the Discounted Cash Flow (DCF) methodology that the Commission uses to calculate the Return on Equity (ROE) for electric transmission owners.

[46] Emission reduction credits are created by renewable generation, energy efficiency, or new nuclear generation.

[47] Prior to the EPA's issuance of the final Clean Power Plan rule, the Murray Corporation and twelve states petitioned the D.C. Circuit to review the proposed rule. In June of 2015, the D.C. Circuit denied the unprecedented request as lacking in jurisdiction because the Agency action was not a final rule. *In re: Murray Energy Corporation*, Case No. 14-1112 (D.C. Cir. 2015). The EPA issued the Clean Power Plan final rule in October 2015. *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 80 Fed. Reg. 64,622 (Oct. 23, 2016). The D.C. Circuit denied petitions to stay the Final Order in January 2016. *State of West Virginia, et al. v. EPA*, et al., Case No. 15-1363 (D.C. Cir. 2016).

[48] *State of West Virginia, et al. v. EPA, et al.*, 577 U.S. __, (2016) (Order in Pending Case).

[49] COUNCIL ON ENVIRONMENTAL QUALITY, EXECUTIVE OFFICE OF THE PRESIDENT, MEMORANDUM FOR HEADS OF FEDERAL DEPARTMENTS AND AGENCIES (2016).

[50] *Martha Coakley, Mass. Attorney General, et al. v. Bangor Hydro-Electric Co. et al.*, 147 FERC ¶ 61.234, FERC Docket No. EL11-66-001 (June 19, 2014) (Opinion No. 531), *reh'g denied* 150 FERC ¶ 61,165 (2015). Opinion

Opinion No. 531 modified three aspects of the Commission's traditional single-step DCF. First, Opinion No. 531 set the base ROE at the midpoint of the upper half of the zone of reasonableness established in the analysis of a proxy group of transmission providers. This new way of setting a just and reasonable base ROE recognizes the risks of transmission development and certain anomalous financial circumstances in the market. Second, FERC relied on the increased risks associated with anomalous capital market conditions, namely recessionary conditions that caused the Federal Reserve to reduce interest rates precipitously, when setting the base ROE at the midpoint of the upper half of the zone of reasonableness. This contrasts with FERC's typical approach of setting base ROE at the midpoint of the zone of reasonableness.[51] Finally, Opinion No. 531 replaces the single-step DCF method of establishing appropriate growth rates with a two-step method, as the FERC has used for natural gas and oil pipelines.

b. ROE Cases

While several regional ROEs have been fully litigated under Opinion No. 531, FERC has not yet issued an order reviewing the ALJ Initial Decisions. Complainants continue to file complaints seriatim under FPA Section 206.[52] FERC complaint cases post-Opinion 531 have revealed ambiguities and volatility in the results of the Commission's Opinion No. 531 approach, which FERC itself has yet to address. For example, complainants have argued that it is no longer appropriate to set the ROE at the midpoint of the upper half of the zone of reasonableness, as current economic conditions are no longer anomalous. FERC has offered to allow parties to consider alternative benchmarks for the DCF analysis when such benchmarks deviate significantly from the DCF results.

2. Market-Based Rate Filing Requirements

a. Order No. 816

FERC streamlined the filing requirements imposed on market-based rate sellers of wholesale energy by revising regulations governing wholesale sellers of energy at market-based

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No. 531 set the ROE for transmission owners (NETOs) in ISO-NE. Two similar cases set the ROE for transmission owners in MISO: *Arkansas Electric Cooperative Corporation et al. v. ALLETE, Inc. et al.*, 155 FERC ¶ 63,030, FERC Docket No. EL15-45 (June 30, 2016), and *Association of Businesses Advocating Tariff Equality, et al. v. Midcontinent Independent System Operator, Inc. et al.*, 153 FERC ¶ 63,027, FERC Docket No. EL14-12 (Dec. 22, 2015).

[51] The Commission also ended the practice of making post-hearing ROE adjustments based on changes to U.S. Treasury bond yields.

[52] *Environmental Northeast, et al. v. Bangor Hydro-Electric Co., et al.*, 154 FERC ¶ 63,024, FERC Docket No. EL13-33 (Mar. 22, 2016) (Initial Decision on seriatim challenges against the NETOs' ROE, led by the Massachusetts Attorney General) (consolidated with an additional, separate seriatim challenge against the NETOs' ROE: *Attorney General of Mass., et al. v. Bangor Hydro-Electric Co., et al.*, FERC Docket No. EL14-86); Complaint of Eastern Massachusetts Consumer-Owned Systems, FERC Docket No. EL16-64 (Apr. 20, 2016) (an additional, separate complaint against NETOs' ROE).

rates.[53] Order No. 816 modifies the definition of a "Category 1 Seller,"[54] added new requirements to market-power analysis filings,[55] and clarified when a "Change in Status" is triggered.[56] Order No. 816 requires market-based rate (MBR) sellers to provide a corporate organizational chart.

b. Pending Filing Modification

The Commission issued a Notice of Proposed Rulemaking regarding *Data Collection for Analytics and Surveillance and Market-Based Rate Purposes*.[57] The new data collection requirements purport to improve the Commission's surveillance of wholesale power markets through disclosure of financial and legal connections among market participants and other entities in Commission-jurisdictional electric markets. FERC proposes to require MBR sellers and entities trading virtual products or holding financial transmission rights to file new data sets on a regular basis.[58] The requirements facilitate both the sharing of data across different RTO/ISO information systems and reporting into FERC's eLibrary system.

The Commission proposes to modify both filing processes[59] and filing substance. The NOPR proposes to remove Order No. 816's requirement that MBR sellers must provide a corporate organizational chart. It proposes to modify the asset appendix so that MBR sellers are no longer required to report assets owned by affiliates with MBR authority, but must incorporate

[53] *Refinements to Policies and Procedures for Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities,* Order No. 816, 153 FERC ¶ 61,065 (2015).

[54] In determining whether "Category 1" status applies, power marketers should now include all affiliated generation capacity in the region. Power producers only need to include affiliated generation that is located in the same region as the power producer's generation assets.

[55] Sellers must follow the regional reporting schedule on FERC's website, not the schedule announced in Order No. 697. A seller must continue to affirm that it has not and will not erect barriers to entry into the relevant market on behalf of itself and its affiliates.

[56] Order No. 816 clarifies that a change in status is triggered when ownership or control of generation capacity results in net increase of 100 MW or more in any individual geographic market. Energy-limited resources, excluding solar photovoltaic, may use a five-year capacity rating for purposes of this threshold. When a seller notifies the Commission of a change in status, it no longer has to report acquisition of control of new sites for generation capacity development.

[57] *Data Collection for Analytics and Surveillance and Market-Based Rate Purposes*, 156 FERC ¶ 61,045, FERC Docket No. RM16-17 (July 21, 2016). In light of this NOPR, the Commission withdrew the Connected Entity NOPR (*Collection of Connected Entity Data from Regional Transmission Organizations and Independent System Operators*, FERC Docket No. RM15-23 (2015)) and the Ownership NOPR (*Ownership Information in Market-Based Rate Filings*, FERC Docket No. RM16-3 (2015)).

[58] *Data Collection for Analytics and Surveillance and Market-Based Rate Purposes*, 156 FERC ¶ 61,045, FERC Docket No. RM16-17 (July 21, 2016).

[59] The proposed rule directs the establishment of a relational database. Under the proposal, existing MBR sellers must make a baseline submission with both Connected Entity[59] and MBR Information to establish entity information in the relational database. Additionally, it proposes to require MBR sellers to submit changes in connected entity information within 30 days of the change. Under the proposed rule, the submission must be filed directly with the Commission rather than the current practice of filing with the RTO/ISO.

by reference its affiliates' most recent relational database submittals or acknowledge that its affiliates' submissions will be included in its asset appendix once the affiliate makes an asset report. Under the proposal, MBR sellers would no longer be required to report: (i) the size of transmission facilities or identify specific transmission facilities, and (ii) natural gas pipeline transmission information. Rather, they must report whether they have: (1) an electric transmission facility covered by an OATT in a particular balancing authority area, and (2) natural gas pipeline and storage facilities in a particular balancing authority area. Additionally, the NOPR modifies Asset Reporting[60] and Ownership Information[61] reporting requirements.

3. Order No. 1000

a. Competitive Electric Transmission Solicitation

ITC Grid Development requested a Declaratory Order from the Commission finding that the *Mobile-Sierra* presumption applies to transmission rates resulting from an Order No. 1000-compliant competitive transmission development process when they include cost containment provisions and are filed with exceptions.[62] ITC Grid Development argued that transmission developers experience asymmetrical risk: the transmission developer is responsible for costs in excess of the stated rate, but cost savings below the stated rate may subject the developer to a revenue requirement reduction in a FPA Section 206 proceeding. The Commission dismissed the petition on the grounds that a petition for declaratory order was an inappropriate mechanism for addressing the merits of the presumption because it implicates broad policy considerations.

b. FERC Technical Conference

FERC's technical conference on competitive transmission development was held on June 27, 2016, and June 28, 2016.[63] It addressed the following: (i) issues related to the

[60] NOPR proposes to replace facility-wide generation asset reporting with unit-specific reporting. Under the proposed rule, MBR sellers must report the Plant Name, Plant Code, Generator ID, and Unit Code. The proposal requires MBR sellers to report the "Telemetered Location: Market/Balancing Authority Area" and "Telemetered Location: Geographic Region" in which the unit should be considered for market power purposes when the location differs from the reported physical location. The proposed rule requires MBR sellers to report on long-term firm sales in their relational database submission. Under the proposed rule, MBR sellers must report the associated Plant Code and Generator ID for unit-specific power purchase agreements.

[61] Under the proposed rule, MBR sellers are required to provide information only on "affiliate owners" that either: (i) are an "ultimate affiliate owner," defined as the furthest upstream affiliate owner in the ownership chain, or (ii) have a franchised service area or MBR authority, or directly own or control generation; transmission; intrastate natural gas transportation; storage or distribution facilities; physical coal supply sources; or ownership of or control over who may access transportation of coal supplies.

[62] *ITC Grid Development, LLC*, 154 FERC ¶ 61,206 (March 17, 2016).

[63] *Competitive Transmission Development Technical Conference*, FERC Docket No. AD16-18 (June 27-28, 2016). At the beginning of 2016, the Commission heard three cases, each involving a separate competitive transmission development issue. In each case, the Commission stated the need for a stakeholder conference on legal and policy issues. *NextEra Energy Transmission West, LLC*, 154 FERC ¶ 61,009 (Jan. 8, 2016) (denying ROE incentive request); *ITC Grid Development, LLC*, 154 FERC ¶ 61,206 (Mar. 17, 2016) (denying request to issue Declaratory

competitive transmission development processes; (ii) cost containment provisions, (iii) transmission development incentives, (iv) rate issues, including ROE incentives[64] and the *Mobile-Sierra* presumption, (v) regional transmission planning, and (vi) interregional transmission coordination. Extensive comments on these issues can be located on the Commission's website.[65] For the first time in five years, FERC is indicating that it may re-examine portions of Order No. 1000. It is anticipated that FERC will request additional comments on the effectiveness of Order No. 1000's competitive solicitation provisions.

4. Public Utility Regulatory Policies Act (PURPA) Implementation

Disputes over the continuation of the mandatory purchase obligation under PURPA and differences in calculation of avoided cost have resurrected issues with the *Public Utility Regulatory Policies Act (PURPA)*.[66] FERC held a technical conference to discuss issues surrounding implementation of PURPA.[67] The conference was held to determine if states need more guidance on these issues, while recognizing that states have the primary role in setting avoided cost. ERCOT's member electric utilities are eligible for relief from PURPA's mandatory purchase obligation.[68] Commission regulations set forth the filing procedures for terminating PURPA's mandatory purchase.[69]

Order extending *Mobile-Sierra* presumption to rates that result from competitive transmission solicitations); *Northern Indiana Public Service Co. v. Midcontinent Independent System Operator and PJM Interconnection*, 155 FERC ¶ 61,058 (Apr. 21, 2016) (denying request to create a single set of interregional transmission planning criteria and benefit analysis).

[64] *Promoting Transmission Investment Through Pricing Reform*, 141 FERC ¶ 61,129 (2012) (Policy Statement) (stating expectation that applicants reduce risk, not otherwise accounted for in the base ROE, by using risk-reducing incentives before seeking an incentive ROE).

[65] Comments and transcripts from both days of the Technical Conference are available on FERC's eLibrary in FERC Docket No. AD16-18. In FERC Docket No. AD15-12, FERC staff issued a widely criticized report – Transmission Metrics: Initial Results in March 2016, to measure whether the industry is achieving "appropriate levels of transmission investment." OFFICE OF ENERGY POLICY AND INNOVATION, FEDERAL ENERGY REGULATORY COMMISSION, TRANSMISSION METRICS: INITIAL RESULTS (2016).

[66] Different calculations of avoided cost include: (i) updating avoided cost every five minutes according to a market-based price point, (ii) setting avoided cost at a ten-year fixed rate, (ii) fixing avoided cost at the rate that exists at time the contract is entered into ("short-term" calculation), (iii) modifying the QF's avoided cost each time the utility re-calculates its marginal cost ("long-term" calculation), and (iv) assigning QFs a different price for energy than the price afforded for capacity.

[67] *Implementation Issues Under the Public Utility Regulatory Policies Act of 1978 Technical Conference*, FERC Docket No. AD16-16 (June 29, 2016).

[68] *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, Order No. 688 (Oct. 20, 2006).

[69] *Procedures for Utilities Requesting Termination of Obligation to Purchase From Qualifying Facilties*, 18 C.F.R. 292.310 (2016).

5. North American Electric Reliability Corporation (NERC)

a. Proposed Voltage and Frequency "Ride Through" Rule for Small Generators

The Commission issued a Notice of Proposed Rulemaking and received comments on a proposed modification to the *pro forma* small generator interconnection agreement (SGIA).[70] Under the proposed *Requirements for Frequency and Voltage Ride Through Capability of Small Generating Facilities*, newly interconnecting small generating facilities would be required "to ride through abnormal frequency and voltage events and not disconnect during such events."[71]

Historically, small have generators had minimal impact on the transmission system. The amount of small generators has increased. However, that may cause load imbalances that significantly impact reliability when these generators disconnect during abnormal frequency and voltage events.

b. Renewables and Ancillary Services

Order No. 827 eliminates wind generators' exemption from the requirement to provide reactive power.[72] The rule revises the *pro forma* Large Generator Interconnection Agreement (LGIA) and Small Generator Interconnection Agreement (SGIA) to require all newly interconnecting non-synchronous generators that have not yet executed a Facilities Study Agreement to provide reactive power as a condition of their interconnection.[73]

FERC provided the reactive power exemption to account for non-synchronous wind generators' "unique electrical characteristics."[74] Traditional synchronous generators have historically been able to provide reactive power capability without additional equipment. Early models of large, non-synchronous wind turbines had to install costly equipment in order to provide the same reactive power, which created a barrier to project development.

Advancements in wind generator technology have allowed wind generators to provide reactive power economically. The Commission found that it may be unduly discriminatory and preferential to exempt wind generators from reactive power requirements when wind generators are capable of providing reactive power in a similar manner to generators subject to reactive

[70] *Requirements for Frequency and Voltage Ride Through Capability of Small Generating Facilities*, 154 FERC ¶ 61,222, FERC Docket No. RM16-8 (Mar. 17, 2016). Order No. 2006, 18 CFR Pt. 35, provided the *pro forma* SIGA, which is applicable to facilities no larger than 20 megawatts.

[71] Large generators are already required to "ride through" abnormal frequency and voltage events. The Commission reasoned that it may be unduly discriminatory to require large generators to "ride through," but not to require the same from small generators.

[72] *Reactive Power Requirements for Non-Synchronous Generation*, Order No. 827 (June 16, 2016).

[73] Those non-synchronous generators are required to provide dynamic reactive power at the high-side of the generator substation – not at the point of interconnection.

[74] Order No. 827, at P 7.

power requirements. Additionally, the increasing penetration of wind generation on the system increases the potential for a deficiency in reactive power if those generators represent a substantial amount of total generation, especially if units that provide reactive power are retired from operation.[75]

Public utility transmission providers must adopt the revised *pro forma* LGIA and SGIA, or demonstrate that previously approved variations remain justified despite the new rule. RTO/ISOs with LGIA and SGIA provisions in their Open Access Transmission Tariff (OATT) must also comply with the rule or demonstrate why those previously approved LGIA and SGIA provisions continue to justify an independent entity variation from the *pro forma* agreements.

c. New Critical Infrastructure Protection (CIP) Reliability Standards

Order No. 882 approves NERC's CIP Reliability Standards Version 0-6.[76] It implements CIP revisions that aim to reduce cyber security risks to bulk power facilities, systems, and equipment. The revised CIP standards included modified personnel, training, and information protection requirements.[77] The Order directed NERC to make further modifications standards related to transient electronic devices, network components between control centers, and low-impact routable connectivity. NERC is required to submit a study on the effectiveness of CIP remote access controls and associated threats and vulnerabilities. The compliance date for CIP Version 0-6 was July 1, 2016.

6. Price Formation

FERC Order No. 825 addresses price formation in the energy and ancillary services markets operated by RTOs and ISOs.[78] The rule addresses practices that fail to compensate

[75] *Reactive Power Requirements for Non-Synchronous Generation*, Notice of Proposed Rulemaking, FERC Docket No. RM16-1 (Nov. 19, 2015) (explaining the potential for a reactive power deficiency).

[76] *Revised Critical Infrastructure Protection Reliability Standards*, Order No. 822, (Jan. 21, 2016) (revising the following seven CIP standards: Security Management Controls, Personnel and Training, Physical Security of BES Cyber Systems, Systems Security Management, Recovery Plans for BES Cyber Systems, Configuration Change Management and Vulnerability Assessments, and Information Protection).

[77] In the Notice of Proposed Rulemaking that led to Order No. 882, the Commission proposed to develop supply-chain requirements. Opposition to supply-chain risks resulted in the withdrawal of supply-chain requirements in the final rule, but supply-chain risks remain a perennial issue. NERC's Senior Vice President and Chief Security Officer cautioned against implementing additional supply-chain requirements on the grounds that supply-chain risks are global and not limited to the electric industry. Remarks of Marcus Sachs, NERC, *Technical Conference on Critical Infrastructure Protection Supply Chain Risk Management*, FERC Docket No. RM15-14 (Jan. 28, 2016). NERC's comments point out that the limitations of FPA Section 215 prevent the Commission from "directly impos[ing] obligations on suppliers, vendors or other entities that provide products or services to registered entities." *Id.* at 4. The Commission scheduled a technical conference on the issue. *Critical Infrastructure Protection Supply Chain Risk Management Technical Conference*, FERC Docket No. RM15-14 (2016).

[78] *Settlement Intervals and Shortage Pricing in Markets Operated by Regional Transmission Organizations and Independent System Operators*, 155 FERC ¶ 61,276 (June 16, 2016).

resources at prices that reflect the value the resource provides to the grid. It aligns market prices with the grid operator's needs and provides incentives for resource performance. It does this by requiring regional grid operators to align settlement and dispatch intervals as follows: (1) settle energy transactions in real-time markets at the same time interval they dispatch energy, (2) settle operating reserves transactions in their real-time markets at the same time interval they price operating reserves, and (3) settle intertie transactions in the same time interval they schedule intertie transactions.

The rule requires shortage pricing for any interval in which a shortage of energy or operating reserves is indicated during the pricing of the resources for the interval. Shortage pricing is the method that grid operators (RTOs and ISOs) use to accurately price energy when wholesale resources are not abundant.[79] Shortage pricing sends a short-term, high price signal to generators to incent them to operate during times of short supply.

Several issues impact market price formation and shortage pricing: uplift payments, offer price caps, and operator actions that affect market prices. The Order recognizes the goal of generally reducing uplift payments. Uplift payments are payments from the RTO or ISO to a resource whose operational commitment and physical dispatch results in a shortfall between the offer price and the market clearing price.[80] Offer price caps establish the highest dollar amount that a generator can offer for its resource when bidding the resource into the RTO or ISO market. Offer price caps vary by RTO and ISO, as well as based on the specific resource or grid service that is provided. Some operator actions that affect market prices include: (i) not following dispatch instructions, and (ii) dispatching excessive generation. FERC's Office of Energy Policy and Innovation has issued multiple reports on price formation issues.[81]

D. FERC: Gas Developments

1. LNG Construction

For the first time in recent history, FERC has rejected an LNG application. In *Jordan Cove Energy Project, L.P. and Pacific Connector Gas Pipeline, LP*,[82] FERC denied two LNG applications: (1) Jordan Cove's application[83] to site, construct, and operate a LNG export terminal and associated facilities, and (2) Pacific Connector's application[84] for a certificate of public convenience and necessity to construct and operate an interstate natural gas pipeline, which proposed to transport natural gas to the Jordan Cove LNG Terminal.

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[79] OFFICE OF ENERGY POLICY AND INNOVATION, FEDERAL ENERGY REGULATORY COMMISSION, STAFF ANALYSIS OF SHORTAGE PRICING IN RTO AND ISO MARKETS (2014).

[80] OFFICE OF ENERGY POLICY AND INNOVATION, UPLIFT IN RTO AND ISO MARKETS (2014).

[81] FERC Staff reports are archived in the "Legal Resources" section of FERC's website, available at http://www.ferc.gov/legal/staff-reports.asp.

[82] *Jordan Cove Energy Project, L.P. and Pacific Connector Gas Pipeline, LP*, 154 FERC ¶ 61,190 (2016).

[83] *Jordan Cove Energy Project, L.P.*, FERC Docket No. CP13-483.

[84] *Pacific Connector Gas Pipeline, LP*, FERC Docket No. CP13-492.

With respect to Jordan Cove, the Commission's basis for the rejection was related to environmental impacts rather than considerations bearing on the exercise of eminent domain. The Commission found that, without a pipeline connecting the LNG terminal to a source of gas supply to be liquefied and exported, the proposed Jordan Cove LNG Terminal cannot provide any benefit to the public to counterbalance any of the impacts (largely environmental) which would be associated with construction of the LNG terminal facilities.

With respect to Pacific Connector, the Commission found that Pacific Connector presented little or no evidence of need for the pipeline because Pacific Connector had not entered into any precedent agreements for its project, or conducted an open season. The Commission refused to issue a certificate that would allow Pacific Connector to proceed with eminent domain proceedings in the absence of a demonstrated need for the pipeline.

This project may have been denied due to political timing and an oversaturated natural gas market. After FERC denied project authorization, parties appealed and FERC granted a rehearing. Jordan Cove has obtained contractual commitments from customers and filed those commitments with FERC. FERC may reverse itself on rehearing. It has not issued a Rehearing Order.

2. North American Energy Standards Board (NAESB) Version 3.0

FERC issued an update to Order No. 587 – Business Practices for Interstate Natural Gas Pipelines – to incorporate NAESB's WGQ Version 3.0.[85] Interstate natural gas pipelines were required to implement the new standards by April 1, 2016. Notably, the Order revises the codes used to identify receipt and delivery locations in the Index of Customers. Interstate pipelines are required to use proprietary codes and post code information on their website instead of maintaining a common code database. The Order also adopts NAESB's modification to "Design Capacity" reporting requirements to include reporting for each location by transportation service provider. This Order is part of the Commission's effort to create a more integrated and efficient pipeline grid, and to harmonize gas-electric scheduling coordination.

E. FERC: Enforcement

1. Electric

Electric power market-manipulation cases can generally be placed into one of two categories: (1) the respondent took advantage of a market or tariff defect, or made an order on the physical side that impacts spread prices on the financial side; or (2) the respondent obtained a financial benefit without corresponding action (ex: receipt of an up-lift payment without resource dispatch), the "something for nothing" theory.

[85] *Standards for Business Practices of Interstate Natural Gas Pipelines; Coordination of the Scheduling Processes of Interstate Natural Gas Pipelines and Public Utilities*, Order No. 587-W, 153 FERC ¶ 61,061 (2015) (NAESB Version 3.0).

In the event that an electric market-manipulation investigation is not settled, the investigation proceeds to the stage where the Commission issues an Order to Show Cause why the respondent should not be found in violation of the FPA Section 222 and the Commission's regulations governing market-manipulation. In that instance, the respondent has two options. It may elect whether to have the matter proceed to litigation before an Administrative Law Judge ("ALJ") and then have the Commission rule on the merits following the issuance of an ALJ Initial Decision. Alternatively, it may await the Commission's issuance of an Order Assessing Civil Penalty and have the matter reviewed *de novo* before a Federal District Court. Unlike the FPA, the NGA does not provide the procedural option to appeal directly to a Federal District Court for *de novo* review in gas enforcement matters. The following cases represent recent FERC electric and gas enforcement cases in 2016.

a. Maxim Power Corporation

For the first time in an electric market-manipulation enforcement matter, a Federal District Court held that when a Federal District Court is petitioned to enforce a FERC civil penalty assessed under FPA Section 31(d)(3), the court has authority to review *de novo* the underlying law and facts.[86] In *FERC v. Maxim Power Corp.*, the U.S. District Court of Massachusetts held that respondents facing a FERC enforcement penalty are, as a matter of due process, entitled to fully litigate the matter under the Federal Rules of Civil Procedure. "Full litigation" includes the ability to conduct full discovery, depose and present witnesses, and argue the case on the merits before a jury. The court reasoned that FERC enforcement proceedings may not ensure a respondent's due process rights, so the respondent must have an opportunity to conduct fact finding at the District Court stage.

The District Court's decision is the first to interpret the procedural implications of what a *de novo* review entails. However, the District Court did not address the scope of further discovery that the Commission staff may be permitted to conduct as it already conducted a full investigation. It should also be noted that this District Court's ruling is not binding on the other District Courts in which Commission penalty assessment enforcement actions are currently pending. However, it is likely that this precedent will provide other district courts with a logical blueprint to follow on this issue. Undoubtedly, this precedent will impact a FERC-enforcement respondent's decision of whether to pursue a hearing before an ALJ or a Federal District Court judge.

b. Berkshire Power Company

The Commission investigated the owner of a 245 MW generator and its general and administrative services management company to determine if they violated the anti-market manipulation and market behavior rules.[87] In *Berkshire Power Co. LLC*, the entities concealed plant maintenance and outages from ISO-NE over the course of three years. The entities admitted the violations and agreed to pay a civil penalty of two million dollars to the

[86] *FERC v. Maxim Power Corp. et al.*, Case No. 3:15-cv-30113-MGM (U.S. Dist. Ct. Mass. 2016).

[87] *Berkshire Power Co. LLC*, 154 FERC ¶ 61,259 (Mar. 30, 2016).

U.S. Treasury, and the generator owner agreed to pay roughly one million dollars disgorgement to ISO-NE.

c. Richard Silkman and Competitive Energy Services & Lincoln Paper and Tissue, LLC

Respondents in two related cases were issued civil penalties for a scheme to defraud ISO-NE's Day-Ahead Load Response Program (DALRP).[88] In *FERC v. Richard Silkman and Competitive Energy Services*,[89] and *Lincoln Paper and Tissue, LLC*, [90] the Commission sought enforcement of its unpaid Civil Penalty Orders from the U.S. District Court of Massachusetts. The court denied respondents motion to dismiss and transferred the case to the U.S. District Court for the District of Maine where the case is pending.

Over the course of a year, Silkman and CES received $3.3 million in compensation from ISO-NE. The Commission found that Silkman and CES violated FPA Section 222 and assessed a $1.25 million civil penalty against Silkman, a $7.5 million penalty against CES, and ordered CES to disgorge its unjust enrichment. While Lincoln Paper and Tissue's matter was pending in district court, Lincoln Paper and Tissue filed for bankruptcy under Chapter 11 and proceeded to liquidate its assets under bankruptcy court supervision. In conjunction with the bankruptcy proceeding, Lincoln Tissue and Paper reached a settlement with FERC Enforcement where it neither admitted nor denied allegations that it defrauded ISO-NE's DALRP program, but agreed to pay a $5 million civil penalty and disgorge $379,000 of unjust enrichment.

d. Coaltrain Energy

The Commission assessed civil penalties against Coaltrain Energy, L.P., its co-owners, and some of its traders for violating FPA Section 222. In *Coaltrain Energy, et al*., The Commission assessed a $26 million civil penalty against Coaltrain, an $11 million in civil penalties against Coaltrain's owners and Coaltrain traders, and ordered disgorgement of over $4 million in unjust enrichment.[91] The respondents executed a high volume of Up-to-Congestion (UTC) trades in PJM Interconnection's markets over a period of four months in order to collect excessive amounts of credit payments called Marginal Loss Surplus Allocation (MLSA) payments. This matter is currently pending in district court in its preliminary stages.

[88] The DALRP is a demand-response program administered by ISO-NE. It compensates program participants for reducing their energy consumption below normal levels during peak demand hours. Silkman and CES ran on-site generators at a reduced level during the baseline period and bought a large amount of wholesale power in order to artificially inflate the DALRP baseline consumption. Once rates were set, Silkman and CES resumed normal on-site electricity generation, causing the appearance of a dramatic reduction in wholesale electric-usage.

[89] *FERC v. Richard Silkman and Competitive Energy Services, LLC*, Case No. 13-13056-DPW (U.S. Dist. Ct. Mass. 2016).

[90] *Lincoln Paper and Tissue, LLC*, 155 FERC ¶ 61,228 (June 1, 2016).

[91] *Coaltrain Energy, L.P. et al*., 155 FERC ¶ 61,204 (May 27, 2016).

2. Natural Gas

The respondent to a NGA market-manipulation enforcement action does not have the option to immediately seek a *de novo* review in federal district court following the Commission's issuance of an Order to Show Cause. Respondents to NGA claims must exhaust all administrative remedies, including a hearing before an ALJ and Commission review on the merits, before appealing to a federal court of appeals.[92] The following cases represent significant FERC natural gas enforcement cases in 2016.

a. BP America

In *BP America Inc.*, the Commission extended its enforcement authority "beyond the transactions whose rates terms and conditions the Commission regulates under NGA sections 4 and 5."[93] The Commission held that the phrase *any entity* found in NGA Section 4(a) includes any entity that directly or indirectly manipulates the natural gas market.[94] FERC brought an enforcement action against *BP America,*[95] alleging that in the wake of Hurricane Ike, BP traders manipulated the prices for next-day fixed-price natural gas prices in the Houston Ship Channel, Henry Hub, and Katy trading markets by making losing trades in the Houston Ship Channel market. The losing trades served to advantage BP's trading position in the Henry Hub market. Over the course of a month, BP realized over $207,000 in unjust profits. Following a hearing and initial decision issued by an ALJ, the Commission issued an order directing BP to pay a $20.16 million civil penalty. BP has not yet filed an appeal of the Commission's final Penalty Order to a circuit court of appeals. This enforcement matter is one of the largest Commission enforcement actions to date. It will likely shape market-manipulation jurisprudence.

b. Total Gas and Power

In *Total Gas & Power North America v. FERC*, during the pendency of a FERC Enforcement non-public investigation, and following the issuance of a Commission Order to Show Cause, Total Gas filed for declaratory relief in the U.S. District Court for the Western District of Texas claiming that FERC's current enforcement practices are unconstitutional and biased.[96] Total Gas argued that respondents facing a FERC enforcement civil penalty are entitled to a full trial-type evidentiary hearing before an impartial tribunal. FERC investigated Total Gas, its owners, and several of its traders for a scheme to manipulate natural gas prices in violation of Section 4(a) of the Natural Gas Act. In its Show Cause Order, the Commission

[92] Todd Mullins and Chris McEachran, *Adjudication of FERC Enforcement Cases: "See You in Court?"* 36 ENERGY L. J. 261 (2016).

[93] *BP America Inc. et al.*, 156 FERC ¶ 61,031 (July 11, 2016).

[94] *Id.*

[95] *Id.*

[96] *Total Gas & Power North America, et al. v. FERC et al.*, Case No. 7:16-cv-00028 (U.S. Dist. Ct. W. Tex. 2016).

ordered Total Gas and its employees to show cause why it should not be required to disgorge its unjust profits and pay $216.6 million in civil penalties.[97]

The Commission's investigation found that Total Gas and several of its employees created a scheme to manipulate natural gas prices by engaging in voluminous disadvantageous or no-benefit trades during bid week to influence the natural gas index to benefit the company's long-term and high-risk portfolios. Over the course of three years, the scheme reaped $9.18 million in unjust profits for the company and caused an estimated $89 million in harm to consumers and producers of natural gas. The District Court has not issued a decision on the matter.

F. CFTC: Private Right of Action

In 2016, the United States Court of Appeals for the Fifth Circuit affirmed the District Court's holding in *Aspire v. GDF Suez*.[98] In *Aspire v. GDF Suez*, the United States District Court for the Southern District of Texas dismissed a Commodities and Exchange Act (CEA) Section 22 private market-manipulation lawsuit against electricity generators on the grounds that the private right of action in the CEA was unavailable.[99] The court reasoned that the CFTC's RTO-ISO Order[100] barred the private right of action found in CEA Section 22 because the CFTC did not specifically retain it.[101] In both appeals, the CFTC argued that the private right of action remained available because the RTO-ISO Order did not discuss the applicability of the private right of action to the transactions that the RTO-ISO Order exempted.[102]

Subsequently, the CFTC issued a Notice of Proposed Amendment to the RTO-ISO Order to explicitly state that the RTO-ISO does not exempt the entities covered under the RTO-ISO Order from the private right of action in CEA Section 22.[103] Further CFTC action is pending. The CFTC warrants that a CEA Section 22 private right of action will not cause regulatory

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[97] *Total Gas & Power North America, et al.*, 155 FERC ¶ 61,105 (Apr. 28, 2016).

[98] *Aspire Commodities, L.P. v. GDF Suez Energy N. Am., Inc.*, 2016 WL 758689 (5th Cir. Feb. 25, 2016).

[99] *Aspire Commodities, L.P. v. GDF Suez Energy N. Am., Inc.*, 2015 WL 500482 (S.D. Tex. Feb. 3, 2015).

[100] *Final Order in Response to a Petition from Certain Independent System Operators and Regional Transmission Organizations to Exempt Specified Transactions Authorized by a Tariff or Protocol Approved by the Federal Energy Regulatory Commission or the Public Utility Commission of Texas From Certain Provisions of the Commodity Exchange Act Pursuant to the Authority Provided in the Act*, 78 Fed. Reg. 19880 (Apr. 2, 2013) ("RTO-ISO Order").

[101] *Aspire Commodities, L.P.*, 2016 WL 758689 (5th Cir. Feb. 25, 2016).

[102] The RTO-ISO Order exempted the following transactions from certain Commodities Exchange Act (CEA) provisions and CFTC regulations: "Energy Transactions," "Forward Capacity Transactions, "Reserve or Regulation Transactions," and "Financial Transmission Rights [Transactions]." RTO-ISO Order, at p. 19912.

[103] *Notice of Proposed Amendment to and Request for Comment on Final Order in Response to a Petition from Certain Independent System Operators and Regional Transmission Organizations to Exempt Specified Transactions Authorized by a Tariff or Protocol Approved by the Federal Energy Regulatory Commission or the Public Utility Commission of Texas From Certain Provisions of the Commodity Exchange Act Pursuant to the Authority Provided in the Act*, 81 Fed. Reg. 30245 (May 16, 2016).

uncertainty, or inconsistent or duplicative regulation. The CFTC states that the existence of a private right of action is not inconsistent or detrimental to cooperation between the CFTC and FERC.

NOTES