REPORT OF THE FERC PRACTICE COMMITTEE

This report covers significant Federal Energy Regulatory Commission (FERC or Commission) practice and procedural issues, including appellate court decisions, major FERC orders and rulemakings, and administrative actions, from July 1, 2019, through June 30, 2020.*

* The Practices Steering Committee thanks Traci Bone, Jonathan Nazami, Karis Anne Parnham, William Simmerson, and Jonathan Trotta.

I. PROCEDURAL HOLDINGS FROM THE FEDERAL COURTS

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

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

1. INEOS USA LLC v. FERC

In *INEOS USA LLC v. FERC*,[4] INEOS, a chemical producer, petitioned the D.C. Circuit for review of the decision of the FERC to accept tariff filings without an investigation pursuant to section 15(7) of the Interstate Commerce Act.[5] INEOS sought to connect its fractionator to the South Eddy Lateral, a natural gas liquids pipeline.[6] Ownership of the South Eddy Lateral recently changed hands from Mid-America Pipeline Company, LLC (Mid-America) to Leveret Pipeline Company LLC (Leveret), both subsidiaries of Enterprise Products Partners L.P.[7]

1. 16 U.S.C. § 825l(b) (2005); 15 U.S.C. § 717r(b) (2005).
2. *Id.*
3. *Id.*
4. INEOS USA L.L.C. v. FERC, 940 F.3d 1326, 1327 (D.C. Cir. 2019).
5. 49 U.S.C. App. § 15(7) (1988).
6. INEOS, 940 F.3d at 1327.
7. *Id.*

Mid-America and Leveret filed tariffs with FERC reflecting the transfer of ownership. INEOS protested the tariff filings and argued that the transfer was intended to deny INEOS' access to the South Eddy Lateral and, more generally, to unduly discriminate in favor of Enterprise affiliates at the expense of third-party shippers.[8] INEOS requested the Commission reject the filings or, alternatively, suspend the tariffs pending investigation of the ownership change.[9] FERC denied INEOS' protest and accepted the tariff filings without investigation.[10] INEOS petitioned the D.C. Circuit for review, and FERC responded that the court lacked jurisdiction.[11] The court, in a per curiam opinion, concluded that INEOS failed to establish Article III standing because "INEOS' claim of competitive injury from denial of access to the South Eddy Lateral is too speculative."[12]

2. Narragansett Indian Tribal Historic Preservation Office v. FERC

In *Narragansett Indian Tribal Historic Preservation Office v. FERC*, the Narragansett Indian Tribal Historic Preservation Office (Narragansett Tribe) petitioned the D.C. Circuit for review of a FERC order denying its motion to intervene in a natural gas pipeline certificate proceeding after the certificate to build a pipeline had issued.[13] The Narragansett Tribe argued that, in authorizing Tennessee Gas Pipeline Company, LLC (Tennessee Gas) to build a pipeline across landscapes that hold sacred significance to the Narragansett Tribe, FERC denied it the procedural protections of the National Historic Preservation Act (Preservation Act).[14] "While the Narragansett Tribe awaited [FERC] action on its pending motion to intervene and its separate motion for reconsideration of an order allowing construction to commence, Tennessee Gas completed its pipeline and in the process irreparably destroyed more than twenty ceremonial stone features."[15] With its effort to save those ceremonial landscapes lost, the Narragansett Tribe petitioned the D.C. Circuit for an order compelling FERC to amend its regulations so that the alleged violations of the Preservation Act could not be repeated in the future.[16] The court concluded that the Narragansett Tribe lacked standing to seek such relief because "[b]y the time the Narragansett Tribe filed its petition for review, the ceremonial landscapes had been irremediably destroyed."[17] And the Narragansett Tribe has not shown a substantial risk that a similar disagreement between it and [FERC] will recur."[18] The court therefore dismissed the petition for lack of jurisdiction.[19]

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8. *Id.*
9. *Id.*
10. *Id.*
11. INEOS, 940 F.3d at 1327.
12. *Id*. at 1329.
13. Narragansett Indian Tribal Historic Pres. Office v. FERC, 949 F.3d 8, 10 (D.C. Cir. 2020).
14. 54 U.S.C. §§ 300101-300321.
15. Narragansett Indian Tribal Historic Pres. Office, 949 F.3d at 10.
16. *Id*.
17. *Id.*
18. *Id.*
19. *Id*.

B. Other Court Decisions

1. Cletus Woodrow & Beverly Bohon, et al. v. FERC

Cletus Woodrow & Beverly Bohon, et. al. v. FERC involves the Mountain Valley Pipeline, LLC's (MVP) proposed construction of a natural gas pipeline through Virginia and West Virginia.[20] In October 2017, FERC granted MVP a certificate that permitted it to build the pipeline and exercise FERC's eminent domain authority.[21] Plaintiffs Cletus Woodrow & Beverly Bohon, et. al., homeowners along a proposed natural gas pipeline's path, brought suit against FERC, raising constitutional challenges to the Natural Gas Act (NGA).[22] The plaintiffs sought, among other things, a nationwide injunction ending the existing FERC pipeline approval process and voiding all pipeline certificates, including the one issued to MVP.[23] The United States District Court for the District of Columbia dismissed the case for lack of subject matter jurisdiction, concluding that the NGA "channels review of FERC decisions relating to pipelines—including constitutional claims inhering in those controversies—to the agency, not to a district court.[24] Plaintiffs' attempt to transform their grievance with FERC over the MVP certificate into a facial constitutional challenge cannot save them from the statutorily mandated administrative review process."[25]

II. FEDERAL ENERGY REGULATORY COMMISSION HEADLINES AND NOTABLE ADMINISTRATIVE ACTIONS

A. Update on Commissioners

1. Commissioner McNamee announces decision not to seek reappointment

On January 23, 2020, Commissioner Bernard L. McNamee issued a statement announcing his decision not to seek reappointment as a FERC Commissioner upon expiration of this term on June 30, 2020.[26]

2. Commissioner James Danly sworn in as FERC Commissioner

On March 31, 2020, Commissioner James Danly was sworn in as a FERC Commissioner for a term ending June 30, 2023.[27] Commissioner Danly was nominated by President Trump on February 12, 2020, and was confirmed by the United States Senate on March 12, 2020.[28] Previously, Danly served as FERC General

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20. Woodrow v. FERC, No. 20-6 (JEB), 2020 WL 2198050, at *1 (D.C. Cir. May 6, 2020).
21. *Id*.
22. *Id*.
23. *Id*.
24. *Id*.
25. *Woodrow,* 2020 WL 2198050 at *1.
26. FERC, COMMISSIONER BERNARD L. MCNAMEE STATEMENT REGARDING HIS DECISION NOT TO SEEK REAPPOINTMENT (Jan. 23, 2020), https://www.ferc.gov/news-events/news/commissioner-bernard-l-mcnamee-statement-regarding-his-decision-not-seek.
27. FERC, COMMISSIONER DANLY BIOGRAPHY (July 25, 2020), https://www.ferc.gov/about/commission-members/commissioner-danly.
28. *Id*.

Counsel since September 2017.[29] Prior to joining the Commission, he was a member of the energy regulation and litigation group at Skadden, Arps, Slate, Meagher and Flom LLP.[30] Prior to this, Danly served as law clerk to Judge Danny Boggs at the U.S. Court of Appeals for the Sixth Circuit.[31] He was a managing director of the Institute for the Study of War, a military think tank in Washington, D.C., and served an International Affairs Fellowship at the Council on Foreign Relations.[32] Danly is a former U.S. Army officer who served two deployments to Iraq, first with an infantry company in Baghdad and then on staff at Multi-National Force—Iraq, receiving a Bronze Star and Purple Heart.[33] Danly earned his juris doctor from Vanderbilt University Law School, and his bachelor's degree from Yale University.[34]

B. FERC Office and Staffing Updates

1. FERC Reorganizes to Create New LNG Division, Opens Houston Regional Office

On July 23, 2019, Chairman Chatterjee announced the creation of the Division of LNG Facility Review & Inspections within the Office of Energy Projects, which will be located in Houston, Texas.[35] This office will accommodate the growing number of applications to site, build, and operate LNG terminals.[36] The expansion "will help prepare FERC for the additional work necessary once LNG project applicants make final investment decisions and move toward construction."[37] The new division will consist of 20 existing LNG staff members in Washington, D.C., and eight additional staffers in Houston.[38]

2. Office of Administrative Litigation – John Kroeger

On January 23, 2020, Chairman Chatterjee announced the appointment of John Kroeger to serve as the Director of the Office of Administrative Litigation (OAL).[39] Kroeger has served as OAL's Acting Director since May 2019 and as OAL's Director of the Legal Division since 2011.[40] Kroeger has also served in

29. *Id*.

30. *Id*.

31. *Id*.

32. COMMISSIONER DANLY BIOGRAPHY, *supra* note 26.

33. *Id.*

34. *Id*.

35. FERC. FERC REORGANIZES TO CREATE NEW LNG DIVISION, OPEN HOUSTON REGIONAL OFFICE (July 23, 2020), https://www.ferc.gov/news-events/news/ferc-reorganizes-create-new-lng-division-open-houston-regional-office.

36. *Id.*

37. *Id.*

38. *Id.*

39. FERC, FERC CHAIRMAN ANNOUNCES NEW PERSONNEL APPOINTMENTS (Jan. 23, 2020), https://www.ferc.gov/news-events/news/ferc-chairman-announces-new-personnel-appointments.

40. *Id.*

the Office of Enforcement.[41] Kroeger joined FERC in 1991.[42] He earned a B.A. from The George Washington University, an M.B.A. from Johns Hopkins University, and a J.D. from The George Washington University Law School.[43]

3. Office of Energy Policy and Innovation – Eric Vandenberg

On January 23, 2020, Chairman Chatterjee announced the appointment of Eric Vandenberg to serve as the Deputy Director of the Office of Energy Policy and Innovation.[44] Vandenberg has served as Senior Technical Advisor to Chairman Chatterjee since 2017.[45] Vandenberg also served in the Office of Energy Market Regulation, Office of Electric Reliability as an Electrical Engineer, and as Acting Advisor to former Commissioner Cheryl LaFleur.[46] Vandenberg joined FERC in 2009.[47] He earned a B.S. in electrical engineering and an M.B.A. from Ohio University.[48]

4. FERC Reorganized Office of the General Counsel to Speed Landowner Rehearing Process

On January 31, 2020, Chairman Chatterjee announced that the Office of the General Counsel (OGC) would be reorganized to more expeditiously process requests for rehearing of Natural Gas Act section 7 certificate orders filed by affected landowners.[49] The objective of the reorganization was to "reinforce the Commission's commitment to ensure landowners are afforded a judicially appealable rehearing order as quickly as possible."[50] The Chairman's reorganization of OGC creates two separate rehearing groups—Landowner Rehearings and General Rehearings.[51] The Landowner Rehearings group will give first priority to landowner rehearing requests and will work on other rehearings requests only as time permits.[52]

5. Office of the General Counsel – David Morenoff

On March 31, 2020, Chairman Chatterjee announced that David Morenoff will serve as Acting General Counsel of the Commission.[53] Morenoff served as

41. *Id.*
42. *Id.*
43. *Id.*
44. FERC CHAIRMAN ANNOUNCES NEW PERSONNEL APPOINTMENTS, *supra* note 38.
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. FERC, FERC CHAIRMAN REORGANIZES OGC TO SPEED LANDOWNER REHEARING PROCESS (Jan. 31, 2020), https://www.ferc.gov/news-events/news/ferc-chairman-reorganizes-ogc-speed-landowner-rehearing-process-0.
50. *Id.*
51. *Id.*
52. *Id.*
53. FERC, CHATTERJEE NAMES MORENOFF AS FERC ACTING GENERAL COUNSEL (Mar. 31, 2020), https://www.ferc.gov/news-events/news/chatterjee-names-morenoff-ferc-acting-general-counsel.

Deputy General Counsel under former General Counsel and current Commissioner James Danly.[54] Morenoff has also served in several senior positions within OGC.[55] Morenoff joined FERC in 2006.[56] He earned a B.A. in history *magna cum laude* from Brown University and a J.D. *cum laude* from Harvard Law School.[57]

6. Office of the Executive Director – Mittal Desai

On June 3, 2020, Chairman Chatterjee announced the appointment of Mittal Desai as the Chief Information Officer in the Office of the Executive Director (OED).[58] Desai has served as a Senior Advisor and Risk Analyst with OED.[59] Desai also served as Deputy Chief Information Security Officer and Chief Information Security Officer.[60] He earned a B.S. in business information technology *magna cum laude* from Virginia Polytechnic Institute and State University.[61]

C. FERC Budget

1. FERC Fiscal Year 2021 Congressional Performance Budget Request, Fiscal Year 2020 Annual Performance Report, and Fiscal Year 2019 Annual Performance Report.

FERC sent its Fiscal Year (FY) 2021 budget request to Congress on February 10, 2020, combined with its FY 2020 Annual Performance Plan and FY 2019 Annual Performance Report.[62] FERC requested a FY 2021 appropriation of $404,350,000[63] and 1,465 full-time equivalents (FTEs).[64] The budget identified three primary goals for FY 2021: (1) "[e]nsure that rates, terms, and conditions of jurisdictional energy services are just and reasonable, and not unduly discriminatory or preferential;"[65] (2) "[p]romote the development of safe, reliable, and secure infrastructure that serves the public interest;"[66] and (3) "[a]chieve organizational

54. *Id.*

55. *Id.*

56. FERC, DAVID L. MORENOFF, ACTING GENERAL COUNSEL (June 25, 2020), https://www.ferc.gov/david-l-morenoff-acting-general-counsel#.

57. CHATTERJEE NAMES MORENOFF AS FERC ACTING GENERAL COUNSEL, *supra* note 52.

58. FERC, FERC CHAIRMAN CHATTERJEE NAMES MITTAL DESAI AS NEW CIO (June 3, 2020), https://www.ferc.gov/news-events/news/ferc-chairman-chatterjee-names-mittal-desai-new-cio.

59. *Id.*

60. *Id.*

61. *Id.*

62. FERC, FISCAL YEAR 2021 CONGRESSIONAL JUSTIFICATION 1 (Feb. 10, 2020), https://www.ferc.gov/sites/default/files/2020-06/FY21-Budget-Request.pdf [hereinafter 2021 BUDGET REQUEST].

63. *Id.* Congress must approve the Commission's budget; however, no net appropriation results, because "[t]he FERC recovers the full cost of its operations through annual charges and filing fees assessed on the industries it regulates as authorized by the Federal Power Act (FPA) and the Omnibus Budget Reconciliation Act of 1986. The Commission deposits this revenue into the Treasury as a direct offset to its appropriation, resulting in a net appropriation of zero." *Id*. at 4.

64. *Id.* at 5.

65. *Id.* at 10.

66. *Id.* at 41.

excellence by using resources effectively, adequately representing FERC employees for success, and executing responsive and transparent processes that strengthen public trust."[67] The FY 2021 budget request reflected an increase of $18,500,000, or 7.3 percent from the FY 2020 budget request.[68]

The table below[69] compares FERC's FY 2021 budget request with recent FY actual and estimated expenditures:

	FY 2017 Actual	FY 2018 Actual	FY 2019 Actual	FY 2020 Estimate	FY 2021 Request
FERC Total Budget	$341,563,000	$367,600,000	$369,900,000	$382,000,000	$404,350,000
Full-Time Equivalent Employees	1,455	1,428	1,434	1,465	1,465

Two-thirds of the FY 2021 FERC budget request is attributable to personnel expenses.[70] The next largest expense category is information technology, which accounts for fifteen percent.[71] The remainder is for environmental and program contracts, building modernization, rent, and administrative expenses.[72]

By regulated industry, the FY 2021 budget reflects the following allocation of resources: (1) electric industry, $226,922,000 (823 FTEs); (2) hydroelectric industry, $88,828,000 (327 FTEs); (3) natural gas industry, $78,437,000 (277 FTEs); and (4) oil industry, $10,163,000 (38 FTEs).[73] These allocations are generally consistent with prior fiscal year budget requests.[74]

D. Rulemakings

1. FERC issues Final Rule Regarding Formal Requirements for Filings in Proceedings Before the Commission

On August 27, 2019, FERC issued Order No. 862, a Final Rule amending Part 385 of its regulations governing "the process for submitting hardcopy filings

67. 2021 BUDGET REQUEST, *supra* note 61, at 77.

68. *Id.* at 5.

69. *Id.* at 7; *see also* FERC, FISCAL YEAR 2019 CONGRESSIONAL PERFORMANCE BUDGET REQUEST iv (2019), https://www.ferc.gov/sites/default/files/2020-04/FY19-Budget-Request.pdf; FERC, FISCAL YEAR 2020 CONGRESSIONAL PERFORMANCE BUDGET REQUEST v (2020), https://www.ferc.gov/sites/default/files/2020-04/FY20-Budget-Request.pdf.

70. 2021 BUDGET REQUEST, *supra* note 61, at 5.

71. *Id.* at 8.

72. *Id.*

73. *Id.*

74. *Id.*

and submissions to the Commission."[75] Under the Final Rule, any physical deliveries of filings or submissions by any means except United States Postal Service (USPS) must be "sent to an off-site facility for security screening and processing."[76] The address of the off-site facility is 12225 Wilkins Ave., Rockville, MD 20852.[77] Hand deliveries may be made in-person at the off-site facility from 7:00 a.m. to 3:30 p.m..[78] Mail sent via the USPS may still be sent directly to the Commission's headquarters, 888 First Street, NE, Washington, DC 20426.[79] On June 23, 2020, the Secretary of the Commission issued a notice announcing that the effective date of the Final Rule as July 1, 2020.[80]

2. FERC issues Final Rule Regarding Annual Update of Filing Fees

On December 26, 2019, FERC issued via Final Rule its annual update of filing fees in order to establish "updated fees on the basis of the Commission's Fiscal Year 2019 costs."[81] All regulatory fees established in Part 381 of the Commission's regulations were revised by the rule except for pipeline certificate applications pursuant to 18 C.F.R. § 284.224.[82] The effective date for the updated fees is February 10, 2020.[83]

3. FERC issues Final Rule regarding Custody and Authentication of Commission Records

On January 28, 2020, FERC issued Order No. 868, a Final Rule revising its regulations in order "to establish a Senior Agency Official for Records as the legal custodian of all Commission Records," who shall have sole legal custody for Commission Records.[84] "Legal custody involves the ownership and the responsibility for creating policies governing access to records regardless of their physical location."[85] The rule also "clarifies that authentication of records can be performed by staff officials exercising delegated authority under 18 CFR Part 375, Subpart C."[86] Per the rule, issuances in eLibrary on the Commission's website "will be considered authenticated."[87] The effective date for the rule is March 23, 2020.[88]

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75. Order No. 862, *Formal Requirements for Filings in Proceedings Before the Commission*, 168 F.E.R.C. ¶ 61,120 at P 1 (2019) (codified at 18 C.F.R. § 385.2001(a)(1)).

76. *Id.*

77. *Id.* at P 5.

78. *Id.*

79. *Id.* at PP 1, 7.

80. *Formal Requirements for Filings in Proceedings Before the Commission*, Docket No. RM19-18-000, Notice Regarding Effective Date (June 23, 2020).

81. *Annual Update of Filing Fees in Part 381*, 169 F.E.R.C. ¶ 62,167 (2019). The Final Rule was published in the Federal Register on January 9, 2020. 85 Fed. Reg. 1102 (January 9, 2020).

82. *Id.*

83. *Id.*

84. Order No. 868, *Custody and Authentication of Commission Records*, 170 F.E.R.C. ¶ 61,060 at PP 1, 6 (2020).

85. *Id.* at P 5.

86. *Id.* at P 7.

87. *Id.* at P 8.

88. *Custody and Authentication of Commission Records,* 85 Fed. Reg. 9661-02 (Feb. 20, 2020) (to be codified at 18 C.F.R. pt. 375).

4. FERC Issues Revision to Policy Statement on Consultation with Indian Tribes in Commission Proceedings

On October 17, 2019, as corrected via errata notice October 18, 2019, FERC amended its Policy Statement on Consultation with Indian Tribes in Commission Proceedings.[89] The revised policy statement now reads that "[t]he Commission will use the agency's environmental and decisional documents to communicate how tribal input has been considered."[90] It also explicitly includes "treaty rights" as an area of concern when the Commission considers the effect of its actions in NEPA and decision documents.[91] Finally, it explicitly includes Corporations established pursuant to the Alaska Native Claims Settlement Act (ANSCA), while also recognizing the differences between the federal relationship to ANSCA Corporations and "the government-to-government relationship between the Federal Government and federally recognized Indian Tribes."[92] The effective date for the rule is November 25, 2019.[93]

5. FERC Issues Policy Statement on Determining Return on Equity for Natural Gas and Oil Pipelines

On May 21, 2020, FERC issued a Policy Statement on Determining Return on Equity for Natural Gas and Oil Pipelines.[94] The policy statement revises the Commission's "policy for analyzing interstate natural gas and oil pipeline [returns on equity (ROEs)] to adopt the methodology established for public utilities in Opinion Nos. 569 and 569-A, with certain exceptions to account for the statutory, operational, organizational, and competitive differences among the industries."[95] Under the revised policy, the Commission will:

> (1) determine ROE by averaging the results of [discounted cash flow (DCF)] and [Capital Asset Pricing Model (CAPM)] analyses while retaining the existing two-thirds/one-third weighting of the short and long-term growth projections in the DCF; (2) give equal weight to the DCF and CAPM analyses; (3) consider using *Value Line* data as the source of the short-term growth projection in the CAPM; (4) consider proposals to include Canadian companies in pipeline proxy groups while continuing to apply our proxy group criteria flexibly until sufficient proxy group members are obtained; (5) exclude Risk Premium and Expected Earnings analyses; and (6) continue to address outliers in pipeline proxy groups on a case-by-case basis and refrain from applying specific outlier tests.[96]

One distinction between the ROE methodology adopted for gas and oil pipelines and the methodology adopted for public utilities is the Commission's finding that "there is insufficient data to estimate cost of equity using the Risk Premium

89. *Revision to Policy Statement on Consultation with Indian Tribes in Commission Proceedings*, 169 F.E.R.C. ¶ 61,036 (2019); FERC Docket No. PL20-1-000 (Oct. 18, 2019).

90. 18 C.F.R. § 2.1c(e) (2020).

91. 169 F.E.R.C. ¶ 61,036 at PP 7-8.

92. *Id.* at PP 8-11.

93. 84 Fed. Reg. 56940-01 (Oct. 24, 2019).

94. *Inquiry Regarding the Commission's Policy for Determining Return on Equity*, 171 F.E.R.C. ¶ 61,155 (2020) (Pipeline ROE Policy Statement).

95. *Id.* at P 2. *See also* Opinion No. 569-A, *Ass'n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, 171 F.E.R.C. ¶ 61,154 (2020) (setting forth ROE policy for electric public utilities).

96. 171 F.E.R.C. ¶ 61,155 at P 18.

models discussed in Opinion Nos. 569 and 569-A."[97] Also in contrast to the ROE analysis for public utilities, the Commission chose not to adopt outlier tests to determine the proxy groups analyzed in the determination of natural gas and oil pipeline ROEs.[98] This was based on the use of the median, as opposed to the midpoint, as the measure of central tendency for pipeline ROEs and the limited " . . . pool of entities eligible for inclusion in natural gas and oil pipeline proxy groups."[99] The Commission confirmed, however, that it " . . . will continue to apply the general principle that 'anomalous' or 'illogical' data should be excluded from the proxy group."[100] Finally, the Commission encouraged oil pipelines to voluntarily submit updated FERC Form No. 6, page 700 data for 2019 to show the revised ROE methodology established by the policy statement.[101] On July 7, 2020, the Secretary of the Commission issued a notice establishing July 21, 2020 as the deadline for such voluntary submissions.[102] The effective date for the policy statement is May 27, 2020.[103]

6. FERC Issues Proposed Policy Statement Regarding Waiver of Tariff Requirements and Petitions or Complaints for Remedial Relief

On May 21, 2020, FERC issued a Proposed Policy Statement on Waiver of Tariff Requirements and Petitions or Complaints for Remedial Relief.[104] "This Proposed Policy Statement sets forth the approach the Commission would propose to take going forward to ensure compliance" with the filed rate doctrine and the rule against retroactive ratemaking.[105] The Commission finds that it "has the authority to grant *prospective* waivers of deadlines or other provisions established in tariffs . . . before the deadline has passed," because "[s]uch waivers are, in effect, temporary or otherwise limited amendments to relevant tariff provisions" that may be approved under FPA section 205 or NGA section 4.[106] It finds that it:

> may not grant retroactive relief, however, unless the applicant makes a showing that either (1) the request for remedial relief does not violate the filed rate doctrine or the rule against retroactive ratemaking due to adequate prior notice or, alternatively, (2) that the requested relief is within the Commission's authority to grant under FPA section 309 or NGA section 16 [such that] granting the requested relief conforms with the purposes and policies of Congress and does not contravene any terms of the FPA or NGA.[107]

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97. *Id.* at P 70.

98. *Id.* at P 87.

99. *Id.* at PP 88-89.

100. *Id.* at P 91.

101. *Id.* at P 92.

102. *Inquiry Regarding the Commission's Policy for Determining Return on Equity*, Notice Establishing Date for Filing Updated Data, Docket No. PL19-4-000 (2020).

103. 85 Fed. Reg. 31,760 (May 27, 2020).

104. *Waiver of Tariff Requirements*, 171 F.E.R.C. ¶ 61,156 (2020) (Proposed Waiver Policy Statement).

105. *Id.* at P 1. The filed rate doctrine "holds that a public utility may not charge any rate other than what has been filed by the Commission and allowed to go into effect." *Id.* at P 5 (citations omitted). The rule against retroactive ratemaking holds that the courts cannot "impose a different rate than the one approved by the Commission [and] the Commission itself has no power to alter a rate retroactively." *Id.* (citation omitted).

106. *Id.* at P 10.

107. *Id.*

The Commission further "propose[s] to no longer grant retroactive waivers of tariff provisions" including non-rate terms and conditions, except as consistent with the Proposed Waiver Policy Statement.[108] To implement its proposed policy, the Commission suggests the following guidance on filing procedures:

- Requests for remedial relief for an action or omission that has already occurred, but prior to the date that the relief is sought, should be styled as a request for remedial relief instead of a request for waiver.[109]
- Waiver requests should be limited to "(a) requests for prospective relief when a requested future deviation from the filed rate has not yet occurred at the time the request is filed; or (b) petitions for remedial relief when a tariff expressly authorizes regulated entities to seek a remedial waiver from the Commission" for prior deviations from the filed tariff.[110]
- If an entity seeks remedial relief and it has "acted in a manner inconsistent with the tariff, or believes it may have done so," its request should be filed as a petition for declaratory order under 18 C.F.R. § 385.207.[111]
- If an entity seeks remedial relief alleging that "a different entity has acted in a manner inconsistent with the tariff," the request should be filed as a complaint under 18 C.F.R. § 385.206.[112]
- "[P]etitions or complaints seeking remedial relief for actions or omissions that occurred prior to the date of filing, where the petitioner acknowledges or the complainant alleges a violation of a tariff filed under the FPA or the NGA" should invoke FPA section 309 or NGA section 16 as the basis for relief.[113]

The Commission also offered guidance to regulated entities "[t]o avoid what otherwise may appear to be harsh outcomes by comparison to past practice."[114] First, tariffs may be modified to contain provisions authorizing waiver by order of the Commission of potential future failures to comply with certain deadlines, which would address potential notice issues.[115] Second, tariff amendments could authorize the curing of certain specified errors within a reasonable time after they occur or have been discovered.[116]

Finally, the Commission proposed to clarify that it would apply its four-part waiver test to evaluate requests for prospective waiver and petitions for remedial relief, in cases involving wholesale power or electric rates and natural gas pipeline

108. *Id*. at P 11.
109. 171 F.E.R.C. ¶ 61,152 at P 12.
110. *Id.*
111. *Id.* at P 13.
112. *Id.*
113. *Id.* at P 14.
114. 171 F.E.R.C. ¶ 61,152 at P 15.
115. *Id.* at P 16. The Commission would review and consider such proposals "on a case-by-case basis."
116. *Id.* at P 17.

rates and services.[117] It also proposed "to find that it is appropriate to require a stronger showing when a petitioner is seeking remedial relief for its own failure to comply with a tariff."[118] FERC sought comments on its proposed policy.[119]

7. FERC Issues Final Rule Limiting Authorizations to Proceed with Construction Activities Pending Rehearing

On June 9, 2020, FERC issued Order No. 871, a Final Rule concerning authorizations to construct natural gas projects approved by the Commission.[120] Under the Final Rule, "[i]n order to balance [its] commitment to expeditiously respond to parties' concerns in comprehensive orders on rehearing and the serious concerns posed by the possibility of construction proceeding prior to the completion of Commission review" of approved natural gas pipelines, the Commission will not issue authorizations to proceed with construction of such projects while rehearing of the initial orders is pending.[121] The rule thereby "ensures that construction of an approved natural gas project will not commence until the Commission has acted upon the merits of any request for rehearing, regardless of land ownership."[122] The effective date for the final rule is August 5, 2020,[123] but the Commission clarified in Order No. 871 that, as a matter of policy, it would "not authorize construction to proceed pending rehearing during the period before the rule" became effective.[124]

E. Notices and Decisions

1. Eagle Crest Energy Co.

On September 19, 2019, the Commission issued an Order Denying Rehearing and Stay in response to the National Parks Conservation Association's (the Association) request for rehearing and stay, and the Desert Protection Society's (the Society) request for rehearing, of a May 2019 Commission order granting extensions of time to commence and complete construction for Eagle Crest Energy Company's Eagle Mountain Pumped Storage Hydroelectric Project No. 13123 (Eagle Mountain Project).[125]

The Commission, in the May 2019 order, had denied the Association's motion to intervene and rejected the Society's participation in the proceeding.[126] The Commission stated that the Association failed to adequately support its request for a stay, as it did not demonstrate that a stay was necessary to allow it to seek judicial

117. 171 F.E.R.C. ¶ 61,156 at P 18.

118. *Id.* at P 20.

119. *Id.* at PP 22-25.

120. Order No. 871, *Limiting Authorizations to Proceed with Construction Activities Pending Rehearing*, 171 F.E.R.C. ¶ 61,201 at P 1, 85 Fed. Reg. 40,113 (2020) (to be codified at 18 C.F.R. pts. 153, 157) [hereinafter Order No. 871].

121. *Id.* at P 11.

122. *Id.*

123. 85 Fed. Reg. 40,113 (July 6, 2020).

124. Order No. 871, *supra* note 119, at P 21.

125. *Eagle Crest Energy Co*., 168 F.E.R.C. ¶ 61,186 at P 1 (2019).

126. *Id.*

review or explain how it would suffer irreparable harm absent a stay.[127] With respect to the Association's rehearing request, the Commission stated that, contrary to the Association's arguments: (1) Rule 214 of the Commission's regulations was inapplicable because the instant proceeding was not one where the Commission permits intervention; (2) the Association's legal objections do not render Eagle Creek's extensions of time material amendments; and (3) the license amendments are not subject to the FPA's and Commission's thirty-day public notice requirement.[128] Regarding the Society's rehearing request, the Commission found that the Society's previous rehearing request was not valid in the instant proceeding because the Commission previously denied the Society's rehearing request and the time for seeking judicial review had expired.[129]

2. Placer County Water Agency

On October 17, 2019, the Commission issued an Order Denying Rehearing of requests for rehearing filed by the California State Water Resources Control Board (California Board) and others following the Commission's determination that the California Board "had waived its authority under section 401(a)(1) of the Clean Water Act to issue a water quality certification for the relicensing of the Middle Fork American River Hydroelectric Project No. 2079."[130] Placer County submitted evidence that California Board sent it e-mails about each upcoming one-year deadline for the purpose of eliciting a withdrawal and submission.[131] One e-mail mentioned denial without prejudice as the alternative if Placer County did not withdraw its pending application, and two of the emails explicitly requested withdrawal and resubmission.[132] The Commission applied *Hoopa Valley Tribe v. FERC*[133] to determine that a formal agreement between a licensee and a state is not necessary to support a finding of waiver.[134] Rather, the Commission concluded that the exchanges between the entities could amount to an ongoing agreement.[135]

3. Grand River Dam Authority

On February 20, 2020, the Commission issued an Order Denying Rehearing to the City of Miami, Oklahoma (Miami).[136] Miami sought rehearing of a March 26, 2019, notice issued by the Secretary of the Commission dismissing the City of Miami's request for rehearing of Commission staff's January 28, 2019, letter stating that a complaint filed by the City of Miami had been referred to the Office of Energy Projects, Division of Hydropower Administration and Compliance.[137] The City of Miami originally filed the complaint alleging that the Grand River Dam

127. *Id*. at P 11.
128. *Id*. at PP 12, 15, 19, 25.
129. *Id*. at P 30.
130. *Placer County Water Agency*, 169 F.E.R.C. ¶ 61,046 at PP 1-2 (2019).
131. *Id*. at P 17.
132. *Id*.
133. 913 F.3d 1099 (D.C. Cir. 2019).
134. 169 F.E.R.C. ¶ 61,046 at P 18.
135. *Id.*
136. *Grand River Dam Authority*, 170 F.E.R.C. ¶ 61,136 at P 1 (2020).
137. *Id.*

Authority (GRDA) was "in violation of its license for failing to obtain property rights in areas repeatedly flooded due to operation of a proposed hydroelectric project."[138] The Commission disagreed with Miami's assertion that the January 28, 2019 Commission staff letter was a final order subject to rehearing.[139] The Commission determined that the January 28 letter did not constitute a final order because it did not "impose[] an obligation, den[y] a right, or fix[] some legal relationship as a consummation of the administrative process."[140] Rather, the letter was "an initial procedural step informing the City of Miami and GRDA how the Commission will process the complaint and is not subject to rehearing."[141]

4. Algonquin Gas Transmission, LLC

On May 21, 2020, the Commission issued an Order Denying Rehearing of a number of requests for rehearing of a Director of the Office of Energy Projects' (OEP) notice providing Algonquin Gas Transmission, LLC and Maritimes & Northeast Pipeline, L.L.C. authorization to proceed with construction of certain Atlantic Bridge Project facilities in Massachusetts and Maine (Notice to Proceed).[142] Procedurally, the decision addressed whether particular individuals or organizations were ever parties to the underlying proceeding and thus entitled to request rehearing.[143] Substantively, the Commission found that the issuance of the Notice to Proceed was appropriate because (1) sub-delegation in this situation to the OEP is permissible; (2) the Notice to Proceed did not violate the operative Certificate Order; and (3) reopening the record was not appropriate because the certificate and rehearing orders were already affirmed on appeal.[144]

138. *Id*. at P 3.
139. *Id*. at P 7.
140. *Id*. at P 6.
141. 170 F.E.R.C. ¶ 61,136 at P 6.
142. *Algonquin Gas Transmission, LLC*, 171 F.E.R.C. ¶ 61,148 (2020).
143. *Id*. at PP 7-8.
144. *Id*. at PP 7, 11-12.

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