

REPORT OF THE POWER GENERATION AND MARKETING SUBCOMMITTEE

This report covers significant developments pertaining to electric power generation and marketing, from July 1, 2018 through June 30, 2019.*

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I. FERC DEVELOPMENTS

A. Order No. 845-A

On February 21, 2019, the Federal Energy Regulatory Commission (FERC) issued Order No. 845-A,¹ granting in part and denying in part the requests for rehearing and clarification of its determinations in Order No. 845.² Order No. 845

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1. Order No. 845-A, *Reform of Generator Interconnection Procedures and Agreements*, 166 F.E.R.C. ¶ 61,137 (2019) [hereinafter Order No. 845-A].

2. Order No. 845, *Reform of Generator Interconnection Procedures and Agreements*, 163 F.E.R.C. ¶ 61,043 (2018) [hereinafter Order No. 845].

adopted many of the reforms proposed in FERC's 2016 Notice of Proposed Rulemaking on Generator Interconnection Procedures and Agreements³ to provide interconnection customers (ICs) with better information and more options for obtaining interconnection service such that there are fewer interconnection requests overall and fewer interconnection requests that are unlikely to reach commercial operation.

In Order No. 845, the FERC adopted ten different reforms to its *pro forma* Large Generator Interconnection Procedures and *pro forma* Large Generator Interconnection Agreement.⁴ With regard to the "option to build reform," the FERC granted rehearing in order to: "(1) require that transmission providers explain why they do not consider a specific network upgrade to be a standalone network upgrade; and (2) allow transmission providers to recover oversight costs related to the interconnection customer's option to build."⁵ With regard to the surplus interconnection service reform, the FERC granted rehearing to explain that the FERC does not intend to limit the ability of Regional Transmission Organizations (RTOs) and Independent System Operators (ISOs) to "argue that an independent entity variation from the [FERC's] surplus interconnection service requirements is appropriate."⁶ With regard to the reform for requesting interconnection service below generating facility capacity, the FERC granted rehearing in part and found that "an interconnection customer may propose control technologies at any time in the interconnection process that it is permitted to request interconnection service below generating facility capacity."⁷

Further, the FERC granted clarification with regard to "the option to build by finding that: (1) the Order No. 845 option to build provisions applies to all public utility transmission providers, including those that reimburse the interconnection customer for network upgrades; and (2) the option to build does not apply to stand alone network upgrades on affected systems."⁸ The FERC also granted clarification

with regard to transparency regarding study models and assumptions to find that: (1) transmission providers may use the FERC's critical energy/electric infrastructure information (CEII) regulations as a model for evaluating entities that request network model information and assumptions; and (2) the phrase "current system conditions" does not require transmission providers to maintain network models that reflect current real-time operating conditions of the transmission provider's system.⁹

With regard to the interconnection study deadlines reform, the FERC clarified "that the date for measuring study performance metrics and the reporting requirements do not require transmission providers to post 2017 interconnection

3. Notice of Proposed Rulemaking, *Reform of Generator Interconnection Procedures and Agreements*, 157 F.E.R.C. ¶ 61,212 (2016).

4. Order No. 845, *supra* note 2, at P 1.

5. Order No. 845-A, *supra* note 1, at P 4.

6. *Id.*

7. *Id.*

8. *Id.* at P 5.

9. *Id.*

study metrics.”¹⁰ The FERC also granted clarification that, when requesting interconnection service below generating facility capacity, a transmission provider must provide a detailed explanation of its determination to perform additional studies at the full generating facility capacity for an interconnection customer that has requested service below its full generating facility capacity.¹¹ The FERC denied all other requests for rehearing and clarification.¹²

B. Order No. 841-A

On May 16, 2019, the FERC issued Order No. 841-A,¹³ its Order on Rehearing and Clarification related to Electric Storage Participation in Markets Operated by RTOs and ISOs. In Order No. 841-A, the FERC denied the requests for rehearing of Order No. 841¹⁴ and denied in part and granted in part the requests for clarification. The FERC declined to adjust the timetable previously identified for Order No. 841 compliance.¹⁵

Order No. 841-A generally affirmed the FERC’s determinations regarding the participation of electric storage resources (ESR) in the capacity, energy, and ancillary service markets operated by RTOs and ISOs.¹⁶ Order No. 841 requires each RTO and ISO to “revise its tariff to establish a participation model consisting of market rules that recognize the physical and operation characteristics of ESRs and facilitates their participation in the RTO/ISO markets.”¹⁷ Order No. 841 found that existing RTO/ISO market rules and participation models designed for traditional generation or load resources are unjust and unreasonable because they can create barriers to market entry for emerging technologies.¹⁸ These can be entry barriers because they do not recognize ESRs’ unique physical and operational characteristics and their capability to provide services in the RTO/ISO markets.

In Order No. 841-A, the FERC addressed seven issues on rehearing, as follows:

- (1) Definition of Electric Storage Resource: The FERC rejected claims that (A) its definition of a storage resource raised state/federal jurisdictional concerns, (B) it should offer an ‘opt-out’ from Order 841 requirements, and (C) it should reverse its decision that wholesale sales to storage resources (who then resell energy back into wholesale markets) should be at the wholesale locational marginal price (LMP).¹⁹

10. Order No. 845-A, *supra* note 1, at P 5.

11. *Id.*

12. *Id.*

13. Order No. 841-A, *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, 167 F.E.R.C. ¶ 61,154 (2019) [hereinafter Order No. 841-A].

14. Order No. 841, *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, 162 F.E.R.C. ¶ 61,127 (2018) [hereinafter Order No. 841].

15. Order No. 841-A, *supra* note 13, at P 155.

16. *See generally id.*

17. *Id.* at P 2.

18. Order No. 841, *supra* note 14, at P 10.

19. Order No. 841-A, *supra* note 13, at PP 30-62.

(2) Participation Model for Electric Storage Resources: The FERC adhered to its position that “a single participation model can be flexible enough to accommodate any type of electric storage resource.”²⁰

(3) Eligibility of Electric Storage Resources to Participate in RTO/ISO Markets: The FERC granted Southwest Power Pool, Inc.’s (SPP) request for clarification and stated that RTOs/ISOs without capacity products do not have to create one just to comply with Order 841.²¹

(4) Participation in the RTO/ISO Markets as Supply and Demand: The FERC modified its regulations to clarify that storage resources do not necessarily need to be dispatchable to participate, but must be allowed to participate as dispatchable resources if they are capable of doing so.²² The FERC denied Midcontinent Independent System Operator, Inc.’s (MISO) request for clarification regarding the treatment of some storage resources as self-scheduled resources.²³

(5) Physical and Operational Characteristics of Electric Storage Resources: The FERC indicated that MISO could make more specific proposals regarding forecasted State of Charge parameters and ramp rates, though it declined to make specific findings on those issues at this time.²⁴ It granted PJM Interconnection, L.L.C.’s (PJM) request for clarification that mechanisms other than bidding parameters may be used to account for the physical and operational characteristics of storage resources.²⁵

(6) Minimum Size Requirement: The FERC denied EEI’s challenge to the blanket 100 kW minimum size requirement and MISO’s request to phase-in the minimum size requirement, but essentially agreed with MISO that the limit should be applied to the maximum (and not minimum) charge and discharge limits of storage resources.²⁶

(7) Energy Used to Charge Electric Storage Resources: The FERC also dealt with two other issues, the price for charging energy, and metering and accounting practices related to charging energy.²⁷ With respect to price issues, the FERC clarified that (A) it found distribution-level purchases for later resale to be wholesale sales in interstate commerce subject to federal jurisdiction, (B) charging energy purchased at wholesale should be treated like wholesale load for purposes of applying transmission charges, though charging pursuant to economic dispatch may not always qualify as a provision of a service in the RTO/ISO markets, and (C) RTOs/ISOs may consider non-facility specific rates for wholesale distribution service for charging energy.²⁸

20. *Id.* at P 65.

21. *Id.* at P 68.

22. *Id.* at P 74.

23. *Id.* at PP 74-81, 84-85.

24. Order No. 841-A, *supra* note 13, at P 91.

25. *Id.* at PP 90-93.

26. *Id.* at PP 102-06.

27. *Id.* at PP 119-23, 138-44.

28. *Id.* at PP 292, 296.

With respect to metering and accounting, the FERC (A) rejected calls to mandate exclusive participation in either retail or wholesale markets by storage resources, and (B) decided that while RTO/ISOs need not be the entity directly metering storage resources, it would consider on compliance each RTO/ISO's proposal regarding how to ensure storage resources do not pay twice for charging energy.²⁹ It also emphasized that the RTO/ISO may not force storage resources into a participation model designed for retail customer participation simply because the RTO/ISO cannot verify whether the distribution utility is unwilling or unable to net out wholesale charging energy.³⁰ The FERC left metering practices and costs issues for later proceedings.³¹

C. *Panda's Reactive Litigation*

On April 26, 2019, the presiding Administrative Law Judge (ALJ) issued her Initial Decision in *Panda Stonewall LLC*.³² This Initial Decision is the first to follow a litigated reactive service rate case in more than a decade, and addresses many unresolved issues that have arisen in such cases in recent years.³³ As of the date of this publication, the FERC has yet to act on the Initial Decision or related developments, as described below.

Panda Stonewall, a merchant generator, owns a natural gas-fired combined cycle generating facility (Facility), rated at 812 MW of name plate capacity, that is interconnected to transmission facilities owned by Virginia Electric Power Company (VEPCO) and operated by PJM.³⁴ Shortly after the Facility began commercial operation, Panda Stonewall filed to recover a cost-based annual revenue requirement for Reactive Supply and Voltage Control (*i.e.*, reactive service) from Generation or Other Sources Service.³⁵ VEPCO and several of its transmission customers (Joint Customers) filed protests, and the Independent Market Monitor (IMM) for PJM intervened.³⁶

The ALJ determined that Panda Stonewall failed to carry its burden to show its proposed revenue requirement was just and reasonable.³⁷ The ALJ found significant portions of Panda Stonewall's evidence unreliable or lacking in probative value, rejected several arguments raised by the IMM, and largely adopted the positions advanced by Joint Customers and Trial Staff.

29. Order No. 841-A, *supra* note 13, at PP 320-21.

30. Order No. 841, *supra* note 14, at P 320.

31. *Id.* at P 323.

32. Initial Decision, *Panda Stonewall LLC*, 167 F.E.R.C. ¶ 63,010 (2019).

33. *Id.*

34. *Id.* at PP 5-6.

35. *Id.* at PP 1, 9.

36. *Id.* at PP 2, 11.

37. 167 F.E.R.C. ¶ 63,010 at PP 3, 630.

First, the ALJ found that the power factor used to calculate the revenue requirement should be the generating units' nameplate power factor (*i.e.*, 0.85), rather than the power factor set forth in Panda Stonewall's Interconnection Service Agreement (*i.e.*, 0.90), which the IMM supported.³⁸

Second, the ALJ found much of the evidence Panda Stonewall proffered to support its proposed "major equipment" costs³⁹ and balance of plant costs was unreliable.⁴⁰ Specifically, the ALJ declined to rely on cost assignments from Panda Stonewall's engineering, procurement, and construction contractor ("EPC contractor"), deeming them "entirely unreliable and error-laden,"⁴¹ and found Panda Stonewall's claim that it could not have obtained further information from its EPC contractor "unpersuasive, disingenuous, or not credible."⁴² The ALJ also found Panda Stonewall's calculations of major equipment costs, including project indirect and financing costs, were "flawed" in several respects.⁴³ Consequently, the ALJ adopted the total production plant costs and financing costs from Panda Stonewall's audited financial statements⁴⁴ and the cost assignments proposed by Joint Customer's witness.⁴⁵

Third, the ALJ addressed various components of the fixed charge rate.⁴⁶ The ALJ rejected Panda Stonewall's proposal to recover firm fuel transportation costs through its reactive service revenue requirement, an issue of first impression.⁴⁷ Notably, the ALJ made no ruling on *whether* such costs are recoverable in a reactive service revenue requirement; rather, the ALJ found that Panda Stonewall failed to adequately support its claimed costs and failed to show that its fuel transportation costs were indeed fixed (as opposed to variable) costs.⁴⁸ The ALJ also rejected Panda Stonewall's proposal to base its cost of capital on PJM's 2014 Cost of New Entry (CONE) Study, finding VEPCO's cost of capital to be a more appropriate proxy.⁴⁹ With respect to income taxes, the ALJ found that Panda Stonewall, a pass-through entity indirectly owned both by corporations and private equity interests, should receive a partial income tax allowance to the extent its income is distributed to corporate income tax-paying entities.⁵⁰

Fourth, the ALJ rejected Panda Stonewall's proposed method for calculating heating losses, finding its reliance on rated capabilities and proxies for operating

38. *Id.* at PP 36, 40.

39. The ALJ used the phrase "major equipment" to refer to the three categories of plant isolated when calculating a reactive service revenue requirement (*i.e.*, the generator-exciters, generator step up transformers, and accessory electric equipment). *Id.* at P 54.

40. *Id.* at P 83.

41. *Id.*

42. 167 F.E.R.C. ¶ 63,010 at P 116.

43. *Id.* at PP 83.

44. *Id.* at PP 167, 169, 278, 285.

45. *Id.* at PP 47, 84.

46. *Id.* at 308, 319, 499.

47. 167 F.E.R.C. ¶ 63,010 at PP 344, 350, 351.

48. *Id.* at PP 351-52.

49. *Id.* at PP 436, 438.

50. *Id.* at PP 563, 567.

hours inconsistent with FERC precedent.⁵¹ The ALJ opted instead to adopt the FERC Trial Staff's method, which used actual variable costs and actual operational data.⁵²

Lastly, the ALJ rejected the IMM's position that Panda Stonewall's reactive revenue should be capped at a value equivalent to \$2,199 per MW-year⁵³ times the Facility's nameplate MW rating to avoid an impermissible double recovery of costs through its reactive service revenue requirement and PJM's capacity market.⁵⁴ The ALJ found that the IMM had not provided evidence showing any double recovery and, thus, Panda Stonewall's revenue requirement should not be subject to the proffered cap.⁵⁵

Approximately one week after the Initial Decision was issued, several indirect owners of merchant generation, including Panda Stonewall's affiliate, filed a petition with the FERC seeking a declaratory judgment on many of the same issues addressed in the Initial Decision.⁵⁶ The FERC has since received extensive comments on the petition, but has yet to issue a ruling. Also, on July 10, 2019, Panda Stonewall filed a unilateral offer of settlement to resolve all issues set for hearing in its revenue requirement proceeding.⁵⁷ Joint Intervenors, FERC Trial Staff, and the IMM filed initial comments opposing the offer of settlement on July 30, 2019.⁵⁸

D. Order Nos. 860 and 861

On July 18, 2019, the FERC issued two orders revising its regulations for market-based rate (MBR) sellers.⁵⁹ Order No. 861⁶⁰ adopted changes to the horizontal market power analysis proposed in December 2018. Order No. 860⁶¹ closes a rulemaking opened in 2016⁶², adopts changes to the information submitted by MBR sellers, and establishes a relational database that will be used to track this information and the information provided in a seller's asset appendix.

51. *Id.* at P 580.

52. 167 F.E.R.C. ¶ 63,010 at PP 582, 604, 608.

53. This value represents the maximum Net Energy and Ancillary Services Revenue Offset provided for in Attachment DD of the PJM Tariff. *Id.* at P 610-11.

54. *Id.* at PP 610-11, 616-18.

55. *Id.* at PP 627-28.

56. Notice of Petition for Declaratory Order, *Indicated Generation Owners*, 84 Fed. Reg. 20,873 (May 13, 2019).

57. Offer of Settlement, *Panda Stonewall LLC*, FERC Docket No. ER17-1821-003 (July 10, 2019).

58. *See generally* Reply of the Independent Monitor, *Panda Stonewall LLC*, FERC Docket No. ER1719-70-000 (July 30, 2019).

59. *See generally* *Refinements to Horizontal Market Power Analysis for Sellers in Certain Regional Transmission Organization and Independent System Operator Markets*, 168 F.E.R.C. ¶ 61,040 (2019) [hereinafter Order No. 861]; *Data Collection for Analytics and Surveillance and Market-Based Rate Purposes*, 168 F.E.R.C. ¶ 61,039 (2019) [hereinafter Order No. 860].

60. *See generally* Order No. 861, *supra* note 59.

61. *See generally* Order No. 860, *supra* note 59.

62. Notice of Proposed Rulemaking, *Data Collection for Analytics and Surveillance and Market-Based Rate Purposes*, 156 F.E.R.C. ¶ 61,045 (2016).

Order No. 861 eliminates the need for MBR sellers in RTO/ISO-administered energy, ancillary services, and capacity markets subject to FERC-approved RTO/ISO market monitoring and mitigation, to submit indicative screens with their initial MBR application, triennial updates, and change in status notices.⁶³ A seller relying on the exemption must include a statement in its filing that it is relying on FERC-approved market monitoring and mitigation to mitigate any potential market power.⁶⁴ For the California Independent System Operator, Inc. (CAISO) and SPP, which lack an RTO/ISO-administered capacity market, MBR sellers are exempt from the requirement to submit indicative screens if their MBR authority is limited to sales of energy and/or ancillary services.⁶⁵ Sellers seeking to sell capacity at MBRs in CAISO and SPP are still required to submit the indicative screens and can no longer rely on the rebuttable presumption that FERC-approved RTO/ISO market monitoring and mitigation is sufficient to address horizontal market power concerns for their capacity sales in CAISO and SPP.⁶⁶ Therefore, any seller that fails the indicative screens in those markets must submit a delivered price test or other evidence or propose mitigation to demonstrate that it lacks market power in the capacity markets.⁶⁷ The FERC declined to extend the applicability of the rulemaking to the Western Energy Imbalance Market.⁶⁸

Order No. 860 reduces the amount of ownership information that MBR sellers are required to provide to the FERC by eliminating the requirement to provide corporate organizational charts⁶⁹ and eliminating the requirement to demonstrate ownership passivity where the seller makes an affirmative statement concerning passive ownership interests.⁷⁰ It adds requirements that MBR sellers must provide information on their long-term firm sales and generator-specific generation information (most of which is currently reported in EIA-860).⁷¹ It also establishes a relational database that will be used to track this information and the information provided in a seller's asset appendix.⁷² A seller will be required to submit information to the database on its own assets, the assets of its affiliates that do not have MBR authority, and its ultimate upstream affiliates, but will no longer need to provide information on its MBR affiliates, as the database will automatically link affiliated MBR sellers.⁷³ This database will allow for the automated generation of asset appendices and allow sellers to cross-reference the indicative screens.⁷⁴ The rule revises the timeline for change in status notices from a 30-day

63. Order No. 861, *supra* note 59, at PP 1–4, 84.

64. *Id.* at P 7.

65. *Id.* at P 51.

66. *Id.* at PP 38, 46.

67. *Id.* at P 51.

68. Order No. 861, *supra* note 59, at P 56.

69. *Refinements to Policies and Procedures for Market-Based Rates for Wholesale Sales of Elec. Energy, Capacity & Ancillary Serv. by Pub. Util.*, 155 F.E.R.C. ¶ 61,188 at P 47 (2016).

70. Order No. 860, *supra* note 59, at P 7.

71. *Id.*

72. *Id.* at PP 5–6.

73. *Id.* at PP 39–40.

74. *Id.* at PP 39–40, 151.

reporting period to a quarterly submission, but requires sellers to make updates to the relational database on a monthly basis.⁷⁵ To create the relational database, sellers will be required to make initial baseline filings.⁷⁶ The rule is effective October 1, 2020, and baseline filings are due February 1, 2021.⁷⁷ The FERC declined to adopt its proposal to require sellers and Virtual/Financial Transmission Rights (FTR) participants to submit “Connected Entity Information.”⁷⁸

II. MARKET DEVELOPMENTS

A. *California Independent System Operator Corp. (CAISO)*

CAISO made several revisions to its generator interconnection procedures, effective in late 2018, and indicated it intends to further revise its generator interconnection process in the near future.⁷⁹ Ten revisions coming out of CAISO’s Interconnection Process Enhancements IPE stakeholder process were accepted by the FERC without discussion.⁸⁰ Those revisions are:

- Including the generator interconnection study process agreement in the interconnection request;
- Allowing CAISO to remove network upgrades from interconnection customers’ financial security postings where CAISO has determined they are no longer needed, even before CAISO issues the next study results;
- Exempting transmission owners from needing to post financial security to themselves when they develop their own generator interconnection projects;
- Clarifying that interconnection customers must go through the new resource implementation process prior to synchronization;
- Increasing the deposits required for customer-requested repowering studies and serial re-studies from \$10,000 to \$50,000;
- Requiring interconnection customers to provide copies of their power purchase agreements when demonstrating commercial viability;
- Eliminating the demonstration interconnection customers had to make to recover their refundable portion of financial security;
- Including project names in CAISO’s public interconnection queue;
- Prohibiting fuel-type modifications for interconnection customers that have lingered in queue beyond the anticipated tariff timelines (*i.e.*, seven or ten years); and

75. Order No. 860, *supra* note 59, at P 171.

76. *Id.* at P 191.

77. *Id.* at PP 308, 312.

78. *Id.* at P 184.

79. Tariff Amendment to Implement to Implement 2018 Interconnection Process Enhancements, *Cal. Independent Sys. Operator Corp.*, FERC Docket No. ER18-2498-000, at 4 (Sept. 27, 2018).

80. *Cal. Independent Sys. Operator Corp.*, 166 F.E.R.C. ¶ 61,113 at P 10 (2019) [hereinafter CAISO].

- Aligning the deliverability capacity allocation process with the current procurement landscape to place greater emphasis on viable projects.⁸¹

The FERC gave greater attention to three additional revisions also coming out of CAISO's IPE process, which, citing CAISO's independent entity status, the FERC ultimately also accepted.⁸²

1. Suspension

CAISO proposed changing its *pro forma* interconnection agreement suspension provision from permitting an interconnection customer the unilateral right to suspend to, instead, allowing the customer to request suspension.⁸³ The request for suspension must include the anticipated end date of the suspension and a request for a material modification assessment (including a modification assessment deposit) to identify any impacts to the construction schedule of later-queued customers resulting from the project's suspension.⁸⁴ If such impacts are identified, the requesting customer would be permitted to suspend only if it mitigates any such impacts on other customers.⁸⁵ The FERC accepted CAISO's proposal, finding that it "may help prevent the shifting of risks and costs by allowing CAISO, the interconnection customer, and the transmission owner to evaluate mitigation options before the suspension negatively impacts the transmission owner or other interconnection customers."⁸⁶

2. Commercial Viability Criteria

CAISO also proposed applying its "commercial viability" criteria when a material modification assessment is needed for a project that is not expected to achieve commercial operation within the applicable seven- or ten-year timeline.⁸⁷ CAISO previously applied its commercial viability criteria only when a project sought a material modification that would further extend its timeline beyond the applicable seven- or ten-year timeline.⁸⁸ The FERC accepted CAISO's proposal, concluding that "if a project has remained in CAISO's interconnection queue beyond its anticipated development timeline, we conclude that it is reasonable for

81. *Id.* at 3.

82. *Id.* at P 6, 9-10.

83. *Id.* at P 11.

84. *Id.*

85. CAISO, *supra* note 80, at PP 12-14.

86. *Id.* at P 17.

87. *Id.* at P 18. An interconnection customer with a commercial operation date exceeding the applicable seven year timeline must, in order to maintain its Capacity Deliverability status, demonstrate commercial viability, which includes among other things, demonstrating site control, an executed offtake agreement and certain permit applications. *Id.* at P 3.

88. *Id.*

CAISO to assess whether the project remains commercially viable before approving material modifications, given that CAISO allows seven or ten years to achieve commercial operation.”⁸⁹

3. Converting to Energy-Only Deliverability Status

Finally, CAISO proposed permitting interconnection customers to switch from capacity deliverability to energy-only status only to the extent that the switch does not shift cost responsibility for delivery network upgrades needed for other projects.⁹⁰ The FERC accepted CAISO’s proposal, finding:

it is reasonable for CAISO to implement changes to ensure that, if an interconnection customer voluntarily converts to energy only status well after studies have been completed, or is involuntarily converted as a result of failing the commercial viability or deliverability retention requirements, it will be allowed to reduce its interconnection financial security for delivery network upgrades only where CAISO and the transmission owner can determine that the assigned delivery network upgrade is no longer necessary.⁹¹

B. *New York Independent System Operator, Inc. (NYISO)*

FERC found NYISO’s fast-start pricing practices unjust and unreasonable and directed NYISO to modify its pricing logic to allow the start-up costs of fast-start resources to be reflected in prices and relax the economic minimum operating limit of all fast-start resources, including dispatchable fast-start resources, by up to 100 percent for the purpose of setting prices.⁹² Fast-start resources are those resources that are able to start quickly and respond to dispatch.⁹³

In December 2017, the FERC preliminarily found NYISO’s fast-start resource pricing practices were unjust and unreasonable to the extent they did not allow the start-up costs of fast-start resources to be reflected in prices and limit the relaxation of the economic minimum operating limit to only block-loaded resources.⁹⁴ After further briefing, in April 2019, the FERC found that NYISO’s existing fast-start pricing practices are unjust and unreasonable.⁹⁵ The FERC directed NYISO to submit its compliance filing by December 31, 2019, and to implement the related tariff changes by December 31, 2020.⁹⁶

The FERC affirmed its earlier finding that commitment costs of fast-start resources should be considered marginal for the purpose of setting prices in NYISO.⁹⁷ It also found that “failing to include commitment costs for fast-start resources in prices would not accurately represent the marginal cost of serving

89. CAISO, *supra* note 80, at P 24.

90. *Id.* at P 29.

91. *Id.* at P 36.

92. *New York Ind. Sys. Operator, Inc.*, 167 F.E.R.C. ¶ 61,057 at P 11 (2019).

93. *Id.* at P 2.

94. *New York Ind. Sys. Operator, Inc.*, 161 F.E.R.C. ¶ 61,294 at P 5 (2017).

95. 167 F.E.R.C. ¶ 61,057 at P 11.

96. *Id.* at P 12.

97. *Id.* at P 22.

load, and . . . NYISO's current practice of not incorporating fast-start resources' start-up costs in its price-setting logic is unjust and reasonable."⁹⁸ The FERC further directed NYISO to expand fast-start pricing to all fast-start resources – no longer limited to NYISO's block-loaded resources – by relaxing the economic minimum operating limits of all fast-start resources, including dispatchable fast-start resources, by up to 100 percent for the purpose of setting prices.⁹⁹

C. *ISO-New England (ISO-NE)*

In January 2019, the FERC accepted ISO-NE's proposed revisions to its Competitive Auctions with Sponsored Policy Resources (CASPR), effective January 29, 2019.¹⁰⁰ ISO-NE's CASPR Tariff provisions were accepted in March 2018, first implemented in Forward Capacity Auction (FCA) 13 and generally provide a mechanism in ISO-NE's forward capacity market for existing capacity resources to retire and coordinate with entry of state-supported resources, known as Sponsored Policy Resources.¹⁰¹ These recent revisions included, among other things, a new "test price" mechanism, which ISO-NE said was intended to address "bid shading," *i.e.*, selling capacity below a competitive price to increase its chance of later retiring its resource and receiving payment under the CASPR mechanism.¹⁰² ISO-NE states that if a resource bids in the capacity auction below what ISO-NE considers to be its competitive, break-even price to acquire a Capacity Supply Obligation (instead of retiring), it will be precluded from participating in the "substitution auction" that is the basis for coordinating existing resource retirement with Sponsored Policy Resource entry under CASPR.¹⁰³

The FERC accepted ISO-NE's CASPR revisions, including the new test price mechanism, noting that the ISO-NE-determined test price will be filed with the FERC and the resource will have an opportunity to contest the determination.¹⁰⁴ Commissioner Glick, however, dissented, taking issue with ISO-NE's "preference for retaining traditional generation resources rather than exploring other approaches that might more effectively address the ISO's fuel security concerns," citing ISO-NE's steps taken in the proceedings involving Exelon Mystic facility, and ISO-NE's conclusion that an offshore wind facility procured under a state-mandated solicitation does not constitute a state-sponsored resource.¹⁰⁵

98. *Id.* at P 34.

99. *Id.* at P 43.

100. *ISO New England Inc. and New England Power Pool Participants Comm.*, 166 F.E.R.C. ¶ 61,061 (2019).

101. *Id.* at P 2.

102. Joint Filing of ISO New England Inc. and New England Power Pool regarding Conforming Changes to ISO Tariff for CASPR, *New Eng. Power Pool*, FERC Docket No. ER19-444-000, at 20 (Nov. 30, 2018).

103. *Id.* at 20-22.

104. 166 F.E.R.C. ¶ 61,061 at PP 29-30.

105. *Id.* at P 9.

D. Midcontinent Independent System Operator, Inc. (MISO)

On May 15, 2019, the FERC issued an order accepting MISO's proposal to create a generator replacement procedure, effective May 16, 2019.¹⁰⁶ The FERC found that "MISO's proposal will remove a barrier to more economic, efficient use of existing interconnection capability and reduce some of the current inefficiencies faced by the owners of existing generating facilities who wish to replace those facilities but must go through the multi-year dual track [retirement process and queue] process."¹⁰⁷ The FERC agreed with MISO's arguments that the Generator Replacement proposal does not create an "interconnection property right," rejected protestors' arguments of undue discrimination, and found that MISO's proposal safeguards addressed the FERC's previous concerns around increasing service.¹⁰⁸

MISO's proposal simplified the interconnection process for generator replacements at the same electrical interconnection location when: (1) the requested interconnection service is for an equivalent or lower number of MW and at the same level of service as the existing interconnection service; and (2) a study shows that the requested interconnection for the replacement generating facilities will not have a material adverse impact on the MISO transmission system compared to that of the existing generating facilities.¹⁰⁹ If either of these requirements is not met, then the owner of the existing generating facility requesting replacement interconnection service would continue through the full Definitive Planning Phase (DPP) interconnection study process.¹¹⁰

E. PJM Interconnection, L.L.C. (PJM)

On April 18, 2019, the FERC issued an order in its investigation, pursuant to section 206 of the Federal Power Act (FPA), into PJM's fast-start resource pricing practices (2019 Order).¹¹¹ The FERC first began its inquiry into fast start pricing in 2016 when it issued a Notice of Proposed Rulemaking (NOPR)¹¹² that preliminarily found that some existing RTO/ISO fast-start pricing practices, or the lack thereof, may not result in just and reasonable rates. The FERC later withdrew that NOPR in favor of targeted section 206 investigations of fast-start pricing practices in the NYISO, PJM, and SPP RTO/ISOs.¹¹³ In a December 2017 order,¹¹⁴ the FERC preliminarily found that multiple PJM practices related to fast-start resource pricing were unjust and unreasonable and set forth proposed changes to PJM's

106. *Midcontinent Indep. Sys. Operator, Inc.*, 167 F.E.R.C. ¶ 61,146 (2019).

107. *Id.* at P 71.

108. *Id.* at P 69.

109. *Id.* at P 8.

110. *Id.*

111. *PJM Interconnection, L.L.C.*, 167 F.E.R.C. ¶ 61, 058 (2019).

112. *Fast-Start Pricing in Markets Operated by Regional Transmission Organizations and Independent System Operators*, 157 F.E.R.C. ¶ 61,213 (2016).

113. 167 F.E.R.C. ¶ 61, 058 at P 3.

114. *PJM Interconnection, L.L.C.*, 161 F.E.R.C. ¶ 61,295 (2017).

tariff that it believed would result in just and reasonable rates. Initial and reply briefs were filed by over a dozen parties.¹¹⁵

In its 2019 Order, the FERC affirmed its preliminary finding that PJM's current fast-start resource pricing practices are unjust and unreasonable because the practices do not allow prices to reflect the marginal cost of serving load.¹¹⁶ The FERC found that allowing fast-start resources to participate in setting prices and incorporating their commitment costs in prices would more accurately represent the marginal cost of serving load and better reflect system needs and inform investment decisions.¹¹⁷ The FERC directed PJM to take the following actions:

- Consider fast-start resources dispatchable from zero to their economic maximum operating limits for the purpose of setting prices;
- Apply fast-start pricing to all fast-start resources, instead of only block-loaded resources;
- Alter its real-time energy market clearing process to consider fast-start resources in a way that is consistent with minimizing production costs (specifically, using its integer relaxation approach in conjunction with separate dispatch and pricing runs to clear its real-time energy market);
- Include fast-start resources' commitment costs in energy offers by implementing its proposed integer relaxation approach;
- Restrict eligibility for fast-start pricing to fast-start resources that have a start-up time of one hour or less and a minimum run time of one hour or less;
- Include its fast-start pricing practices in its tariff;
- Include commitment costs in energy prices for fast-start resources in both the day-ahead and real-time markets, and include in its compliance filing a proposal to withhold uplift payments in excess of a fast-start resource's commitment costs (in order to eliminate the possibility that a fast-start resource can over-recover its commitment costs); and
- Implement its proposal to use lost opportunity cost payments to offset the incentive for over-generation or price chasing.¹¹⁸

PJM must submit a compliance filing by August 30, 2019, with the proposed tariff changes and effective date.¹¹⁹ PJM was also directed to file a one-time informational report by September 27, 2019, addressing market power concerns related to the proposed tariff provisions.¹²⁰

115. 167 F.E.R.C. ¶ 61,058 at P 12.

116. *Id.* at P 17.

117. *Id.* at P 35.

118. *Id.* at P 17.

119. See Notice of Extension of Time, *PJM Interconnection, L.L.C.*, FERC Docket No. EL18-34-000 (July 19, 2019).

120. *Id.*

F. Southwest Power Pool (SPP)

1. SPP Exit Fee Complaint

On November 5, 2018, the American Wind Energy Association (AWEA) and the Wind Coalition (together with AWEA, “Complainants”) filed a complaint claiming that the exit fee imposed by SPP was unjust and unreasonable as applied to market participants that are not Transmission Owners (TOs) or Load Serving Entities (LSEs).¹²¹ The Complainants estimated the average exit fee for non-TO/non-LSE members would be in the range of \$700,000 to \$1,000,000.¹²² The largest component of the exit fee is the member’s calculated share of SPP’s outstanding long-term financial obligations, such as loans, leases, and pensions.¹²³ Complainants claimed that the exit fee was not based on cost-causation principles and had the effect of suppressing diverse membership in SPP, thereby making it more likely that jurisdictional rates are unjust and unreasonable.¹²⁴ Complainants noted that no other RTO or ISO requires membership exit fees for non-TOs/non-LSEs.¹²⁵ The Complainants proposed modifications to the exit fee formula, as applied to non-TO/non-LSE members and also requested modifications to the notice and deposit provisions related to the withdrawal process at SPP.¹²⁶

The Complaint was supported by several independent power producers, industry groups, and public interest organizations.¹²⁷ The Complaint was opposed by SPP and the SPP Load Serving Entities.¹²⁸ SPP estimated the withdrawal fee for a non-TO/non-LSE member, as of October 31, 2018, to be \$621,851.¹²⁹ SPP disagreed that minority positions are muted or unrepresented in SPP’s stakeholder process and argued that the exit fee formula is necessary for SPP to meet its financial obligations and cover its costs.¹³⁰ SPP stated that its loan agreements include terms premised on its exit fee structure, including negative covenants that trigger an event of default should SPP members withdraw and SPP not enforce the exit fee provisions.¹³¹

On April 18, 2019, the FERC issued its Order on Complaint, partially granting the relief requested.¹³² Rather than implement specific modifications to SPP’s exit fee formula, as requested by the Complainants, the FERC eliminated the exit

121. *Am. Wind Energy Ass’n v. Sw. Power Pool, Inc.*, 167 F.E.R.C. ¶ 61,033 (Nov. 5, 2018).

122. *Id.* at P 9.

123. *Id.* at P 3.

124. *Id.* at P 6-7.

125. *Id.* at P 10.

126. 167 F.E.R.C. ¶ 61,033 at P 38, 40.

127. *Am. Wind Energy Ass’n Wind Coalition v. Sw. Power Pool, Inc.*, 166 F.E.R.C. ¶ 61,160 at P 3 (2019).

128. *Id.*

129. Answer of Southwest Power Pool, Inc. to Complaint, *Am. Wind Energy Ass’n v. Sw. Power Pool*, FERC Docket No. EL19-11-000 (Nov. 30, 2018).

130. *Id.* at 19, 26.

131. *Id.*

132. See generally 166 F.E.R.C. ¶ 61,160.

fee entirely as applied to all non-TOs, including LSEs that do not own transmission.¹³³ The FERC denied the Complainants' requests regarding the notification period and deposit provisions of SPP's withdrawal process.¹³⁴

On May 20, 2019, SPP and the SPP Load Serving Entities requested rehearing of the April 18, 2019 Order.¹³⁵ On June 17, 2019, the FERC issued an Order Granting Rehearing for Further Consideration, but has not acted substantively on the requests for rehearing.¹³⁶

Also on May 20, 2019, SPP filed a Motion for Stay and Expedited Action, requesting that the FERC hold that the existing exit fee formula will remain in effect until the FERC issues an order accepting a replacement exit fee formula.¹³⁷ On July 2, 2019, the FERC denied SPP's Motion for Stay, finding that SPP did not demonstrate that it will suffer irreparable injury in the absence of a stay.¹³⁸ Accordingly, the April 18, 2019 Order is currently effective, and SPP is required to make a compliance filing removing the exit fee requirement for non-TO members by August 1, 2019.¹³⁹

2. SPP Tariff Attachment Z2 Proceedings

SPP's Open Access Transmission Tariff (Tariff) directly assigns costs of new network upgrades that are needed to accommodate long-term transmission service requests, generator interconnections, and sponsored upgrades to the party making the request.¹⁴⁰ Attachment Z2 of the SPP Tariff "provides that transmission customers, [] interconnection customers, and entities that request a Sponsored Upgrade may receive revenue credits" for directly assigned network upgrade costs if later service to another customer cannot be provided "but for" that network upgrade.¹⁴¹ Attachment Z2 has been in place since 2008, but SPP's implementation of revenue crediting was delayed until 2016 for a variety of reasons.¹⁴²

In order to catch up on revenue credits for the 2008-2016 historical period under Attachment Z2, SPP sought a waiver of Section I.7.1 of the Tariff, which sets forth a one-year billing adjustment limitation for past invoices.¹⁴³ The FERC

133. *Id.* at P 2.

134. *Id.* at P 67.

135. *See generally* FERC Docket No. EL19-11-001 (May 20, 2019); FERC Docket No. EL19-11-001 (May 20, 2019).

136. FERC Docket No. EL19-11-001 (June 17, 2019).

137. *Am. Wind Energy Ass'n Wind Coalition v. Sw. Power Pool, Inc.*, 168 F.E.R.C. ¶ 61,006 (July 2, 2019).

138. *Id.* at P 22.

139. 167 F.E.R.C. ¶ 61,033 at P 37.

140. 166 F.E.R.C. ¶ 61,160 at P 3.

141. *Id.* at P 4.

142. *Id.* at P 5.

143. *Id.* at P 6.

granted the waiver on July 7, 2016.¹⁴⁴ The order granting the waiver was appealed to the D.C. Circuit Court.¹⁴⁵

While the appeal was pending, the D.C. Circuit Court issued a decision in another matter regarding Old Dominion Electric Cooperative and PJM.¹⁴⁶ In *Old Dominion*, the court denied waiver of PJM's rate cap provision based on the filed-rate doctrine.¹⁴⁷ As a result of *Old Dominion*, SPP sought voluntary remand of its order granting waiver in the Attachment Z2 matter.¹⁴⁸ On remand, on February 28, 2019, the FERC reversed its waiver of the one-year billing adjustment limitation, thereby reducing the revenue credits that can be collected and redistributed under Attachment Z2.¹⁴⁹ However, between July 2016 and February 2019, the SPP had already collected and redistributed revenue credits based on the 2016 waiver.¹⁵⁰

On June 28, 2019, SPP filed a Motion seeking a stay of the FERC's February 28, 2019 Order on Remand and initiation of settlement procedures, "to avoid multiple resettlements of post-Refund Period credits and payments and instead facilitate a single, comprehensive resettlement"¹⁵¹ SPP's Motion is still pending as of the date of this publication, as is the status of revenue credits under Attachment Z2.

III. STATE/REGIONAL DEVELOPMENTS

A. Zero-Emission Credits Programs

This Committee in its previous report provided a summary of statewide efforts to implement Zero-Emission Credit (ZEC) programs benefitting owners of nuclear-fueled generation plants.¹⁵² The report at hand will update those and report on new state efforts.

1. ZEC Litigation

ZEC programs adopted in 2016 in Illinois and New York were challenged and decisions upholding the legality of the programs were issued by district courts in 2017.¹⁵³ Both orders were subsequently appealed and arguments were heard in early 2018, with decisions being handed down by the respective courts of appeals

144. *Sw. Power Pool Inc.*, 156 F.E.R.C. ¶ 61,020 (2016).

145. Notice Affording the Parties an Opportunity to File Briefs, *Sw. Power Pool, Inc.*, 83 Fed. Reg. 40,033 (Aug. 13, 2018).

146. *Old Dominion Elec. Coop. v. FERC*, 892. F3d 1223 (D.C. Cir. 2018).

147. *Id.* at 1230.

148. 166 F.E.R.C. ¶ 61,160 at P 13.

149. *Id.* at P 58.

150. *Id.* at n.162.

151. *Id.*

152. Stephen J. Hug et al., *Report of the Power Generation and Marketing Subcommittee*, 39 ENERGY L.J. 8 (2018).

153. *Coal. for Competitive Elec. v. Zibelman*, 272 F. Supp. 3d 554 (S.D.N.Y. 2017); *Elec. Power Supply Ass'n v. Star*, No. 17 CV 1164, slip op. at 43 (N.D. Ill. July 14, 2017).

during the last year.¹⁵⁴ In *Coalition for Competitive Electricity v. Zibelman*, Plaintiffs asserted that New York's ZEC program manipulates wholesale auction prices and distorts the mechanism used to determine which energy generators should close.¹⁵⁵ Plaintiffs also alleged that the program is preempted under the FPA and violates the dormant Commerce Clause.¹⁵⁶ The United States Court of Appeals for the Second Circuit affirmed the decision of the Southern District of New York, concluding that:

the ZEC program is not field preempted, because Plaintiffs have failed to identify an impermissible 'tether' under *Hughes v. Talen Energy Marketing, LLC*, [] 136 S. Ct. 1288, 1293 [] (2016) between the ZEC program and wholesale market participation; that the ZEC program is not conflict preempted, because Plaintiffs have failed to identify any clear damage to federal goals; and that Plaintiffs lack Article III standing as to the dormant Commerce Clause claim. These conclusions are consistent with the recent Seventh Circuit decision in *Elec. Power Supply Ass'n v. Star*, No. 17-2433, 2018 WL 4356683, at *1 (7th Cir. Sept. 13, 2018).¹⁵⁷

In *Electric Power Supply Association v. Star*, plaintiffs raised two procedural questions upon which the United States Court of Appeals for the Seventh Circuit focused: (1) whether a claim of preemption may be presented directly under the Supremacy Clause of the Constitution, and (2) whether relief under the theory of *Ex parte Young*¹⁵⁸ is appropriate against a state official when remedies would potentially be available under the FPA.¹⁵⁹ The court found that, since none of the procedural disputes concerned subject-matter jurisdiction, the district court's jurisdiction was secure and it only need look at the merits of the case.¹⁶⁰

At oral argument, the court expressed concern that the FERC had not opined on whether Illinois had interfered with the FERC's authority over interstate power auctions, and subsequently requested from the FERC its views via an *amicus curiae* brief.¹⁶¹ The FERC in its brief concluded "that Illinois' ZEC program does not interfere with interstate auctions and is not preempted."¹⁶² Recognizing the inherent conflict in the division of regulatory authority under the FPA, the court, in referencing *Hughes v. Talen Energy Marketing, LLC*,¹⁶³ noted the distinct line drawn "between state laws whose effect depends on a utility's participation in an interstate auction (forbidden) and state laws that do not so depend but that may affect auctions (allowed)."¹⁶⁴ The court determined that the Illinois ZEC program does just that, reasoning that

154. *Coal. for Competitive Elec. v. Zibelman*, 906 F.3d 41 (2d Cir. 2018); *Electric Power Supply Ass'n v. Star*, 904 F.3d 518 (7th Cir. 2018).

155. *Coal. for Competitive Elec.*, 906 F.3d at 46.

156. *Id.*

157. *Id.*

158. *Ex parte Young*, 209 U.S. 123 (1908).

159. *Elec. Power Supply*, 904 F.3d at 522.

160. *Id.*

161. *Id.*

162. *Id.* at 522.

163. *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288 (2016).

164. *Elec. Power Supply*, 904 F.3d at 523.

[t]o receive a credit, a firm must generate power, but how it sells that power is up to it. It can sell the power in an interstate auction but need not do so. It may choose instead to sell power through bilateral contracts with users (such as industrial plants) or local distribution companies that transmit the power to residences. If a producer does offer power to an interstate auction, the value of a credit does not depend on its bid. True, the outcome of all PJM auctions, averaged over a year, may affect the value of a credit . . . but what (indeed, whether) a producer bids in the interstate auction does not determine the amount it receives.¹⁶⁵

The court, in affirming the decision of the lower court, further pointed out that the FERC, rather than forbidding state programs such as that of Illinois, instead has accepted them while reserving its power to make any changes to auctions for interstate electricity sales, and that Illinois has not engaged in any discrimination beyond what is required by its obligation to regulate within its borders.¹⁶⁶ On April 15, 2019, the United States Supreme Court denied petitions for writ of certiorari filed in the *Zibelman* and *Star* cases, ending the challenges to the ZEC programs in New York and Illinois, respectively.¹⁶⁷

2. Other State Programs

There has been some activity in ZEC programs in several other states. On April 18, 2019, the New Jersey Board of Public Utilities (BPU) approved ZECs of up to \$300 million in annual subsidies to the state's three nuclear power plants¹⁶⁸ pursuant to the ZEC program and application process for nuclear power plants approved by the BPU on November 19, 2018.¹⁶⁹ The New Jersey Rate Counsel filed an appeal on May 15, 2019, challenging the nuclear plant subsidies.¹⁷⁰

Other state programs, while not dubbed ZEC *per se*, have gained some traction. Connecticut state regulators determined that the Millstone Power Station, Connecticut's only nuclear plant, was at risk of early retirement, a status that allowed it to bid into the state's zero-carbon generation resources request for proposals, and in December 2018 state officials selected a 10-year bid for power from the facility.¹⁷¹

Several other states have introduced legislation that would subsidize nuclear power plants. On April 12, 2019, the Ohio legislature introduced HB 6, which would create the Ohio Clean Air Program and provide clean energy credits to zero-

165. *Id.*

166. *Id.* at 524-25.

167. *Coal. for Competitive Elec. v. Zibelman*, 906 F.3d 41 (2d Cir. 2018), *cert. denied*, 139 S. Ct. 1547 (2019); *Elec. Power Supply Ass'n v. Star*, 904 F.3d 518 (7th Cir. 2018), *cert. denied*, 139 S. Ct. 1547 (2019).

168. Anjalee Khemiani, *BPU Approves \$300M Subsidy Needed to Keep 3 Nuclear Plants Online*, ROINJ (Apr. 18, 2019), <http://www.roi-nj.com/2019/04/18/industry/breaking-bpu-approves-300m-subsidy-needed-to-keep-3-nuclear-plants-online/>.

169. N.J. BD. PUB. UTIL., NJBPU APPROVES ZERO EMISSION CREDIT PROGRAM AND APPLICATION PROCESS FOR NUCLEAR POWER PLANTS (Nov. 19, 2018), <https://nj.gov/bpu/newsroom/2018/20181119.html>.

170. NEW JERSEY JUDICIARY SUPERIOR COURT-APPELLATE DIVISION, NOTICE OF APPEAL (May 15, 2019), https://www.nj.gov/rpa/docs/ZEC_Rate_Counsel_Notice_of_Appeal_and_CIS_hardcopies_5-15-19.pdf.

171. ST. CONN. DEP'T ENERGY & ENVTL. PROTECTION, GOV. MALLOY ANNOUNCES ZERO-CARBON RESOURCE SELECTIONS (2018), <https://www.ct.gov/deep/cwp/view.asp?Q=607002&A=4965> (last visited Jul. 19, 2019).

emission power producers, including the state's two nuclear plants.¹⁷² The Ohio Senate introduced its substitute version of HB 6¹⁷³ which includes provisions that will generate \$150 million for the nuclear generation fund.¹⁷⁴ The Senate Bill also preserves subsidies for the Ohio Valley Electric Corporation (OVEC), which owns two coal plants in the state, as a "legacy generation resource"¹⁷⁵ and caps charges per residential ratepayer at \$1.50 per month.¹⁷⁶ OVEC is currently under Chapter 11 bankruptcy protection.¹⁷⁷

Pennsylvania legislators introduced House Bill 11 on March 12, 2019, effectively updating the state's Alternative Energy Portfolio Standards Act of 2004 to allow carbon-free energy producers, including nuclear power plants, to take advantage of a credit program requiring electricity suppliers to purchase alternative energy credits from producers.¹⁷⁸

B. Ohio/Ohio Valley Electric Corp. (OVEC) Proceeding

The Court of Appeals for the Sixth Circuit is poised to address the issue of whether the FERC has any say in a utility's rejection of power purchase agreements (PPAs) in bankruptcy.¹⁷⁹ On March 31, 2018, FirstEnergy Solutions Corp. (FES) filed a voluntary petition in a Chapter 11 bankruptcy in the U.S. Bankruptcy Court for the Northern District of Ohio¹⁸⁰ and pursuant to it sought to reject long-term PPAs, including one it had with OVEC.¹⁸¹ OVEC, in anticipation of FES' bankruptcy filing, had earlier filed a complaint with the FERC against FES seeking to prevent the rejection of its PPA.¹⁸² FES responded with a complaint filed against the FERC seeking a declaratory judgment as well as injunctive relief to enjoin the FERC from taking actions that could interfere with the jurisdiction of the bankruptcy court to consider FES's motions to reject executory contracts, including the PPA it had with OVEC, and the court granted the requested relief.¹⁸³

In a July 31, 2018 ruling from the bench, U.S. Bankruptcy Judge Alan M. Koschik, in approving the rejection of FES's PPA with OVEC, held that the U.S.

172. H.B. 6, 133rd Gen. Assemb., Reg. Sess. (Ohio 2019).

173. Am. Sub. H.B. 6, 133rd Gen. Assemb., Reg. Sess. (Ohio 2019).

174. *Id.* at 8.

175. *Id.* at 30.

176. *Id.* at 32.

177. Gavin Blade, *FirstEnergy CEO says generation subsidiary headed for bankruptcy protection*, UTILITY DIVE (Feb. 23, 2018), <https://www.utilitydive.com/news/firstenergy-ceo-says-generation-subsi-dary-headed-for-bankruptcy-protection/517743/>.

178. H.B. 11, 2019 Gen. Assemb., Reg. Sess. (Pa. 2019).

179. Court Audio of Oral Argument: In re FirstEnergy Solutions Corp. et al. (6th Cir. June 26, 2019), http://www.opn.ca6.uscourts.gov/internet/court_audio/aud1.php [hereinafter "Court Audio of Oral Argument"].

180. In re FirstEnergy Solutions Corp., No. 18-50757 (Bankr. N.D. Ohio Mar. 31, 2018).

181. Mot. for Entry of an Order Authorizing FirstEnergy Solutions Corp. and FirstEnergy Generation, LLC to Reject a Certain Multi-Party Intercompany Power Purchase Agreement with the Ohio Valley Electric Corp. as of the Petition Date, In re FirstEnergy Solutions Corp., No. 18-50757 (Bankr. N.D. Ohio Apr. 1, 2018).

182. Ohio Valley Electric Corp. v. FirstEnergy Solutions Corp., 83 Fed. Reg. 14453 (2018).

183. Mem. Decision Supporting Order Granting Preliminary Injunction, In re FirstEnergy Solutions Corp., No. 18-50757 (Jointly Administered) (Bankr. N.D. Ohio May 18, 2018).

Bankruptcy Code gave the court exclusive jurisdiction to decide whether the rejection of the PPAs was appropriate.¹⁸⁴ Judge Koschik specifically overruled arguments that the PPA constituted a filed-rate under the FPA and therefore required a determination by the FERC that any contractual changes must be in the public interest under the FPA and the *Mobile-Sierra* doctrine,¹⁸⁵ that the FERC has exclusive jurisdiction in that public interest determination, and that the bankruptcy court and the FERC share concurrent jurisdiction over the rejection of wholesale power agreements.¹⁸⁶

“On August 14, 2018, the U.S. Court of Appeals for the Sixth Circuit agreed to hear a direct appeal of the bankruptcy court’s preliminary injunction order” and consider certain legal questions of the FERC and bankruptcy court jurisdiction over rejected wholesale power contracts as addressed in the bankruptcy court’s certified order.¹⁸⁷ A Sixth Circuit panel heard oral arguments in the FES matter on June 26, 2019.¹⁸⁸ Two Sixth Circuit judges questioned whether the FERC’s claim of concurrent jurisdiction with the bankruptcy court over whether PPAs can be rejected in bankruptcy would gut the authority of bankruptcy courts to approve contract rejections as part of a reorganization plan.¹⁸⁹ Conversely, the panel’s third judge queried whether the FERC’s obligations to regulate in the public interest can simply be swept aside when a utility has landed in bankruptcy court.¹⁹⁰ The Sixth Circuit judges were united in noting that if they sided with the FERC, they would create a split with the Fifth Circuit, which held in *Mirant*¹⁹¹ that wholesale power contracts can be breached without the FERC’s approval.¹⁹² As of August 1, 2019, the Sixth Circuit has not ruled in this matter.

184. Order (I) Authorizing the Debtors to Reject a Certain Multi-Party Intercompany Power Purchase Agreement With the Ohio Valley Electric Corp. and (II) Granting Certain Related Relief, In re FirstEnergy Solutions Corp., No. 18-50757 (Bankr. N.D. Ohio Aug. 9, 2018).

185. Charles Dale III et al., FirstEnergy: Bankruptcy Court Asserts Primacy Over FERC; Approves Rejection of Power Purchase Agreements, K&L GATES (Sept. 5, 2018).

186. *Id.*

187. Order Authorizing Direct Appeal of Order of Bankruptcy Court, In re Ohio Valley Elec. Corp., No. 18-0307 (6th Cir. Aug. 14, 2018).

188. Court Audio of Oral Hearing, *supra* note 179.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

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