REPORT OF THE ELECTRICITY STEERING COMMITTEE

This report covers significant electric regulatory orders issued by the Federal Energy Regulatory Commission (Commission or FERC) as well as court issuances of national import in 2020.

I. FEDERAL ENERGY REGULATORY COMMISSION ORDERS

A. Constellation Mystic Power, LLC, 172 F.E.R.C. ¶ 61,044 (2020).

Mystic 8 and 9 are twin combined cycle units with a combined summer claimed capacity of 1417 MW, located on Boston Harbor in Everett, Massachusetts, and fueled by liquefied natural gas (LNG) imported through the Everett Marine Terminal LNG import facility.[1] The March 2018 determination by ISO New England, Inc. (ISO-NE) to reject Mystic 8 and 9's Retirement De-List Bid for ISO-NE's Forward Capacity Auction 13 based on "fuel security" concerns, and enter into a two-year cost-of-service agreement to retain Mystic 8 and 9 through May 31, 2024, set the stage for the Federal Energy Regulatory Commission's (FERC or Commission) July 17, 2020, Order on Clarification, Directing Compliance, and Addressing Arguments Raised on Rehearing.[2] That Order confirmed many of the rulings in its December 20, 2018, Order accepting the cost-of-service agreement subject to a compliance filing and a paper hearing on return on equity,[3] while clarifying several contested issues and modifying a revenue credit for certain LNG sales from Everett. Commissioner Glick dissented, stating that "the Commission is forcing consumers to pay the full cost of service for Constellation Mystic Power, LLC's (Mystic) electric generating facility in order to bail out the Everett Marine Terminal (Everett), an LNG import facility," over which the Commission has no jurisdiction.[4]

Highlights of the July 17 Order include the following:

- Requiring that Mystic's cost-of-service rate base must reflect the reduction in the depreciated original cost of Mystic 8 and 9 that occurred when (in May 2004) Exelon transferred those units to its project finance lenders in lieu of foreclosure – an issue that had not been addressed definitively in the December 20 Order[5] – while

1. *Constellation Mystic Power, LLC*, 172 F.E.R.C. ¶ 61,044 (2020), *review pending sub nom. Constellation Mystic Power, LLC*, No. 20-1343 (D.C. Cir. filed Sept. 8, 2020) [hereinafter July 17 Order].

2. *Id*. This order was one of three that the Commission issued in the Mystic 8 and 9 cost-of-service agreement proceedings on July 17. *Constellation Mystic Power, LLC*, 172 F.E.R.C. ¶ 61,044 (2020) addressed requests for rehearing of the Commission's July 13, 2018 determination to accept the Mystic 8 and 9 cost-of-service agreement for filing, subject to hearing and refund. *Constellation Mystic Power, LLC*, 172 F.E.R.C. ¶ 61,045 (2020) addressed protests concerning the March 2019 compliance filing directed in the December 20, 2018 order.

3. *Constellation Mystic Power, LLC*, 165 F.E.R.C. ¶ 61,267 (2018) [hereinafter December 20 Order].

4. July 17 Order, *supra* note 1, at P 3 (Glick, Commissioner, dissenting).

5. *Id.* at P 112 ("In May 2004, . . . [i]n practical effect, Exelon sold Mystic 8 and 9 to the lenders for the amount of debt outstanding on the facilities, which was less than Exelon's [FERC's Uniform System of Accounts] net book value (and therefore requires an increase to accumulated depreciation added to the units' net

confirming that "GAAP impairments" need not be reflected in depreciated original cost determined under the Uniform System of Accounts.[6]

- Deferring other contested rate base issues to a "true-up" filing of updated inputs to Mystic 8 and 9's formulary cost-of-service, due in April 2022.[7]
- Declining to apply a "claw back" requirement for refunding rate-financed capital expenditures on the Exelon-owned Everett Marine Terminal if Mystic 8 and 9 were to seek to re-enter ISO-NE markets as a competitive supplier.[8]
- Eliminating the "sliding scale" revenue credit "incentive" for third-party sales of vaporized LNG out of the Everett Marine Terminal, but retaining the provisions of section 4.4 of the RMR Agreement that generally credit payments received by Mystic 8 and 9 from ISO-NE for Energy, Capacity and Ancillary Services against the Mystic 8 and 9 Annual Fixed Revenue Requirement.[9]

B. *New England Ratepayers Ass'n, 172 F.E.R.C. ¶ 61,042 (2020)*

On July 16, 2020, the Commission issued an order dismissing a petition for declaratory order filed by the New England Ratepayers Association (NERA).[10] The petition had requested that the Commission (1) declare that there is exclusive federal jurisdiction over wholesale energy sales from generation sources located on the customer side of the retail meter and (2) order that the rates for such sales be priced in accordance with the Federal Power Act (FPA)[11] or Public Utility Regulatory Policies Act of 1978 (PURPA),[12] as applicable.[13]

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book values). As discussed in the Commission's order on compliance, Mystic must include this transfer in lieu of foreclosure in its net original cost study"). *See also Constellation Mystic Power, LLC*, 172 F.E.R.C. ¶ 61,045 at P 45 (2020) (further explaining ruling). *See generally Northern Border Pipeline Co. v. FERC*, 129 F.3d 1315, 1318 (D.C. Cir. 1997) ("Original cost accounting rests on the notion that the purchaser of a facility simply inherits the previous owner's 'claims to a return of and on the capital originally devoted to the public service'"), *quoting United Gas Pipe Line Co.,* 25 F.P.C. 26, 64 (1961), *rev'd and remanded on other grounds sub nom. Willmut Gas and Oil Co. v. FPC,* 299 F.2d 111 (D.C. Cir. 1962); *PacifiCorp*, 124 F.E.R.C. ¶ 61,046 at PP 28-31 (2008) (merchant facilities that transition to cost-of-service cost recovery become subject to Commission's original cost principle).

6. July 17 Order, *supra* note 1, at P 112.

7. *Id*. at PP 86-90.

8. *Id*. at P 22 ("The Commission's jurisdiction in its review of these costs is over Mystic; the Commission did not assert jurisdiction over Everett, nor is jurisdiction over Everett a precondition to the Commission's actions") (footnotes omitted) and P 43 (" . . . even though Mystic included the Everett Agreement as an attachment to the Mystic Agreement transmittal, the Everett Agreement is not on file with the Commission and is not a jurisdictional rate because Everett is not a jurisdictional entity. Thus, we find that the Commission lacks jurisdiction to require a clawback, true-up, and/or refund of Everett's costs. Additionally, if Mystic 8 and 9 retire but Everett does not, the Mystic Agreement would be terminated; therefore, there would be no rate within the jurisdiction of the Commission through which to order a refund").

9. *Id*. at P 66 ("directing this incentive mechanism, which focuses directly on Everett's conduct rather than Mystic's, may exceed the scope of the Commission's authority").

10. *New England Ratepayers Ass'n*, 172 F.E.R.C. ¶ 61,042, at P 1 (2020).

11. 16 U.S.C. §§ 791-828c (1920).

12. *Id.* § 824a-3.

13. *New England Ratepayers Ass'n*, 172 F.E.R.C. ¶ 61,042, at P 1.

In the order, the FERC pointed out that the issuance of declaratory orders to terminate a controversy or remove uncertainty is discretionary, and that the issues raised by NERA's petition did not warrant a generic statement from the Commission.[14] The Commission further noted that the petition did not identify a specific controversy or harm that the Commission should address.[15] Finally, to the extent that NERA was concerned that state regulatory authorities in New England were not pricing sales from Qualifying Facilities (QF) in accordance with PURPA, the Commission found that the petition did not meet the requirements for enforcement under PURPA.[16]

C. Calpine Corp. et al. v. PJM Interconnection, L.L.C., 169 F.E.R.C. ¶ 61,239 (2019), order on reh'g, Calpine Corp. v PJM Interconnection, L.L.C., 171 F.E.R.C. ¶ 61,035 (2020) (pending petitions for review, Illinois Commerce Commission, et al. v. FERC, Case No. 20-1645, (7th Cir. filed April 20, 2020)); Calpine Corp. et al. v. PJM Interconnection, L.L.C., 171 F.E.R.C. ¶ 61,034 (2020) (pending petitions for review, Illinois Commerce Commission, et al., v. FERC, Case No. 20-1645 (7th Cir. filed April 20, 2020)).

1. Orders on PJM Capacity Market Replacement Rate and Minimum Offer Price Rule (MOPR) mitigation mechanism.

December 2019 Order on Replacement Rate. On December 19, 2019, FERC issued an "Order Establishing Just and Reasonable Rate,"[17] reaffirming its June 29, 2018, finding that PJM should expand the PJM Minimum Offer Price Rule (MOPR) mitigation mechanism to "cover out-of-market support to all new and existing resources, regardless of the resource type, with few or no exceptions."[18] In the December 2019 Order, FERC directed PJM to submit a replacement rate for the capacity market that retains PJM's current review of new natural gas-fired resources under the MOPR and extends the MOPR to include both new and existing resources, internal and external, that receive, or are entitled to receive, certain out-of-market payments, with certain exemptions.[19]

Distinguishing between new and existing resources, FERC said that going forward, the default offer price floor for applicable new resources will be the Net Cost of New Entry (Net CONE) for their resource class.[20] The default offer price floor for applicable existing resources will be the Net Avoidable Cost Rate (Net ACR) for their resource class.[21] The replacement rate will have three categorical

14. *Id.* at P 35.

15. *Id*. at P 36.

16. *Id.* at P 37.

17. *Calpine Corp. et al. v. PJM Interconnection, L.L.C.*, 169 F.E.R.C. ¶ 61,239 (2019) [hereinafter December 2019 Order], *order on reh'g*, *Calpine Corp. et al. v. PJM Interconnection, L.L.C.*, 171 F.E.R.C. ¶ 61,035 (2020) [hereinafter April 16 Order I] (*pending pet for review, Illinois Commerce Commission, et al., v. FERC,* Case No. 20-1645 (7th Cir. filed April 20, 2020)).

18. December 2019 Order, *supra* note 17, at P 32.; *PJM Interconnection, L.L.C*., 163 F.E.R.C. ¶ 61,236 (2018) [hereinafter June 2018 Order], at P 158, *order on reh'g*, *Calpine Corp. et al. v. PJM Interconnection, L.L.C*., 171 F.E.R.C. ¶ 61,034 (2020) [hereinafter April 16 Order II] (*pending pet for review*, *Illinois Commerce Commission, et al., v. FERC*, Case No. 20-1645 (7th Cir. filed April 20, 2020)).

19. December 2019 Order, *supra* note 17, at P 2.

20. *Id*. at PP. 13-14.

21. *Id*.

exemptions: (1) existing self-supply resources, (2) existing demand response, energy efficiency, and storage resources, and (3) existing renewable resources participating in renewable portfolio standards (RPS) programs.[22] There is a fourth exemption, the Competitive Exemption, for new and existing resources that are "not subsidized and thus do not generally require review to protect the integrity and effectiveness of the capacity market."[23] In addition, FERC said that PJM will permit new and existing suppliers that do not qualify for a categorical exemption to justify a competitive offer below the applicable default offer price floor through a Unit-Specific Exemption.[24] FERC explained that "new" in this context refers to resources that have not previously cleared a PJM capacity auction.[25] However, FERC found that "any resource, new or existing, that receives, or is entitled to receive, a State Subsidy, and does not qualify for one of the exemptions . . . should be subject to the MOPR."[26]

FERC defined a State Subsidy to be:

> a direct or indirect payment, concession, rebate, subsidy, non-bypassable consumer charge, or other financial benefit that is (1) a result of any action, mandated process, or sponsored process of a state government, a political subdivision or agency of a state, or an electric cooperative formed pursuant to state law, and that (2) is derived from or connected to the procurement of (a) electricity or electric generation capacity sold at wholesale in interstate commerce, or (b) an attribute of the generation process for electricity or electric generation capacity sold at wholesale in interstate commerce, or (3) will support the construction, development, or operation of a new or existing capacity resource, or (4) could have the effect of allowing a resource to clear in any PJM capacity auction.[27]

FERC explained that the definition "is not intended to cover every form of state financial assistance that might indirectly affect FERC-jurisdictional rates or transactions; nor is it intended to address other commercial externalities or opportunities that might affect the economics of a particular resource. Rather . . . those . . . most nearly "directed at" or tethered to the new entry or continued operation of generating capacity in the federally-regulated multi-state wholesale capacity market administered by PJM."[28] FERC declined to adopt a materiality threshold for the level of State Subsidies or the size of State-Subsidized Resources, stating that a "threshold based on resource size will not prevent a collection of smaller resources from having a significant cumulative impact on competitive outcomes."[29]

FERC acknowledged that "federal subsidies distort competitive markets in the same manner that State Subsidies do,"[30] but nevertheless did not impose the same mitigation measures on federal subsidies, reasoning that the Commission "may not disregard or nullify the effects of federal legislation."[31]

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22. *Id*.
23. *Id.*
24. December 2019 Order, *supra* note 217 at PP. 13-14.
25. *Id.* at n.4.
26. *Id*. at P 9.
27. *Id.* at PP 9, 67.
28. *Id*. at P 68.
29. December 2019 Order, *supra* note 17, at P 9.
30. April 16 Order I, *supra* note 17, at P 10.
31. *Id.*

In establishing the replacement rate, FERC declined to order refunds.[32] FERC directed PJM to submit a compliance filing within ninety (90) days that provides revised dates and timelines for the 2019 Base Residual Auction (BRA) and related incremental auctions, along with revised dates and timelines for the May 2020 BRA and related incremental auctions.[33]

Commissioner Glick issued a twenty-eight page dissent stating that the December 2019 Order "is illegal, illogical, and truly bad public policy."[34] He explained that the order has three major elements: (1) it establishes a sweeping definition of subsidy that will potentially subject much, if not most, of the PJM capacity market to a MOPR; (2) it creates a number of exemptions that will entrench the current resource mix by excluding several classes of existing resources from mitigation; and (3) it discards the resource-specific Fixed Resource Requirement (FRR) Alternative, which was the original point of the June 2018 Order.[35] He said, the December 2019 Order amounts to "a multi-billion-dollar-per-year rate hike for PJM customers, which will grow with each passing year. It will increase both the capacity price in the Base Residual Auction as well as the already extensive quantity of redundant capacity in PJM. It is a bailout, plain and simple."[36]

Commissioner Glick noted that, "[t]he Commission justifies its refusal to extend the MOPR to federal subsidies because to do so would "disregard or nullify the effect of federal legislation."[37] But that can only mean that the Commission is fully aware that this is what it is doing to state policies, notwithstanding its repeated assurances that it respects state jurisdiction over generation facilities."[38]

2. April 16, 2020 Order on Rehearing and Clarification of December 2019 Order on Replacement Rate.

On April 16, 2020, FERC issued an Order on Rehearing and Clarification of the December 2019 Order.[39] FERC granted in part and denied in part requests for rehearing and clarification and directed PJM to submit a compliance filing within forty-five (45) days.[40] On rehearing, many parties argued, among other things, that the December 2019 Order unlawfully intruded on state jurisdiction because there was no evidence in the record that any out-of-market payments caused actual price suppression or distortion of wholesale rates.[41] FERC disagreed, stating "the June 2018 Order squarely found that out-of-market payments, which include all State Subsidies, distort wholesale capacity prices, compromising market integrity."[42]

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32. *Id.* at P 3.
33. *Id*. at P 4.
34. December 2019 Order, *supra* note 17, at P 2 (Glick, Commissioner, dissenting).
35. *Id*.
36. *Id.* at P 3.
37. *Id.* at P 7, n.26.
38. *Id*.
39. April 16 Order I, *supra* note 17.
40. *Id*. at P 1.
41. *Id.* at PP 9, 13, 15.
42. *Id.* at P 20.

In so doing, FERC acknowledged that the courts and the Commission recognize that states have authority over generation matters and decisions concerning fuel type, even if the state action affects the market clearing price.[43] FERC said, however, that it has jurisdiction to regulate the RTO's procurement of capacity and "subjecting resources that receive a State Subsidy . . . to the default offer price floors does not amount to the direct regulation of generation facilities, nor does it prohibit states from using preferred resources."[44] The Commission found that "where states are permissibly acting within their jurisdiction, and those actions *directly affect* the wholesale market, then the Commission has jurisdiction to respond in order to ensure just and reasonable wholesale rates."[45]

FERC rejected requests for rehearing regarding a materiality threshold. Some parties argued the rejection of materiality thresholds is "not adequately supported, creates sweeping burdens for PJM and stakeholders, and creates uncertainty for small resources that are otherwise accommodated in the wholesale markets."[46] FERC disagreed, reasoning that a materiality threshold suggests a level under which a State-Subsidized Resource participating in the capacity market has a *de minimis* effect on prices. FERC said, "State Subsidies at any level are capable of distorting capacity prices."[47]

Parties also argued that the December 2019 Order is arbitrary and capricious because it finds that federal and State Subsidies impact the market similarly, but only mitigates State Subsidies, making the December 2019 Order internally inconsistent and unduly discriminatory.[48] In rejecting those requests for rehearing, FERC said it "decline[d] to use [its] ratemaking authority over federally regulated wholesale markets to address the effects of other federal statutes."[49] FERC reasoned that "the source of authority for federal subsidies, as opposed to State Subsidies, is not equivalent. Federal subsidies are authorized by federal statutes; State Subsidies are authorized by state laws."[50] It said that not all discrimination is undue.[51]

Many parties also raised procedural concerns with the Commission's issuing an order on the replacement rate without first ruling on the requests for rehearing of the June 2018 Order expanding the MOPR mitigation mechanism. Some asserted that the Commission must act within thirty days of the receipt of rehearing requests challenging the underlying orders, noting that there is no other form of remediation.[52] FERC said "the timing of the Commission's action violated the parties' due process rights or compromise the reasonableness of the Commission's expansion of the MOPR to establish a just and reasonable replacement rate."[53] FERC said that the rehearing order relates "only to the second

43. *Id.* at P 10.
44. April 16 Order I, *supra* note 17, at P 17.
45. *Id.* at P 21 (emphasis added).
46. *Id.* at PP 125-127.
47. *Id*. at P 130.
48. *Id*. at P 110.
49. April 16 Order I, *supra* note 17, at P 118.
50. *Id.* at P 119.
51. *Id.*
52. *Id*., at P 22.
53. *Id*., at P 23.

prong of the Commission's duty under FPA section 206-choosing the just and reasonable replacement rate to be observed [after the imposition of the expanded mitigation mechanism]."[54]

Regarding the numerous requests for rehearing on the expanded MOPR, FERC acknowledged that it based its findings on economic theory.[55] While there is no evidence of any actual price suppression in the record, FERC said that there is substantial evidence in the record of increased out of market support for state preferred resources and that an increase in states providing out-of-market support for preferred resources can suppress prices.[56]

Commissioner Glick issued a fifty-five page dissent, stating, among other things, that this case is about two things: (1) increasing the price of capacity in PJM Interconnection, L.L.C. (PJM) and (2) slowing the region's transition to a clean energy future.[57] He said that the December 19, 2019, Order "established a sweeping definition of state subsidy that will subject much, if not most, of the resources in PJM's capacity market to a minimum offer price rule (MOPR) . . . [and] turned the 'market' into a system of bureaucratic pricing . . . ."[58] He explained that the case law stands for the proposition that "the FPA prohibits one sovereign from taking advantage of the law's cooperative federalist model to aim at or target, and, thus, interfere with, the other sovereign's exclusive jurisdiction. But that is exactly what the Commission's new MOPR does."[59]

Commissioner Glick said that FERC has described the new MOPR as "targeting the PJM states' exercise of their exclusive jurisdiction to regulate generation facilities under FPA section 201(b)."[60] In particular, he noted the inconsistency of mitigating state policies without mitigating federal policies.[61] He explained, "the Commission refused to extend the MOPR to federal policies because doing so would 'nullify' those policies."[62] "Indeed, the Commission asserted that federal subsidies 'distort competitive market outcomes' every bit as much as state subsidies and that the only reason to refrain from applying the new MOPR to federal subsidies is that the Commission lacks the power to 'nullify' or 'disregard' federal legislation."[63]

3. Order on Rehearing of June 2018 Order Expanding PJM Capacity Market Minimum Offer Price Rule (MOPR) mitigation mechanism.

<u>April 16, 2020 Order on Rehearing of June 29, 2018 Order on Expanded MOPR</u>. On April 16, 2020, FERC also issued an Order on Rehearing and Clarification[64] of the June 2018 MOPR Order (April 16 Order II).[65] In this second

54. April 16 Order I, *supra* note 17, at P 23.
55. *Id.*, at P 39.
56. *Id.*
57. *Id.* at P 1 (Glick, Commissioner, dissenting).
58. *Id.* at P 3.
59. April 16 Order I, *supra* note 17, at PP 7-8.
60. *Id*. at P 8.
61. *Id.* at P 9 (Glick, Commissioner, dissenting).
62. *Id.* at P 10.
63. *Id.* at P 10 (Glick, Commissioner, dissenting).
64. April 16 Order II, *supra* note 18.

Order on Rehearing, FERC reaffirmed again the expansion of the PJM MOPR mitigation mechanism.[66] In so doing, FERC denied that it failed to meet its FPA section 206 burden to demonstrate that PJM's existing tariff is unjust and unreasonable.[67]

Parties on rehearing argued that FERC failed to explain what constitutes meaningful out-of-market support or what types of out-of-market support cause alleged price suppression.[68] They said there was no evidence in the record that particular out-of-market payments are causing price suppression, that out-of-market support has eroded investor confidence in market price signals, or that quantifies the alleged impact of out-of-market support on the capacity markets.[69] FERC responded that "all out-of-market support gives resources the *ability* to suppress prices, and therefore we need not list every type of out-of-market support affecting the capacity market."[70] The Commission noted that it rejected PJM's proposed materiality threshold because "out-of-market support at any level is capable of distorting capacity prices."[71]

On rehearing, multiple parties also argued that the Commission improperly intruded into the states' traditional jurisdiction over generation and resource portfolio decisions, violated principles of cooperative federalism, and unduly discriminated against certain resources, states, and customers.[72] The Commission said it "does not improperly intrude on the states' prerogatives to determine its energy resource mix and the development of new generation merely because the wholesale rules affect matters within the states' jurisdiction."[73] In justifying the result that consumers would likely have to pay twice for the same capacity, thereby increasing rates, FERC said, "courts have affirmed Commission decisions resulting in customers having to pay twice for state-preferred capacity."[74] FERC also clarified that it "need not make an explicit and separate undue discrimination determination if it finds and explains why the Tariff is unjust and unreasonable."[75]

Commissioner Glick issued a fifty-four page dissent indicating that the MOPR and Replacement Rate Orders are "deeply disappointing because they will fracture PJM, the largest RTO in the country."[76] He said, "states committed

65. On April 16, 2020, FERC also issued an order in related Docket No. EL18-169-000. Order Dismissing Complaint as Moot, *CPV Power Holdings, L.P., Calpine Corp. and Eastern Connection, LLC, v. PJM Interconnection, L.L.C.*, 171 F.E.R.C. ¶ 61,036 (2020) (reasoning that FERC addressed these issues in the June 2018 Order and did not order refunds).

66. April 16 Order II, *supra* note 18, at P 23.

67. *Id*.

68. *Id.* at P 24.

69. *Id.* at PP 60-66.

70. *Id*. at P 24 (emphasis added).

71. April 16 Order II, *supra* note 18, at n.151.

72. *Id.* at PP 60-65.

73. *Id.* at P 66.

74. *Id.*

75. *Id*. at P 69.

76. April 16 Order II, *supra* note 18, at P 99 (Glick, Commissioner, dissenting).

to exercising their rights under FPA section 201(b) will have little choice but to exit the capacity market."[77]

Further, Commissioner Glick said the Commission did not show that it met its burden to establish a just and reasonable and not unduly discriminatory or preferential replacement rate.[78] Specifically, he said:

> [i]f the Commission meets its burden to show that the existing rate is unjust and unreasonable or unduly discriminatory or preferential, then the burden is again on the Commission to establish a "replacement rate" that is itself just and unreasonable and not unduly discriminatory or preferential. The December 2019 Rehearing Order fails to articulate a reasoned basis for concluding that the new MOPR meets that burden. Instead, like the June 2018 Rehearing Order, it doubles down on a conclusory statements [sic] that do not seriously wrestle with the contrary arguments and evidence in the record.[79]

Multiple parties filed petitions for review of these orders in the United States Courts of Appeals for both the Seventh and District of Columbia Circuits. On May 5, 2020, pursuant to 28 U.S.C. § 2112(a)(3), the U.S. Judicial Panel on Multidistrict Litigation issued a Consolidation Order, MCP No. 160, consolidating those proceedings in the United States Court of Appeals for the Seventh Circuit. The case is currently pending in the United States Court of Appeals for the Seventh Circuit*, Illinois Commerce Commission, et al. v. FERC*, Case No. 20-1645.

II. RULEMAKINGS AND POLICY STATEMENTS

A. Participation of Distributed Energy Resource Aggregations in Markets Operated by Regional Transmission Organizations and Independent System Operators, Order No. 2222, 172 F.E.R.C. ¶ 61,247 (2020).

On September 17, 2020, FERC issued a landmark order pertaining to the participation of distributed energy resources (DERs) in Regional Transmission Organizations and Independent System Operators (RTOs/ISOs) wholesale markets.[80] The general purpose of Order No. 2222 is to eliminate barriers for DERs seeking to participate in RTO/ISO wholesale markets through aggregators and thereby enhance competition in those markets.[81] By eliminating or reducing barriers to entry, it may incent development and enhance technological advances of DERs.[82] The Commission issued this rule pursuant to section 206 of the Federal Power Act finding that current RTO/ISO tariffs are unjust and unreasonable because they overly restrict most DERs from participating in wholesale markets due to the resources' small power production, and therefore, such resources have been limited to participating in state sponsored retail programs such as net metering or participating in wholesale markets strictly as load reducers.[83]

77. *Id.*
78. *Id.* at P 37 (Glick, Commissioner, dissenting).
79. *Id.*
80. 172 F.E.R.C. ¶ 61,247, at P 1 (2020).
81. *Id.* at P 3.
82. *Id.* at P 5.
83. *Id.* at P 26.

In Order No. 2222, the Commission requires each RTO/ISO to revise its tariff to: (1) Allow DER aggregators to participate directly in RTO/ISO markets and to establish DER aggregators as a type of market participant;[84] (2) Allow DER aggregators to register DER Aggregators under one or more participation models that accommodate the physical and operational characteristics of DER aggregators;[85] (3) Establish a minimum size requirement for DER aggregations that does not exceed 100 kW;[86] (4) Address locational requirements for DER aggregators;[87] (5) Address distribution factors and bidding parameters for DER aggregators;[88] (6) Address information and data requirements for DER aggregators;[89] (7) Address metering and telemetry requirements for DER aggregations;[90] (8) Address coordination between the RTO/ISO, the DER aggregator, the distribution utility, and the relevant electric retail regulatory authorities;[91] (9) Address modifications to the list of resources in a DER aggregation;[92] (10) Address market participation agreements for DERs;[93] and (11) Accept bids from a DER aggregator if its aggregation includes DERs that are customers of utilities that distributed more than four million megawatt-hours of electricity in the previous fiscal year.[94]

Order No. 2222 was published in the Federal Register on October 21, 2020, and became effective on December 21, 2020.[95] RTOs/ISOs must file tariff changes necessary to implement the requirements of Order No. 2222 by September 17, 2021.

B. Qualifying Facility Rates and Requirements: Implementation Issues Under the Public Utility Regulatory Policies Act of 1978, Order No. 872, 172 F.E.R.C. ¶ 61,041 (2020)[96]

On July 16, 2020, FERC issued Order No. 872, revising its regulations and policies implementing sections 201 and 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA),[97] and adopting many of the reforms proposed in its September 19, 2019 Notice of Proposed Rulemaking.[98] Specifically, Order No.

84. *Id.* at P 130.

85. 172 F.E.R.C. ¶ 61,247, at P 130.

86. *Id.* at P 171.

87. *Id.* at P 204.

88. *Id.* at P 225.

89. *Id.* at P 236.

90. 172 F.E.R.C. ¶ 61,247, at P 262.

91. *Id.* at P 278.

92. *Id.* at P 335.

93. *Id.* at P 352.

94. *Id.* at P 65.

95. FERC Docket No RM18-9-000.

96. Order No. 872 is effective December 31, 2020. *See* Final Rulemaking, *Qualifying Facility Rates and Requirements Implementation Issues Under the Public Utility Regulatory Policies Act of 1978*, 85 Fed. Reg. 54,638 (2020) (codified at C.F.R. pts. 292, 375).

97. Order No. 872, 18 CFR pts 292, 375; Public Utility Regulatory Policies Act of 1978, Pub L. No. 95-617, 92 Stat. 3117 (codified as amended in scattered sections of 15, 16, 42, and 43 U.S.C.). For PURPA sections 201 and 2010, see 16 U.S.C. §§ 796(17)-(18), 824a-3.

98. Notice of Proposed Rulemaking, *Qualifying Facility Rates and Requirements; Implementation Issues Under the Public Utility Regulatory Policies Act of 1978*, 168 F.E.R.C. ¶ 61,184 (2019).

872 implements the following reforms to FERC's treatment of QF and others under its PURPA regulations:

- allowing states the flexibility to use competitive market prices to set as-available energy avoided costs rates, including a rebuttable presumption that using the locational marginal prices (LMP) calculated at the time of delivery to set the rate to be paid by the purchasing electric utility reflects that utility's avoided energy costs.[99] States located outside of an RTO market can use prices from a liquid market hub, the results of a competitive solicitation process, or other mechanisms to set the as-available energy avoid cost rate;[100]
- establishing an option permitting fixed energy rates to be based on estimates of forecasted energy prices at the time of delivery over the anticipated life of the contract;[101]
- allowing states the flexibility to require that QF energy rates vary rather than be fixed during the term of the legally enforceable obligation (LEO) or underlying contract between the QF and the purchasing electric utility;[102]
- revising FERC's standards for the determination of whether the facilities owned by a small power production facility or its affiliates are located at the same site for purposes of determining compliance with the 80 megawatt (MW) size limitation, to adopt the following presumptions for such facilities: (a) facilities located within one mile or less of each other are subject to an irrebuttable presumption they are at the same site; (b) facilities located more than one mile but less than ten miles from one another are subject to a rebuttable presumption they are at a separate site; and (c) facilities located ten miles or more from each other are subject to an irrebuttable presumption they are at separate sites;[103]
- holding that protests may be made to initial self-certifications and applications for Commission certification, and to self-recertifications and applications for Commission recertification making substantive changes to the existing certification;[104]
- allowing rooftop solar photovoltaic developers the option to file recertifications quarterly, rather than each time it adds or removes a rooftop facility;[105]
- lowering the rebuttable presumption of small power production QF's nondiscriminatory access to various RTOs have nondiscrim-

99. Order No. 872, at PP 114, 152; revised PURPA Regulations, 18 C.F.R. § 292.304(b)(6). The use of LMPs applies to the rates paid by electric utilities located in regional transmission organizations or independent system operators (collectively, RTOs) with organized markets.

100. *Id.* at PP 189, 211, 430; revised PURPA Regulations, 18 C.F.R. §§ 292.304(b)(7)-(8).

101. *Id.* at P 227; revised PURPA Regulations, 18 C.F.R. § 292,304(d)(1)(iii).

102. *Id.* at P 253; revised PURPA Regulations, 18 C.F.R. § 292.304(d).

103. *Id.* at P 466; revised PURPA Regulations, 18 C.F.R. § 292.204(a)(2).

104. Order No. 872, *supra* note 97, at P 547; revised PURPA Regulations, 18 C.F.R. § 292.207(c).

105. *Id.* at P 560.

inatory access to competitive markets from QFs with a size of 20 MW or less to 5 MW or less;[106] and

- revising its requirement for establishment of a legally enforceable obligation to provide that the QF demonstrate commercial viability and financial commitment to construct its facility with states to have the flexibility to determine what constitutes an acceptable showing.[107]

In response to criticisms of the reforms proposed in the NOPR, FERC reiterated that while PURPA requires FERC to encourage the development of QFs, this congressional directive was not without limitation, and FERC was also obliged to ensure that the rates charged by QFs are "just and reasonable to the electric consumers of the electric utility and in the public interest."[108] FERC noted that while markets and the outlook for renewable resources and others matured and changed since then, FERC has not substantially revised its regulations since they were first promulgated in 1980.[109] Commissioner Glick dissented in part, arguing that FERC was exceeding its authority and making changes that Congress has declined to make.[110] Glick stated he supported the aspects of the Order No. 872 that clarified the one-mile rule, required that QFs needed to demonstrate commercial viability before securing a LEO, and allow parties to protest self-certification filings.[111]

C. Carbon Pricing in Organized Wholesale Electricity Mkts., 173 F.E.R.C. ¶ 61,062 (2020) (Proposed Carbon Pricing Policy Statement)

On October 15, 2020, FERC issued a Proposed Policy Statement[112] to (i) clarify its jurisdiction over wholesale power market rules that incorporate a carbon price set by a state or group of states, and (ii) encourage RTOs[113] and their stakeholders to explore the potential benefits of submitting such rules for FERC's consideration. Then-Chairman Neil Chatterjee stressed that the Proposed Policy Statement "is *not*, in any way, shape or form, an effort by FERC to take proactive action to set a carbon price" under section 206 of the Federal

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106. *Id.* at P 624; revised PURPA Regulations, 18 C.F.R. § 292.309(d)(2). FERC retained the existing 20 MW threshold for qualifying cogeneration facilities. *See* PURPA section 292.302(d)(1). FERC also indicated the small power production QFs that are over 5 MW but less than 20 MW can seek to show that they do not have nondiscriminatory access to markets. *Id.* at P 636; revised PURPA Regulations, 18 C.F.R. § 292.309(c)(1).

107. Order No. 872, *supra* note 97, at P 684; revised PURPA Regulations, 18 C.F.R. § 292.304(d)(3).

108. *Id.* at P 11 (citing 16 U.S.C. 824a-3(b)(1)); *see also, e.g.*, Order No. 872, *supra* note 97, at PP 7, 9, 12, 26, 295. FERC also stated that its reforms were based on the "concern that, at least in some circumstances, long-term fixed avoided cost energy rates have been well above the purchasing utility's avoided costs for energy," and that nothing in PURPA requires that a particular QF be developed or be profitable. *Id.* at PP 283, 335.

109. *Id.* at PP 2, 51-52.

110. *Id.* at PP 1-2 (Glick, Commissioner, dissenting).

111. *Id.* at P 560.

112. *Carbon Pricing in Organized Wholesale Electricity Mkts.*, 173 F.E.R.C. ¶ 61,062 (2020) [hereinafter Proposed Carbon Pricing Policy Statement].

113. "RTOs" as used herein refers collectively to regional transmission organizations and independent system operators, which are non-profit entities that administer the FERC-regulated organized wholesale power markets.

Power Act (FPA).[114] Rather, it aims to provide confidence to states and RTOs—such as the New York Independent System Operator, which has moved a carbon pricing market design through its stakeholder process—that an RTO proposal to incorporate a state-originated carbon price into its market rules will "not be a dead letter on [FERC's] doorstep."[115]

To that end, FERC clarifies that RTO market rules incorporating a state-determined carbon price can, depending on the facts and circumstances unique to any section 205 proceeding, "fall within the Commission's jurisdiction as a practice affecting wholesale rates."[116] In addition, FERC proposes to "make it [Commission] policy" to encourage RTOs and their stakeholders to consider submitting such market rules for FERC's consideration, recognizing that "properly designed and implemented" proposals could "significantly improve the efficiency of [RTO] markets."[117] However, the Proposed Policy Statement did not offer specific guidance to filing parties in designing their proposals. Instead, FERC sought comment on certain considerations it deemed to be "germane" in assessing whether an RTO proposal is just, reasonable, and not unduly discriminatory or preferential under FPA section 205—and whether there are other "appropriate" factors to take into account. FERC's considerations included:

1) Whether and how differences in the state carbon pricing mechanism (e.g., a direct carbon tax vs. a fluctuating cap-and-trade allowance price) and price level affect an RTO's market design;[118]

2) How an RTO proposal seeks to ensure price transparency and enhance price formation;[119]

3) How carbon prices will be reflected in locational marginal prices;[120]

4) How incorporation of a state carbon price (or multiple states' carbon prices, in the case of multi-state RTOs), affects RTO dispatch and co-optimization;[121] and

5) Whether an RTO proposal results in any economic or environmental "leakage," and if so, whether and how an RTO intends to address such leakage.[122]

Over 100 interested parties filed initial and/or reply comments on the Proposed Policy Statement, which were due on December 1, 2020.[123]

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114. Remarks of Chairman Neil Chatterjee on FERC Proposed Policy Statement on State-Determined Carbon Pricing in Wholesale Markets (Oct. 15, 2020), https://www.ferc.gov/news-events/news/remarks-chairman-neil-chatterjee-ferc-proposed-policy-statement-state-determined (emphasis in original).

115. *Id.*

116. Proposed Carbon Pricing Policy, supra note 112, at P 8.

117. *Id.* at P 15.

118. *Id.* at P 16.

119. *Id.*

120. *Id.*

121. Proposed Carbon Pricing Policy, supra note 112, at P 16.

122. *Id.* at P 8.

123. *Id.*

III. EXECUTIVE ORDERS: PRESIDENTIAL EXECUTIVE ORDER 13,920, 85 FED. REG. 26,595 (MAY 4, 2020)

On May 1, 2020, the President issued Executive Order 13,920 on "Securing the United States Bulk-Power System." (EO)[124] The EO declared a national emergency based on the findings that "foreign adversaries are increasingly creating and exploiting vulnerabilities" in the bulk-power system (BPS) and that the "unrestricted foreign supply of [BPS] electric equipment constitutes an unusual and extraordinary threat to the national security" of the United States.[125] The EO highlighted the risk of foreign adversaries creating and exploiting vulnerabilities in the BPS and included several prohibitions related to BPS equipment.[126] Among other things, the EO restricted any acquisition, importation, transfer, or installation of BPS equipment if that equipment was "designed, developed, manufactured, or supplied by persons owned by, controlled by, or subject to the jurisdiction or direction of foreign adversaries. . . ."[127]

In addition, the EO established a Task Force on Federal Energy Infrastructure Procurement Policies Related to National Security (Task Force), chaired by the Secretary of Energy.[128] The Task Force was directed to: (1) develop energy infrastructure procurement policies for agencies; (2) evaluate methods to incorporate national security considerations into energy security and cybersecurity policymaking; (3) consult with the Electricity Subsector Coordinating Council (and the oil and natural gas sector equivalent) in developing recommendations; and (4) conduct other studies and develop other recommendations as appropriate. The EO also directed the Department of Energy (DOE) to develop regulations within 150 days to protect the BPS from supply chain-related threats[129] and the Federal Acquisition Regulatory Council to consider an amendment to the applicable provisions in the Federal Acquisition Regulation to implement the recommendations of the Task Force within 180 days of receiving those recommendations.[130]

On July 8, 2020, the DOE published a Request for Information (RFI) that sought information about the electric industry's current cybersecurity and supply chain practices to assist the DOE in drafting a rule implementing the EO.[131] In particular, the RFI sought the industry's insight regarding evidence-based cybersecurity maturity metrics, foreign ownership, control, and influence, and the EO's potential economic impacts.[132] The RFI also provided a list of countries currently considered foreign adversaries by the United States for purposes of the EO—China, Cuba, Iran, North Korea, Russia, and Venezuela—and noted that

124. Exec. Order No. 13,920, 85 Fed. Reg. 26,595 (May 4, 2020) [hereinafter EO].
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.* at 26,597-98.
129. EO, *supra* note 124, at 26,596.
130. *Id.* at 26,598.
131. *Securing the United States Bulk-Power System*, 85 Fed. Reg. 41,023 (July 8, 2020).
132. *Id.* at 41,024-26.

China and Russia are "near-peer" adversaries that pose particular risk to U.S. critical infrastructure.[133]

The RFI explained that the DOE will (i) rely primarily on pre-existing standards and frameworks for its risk analysis, in particular the National Counterintelligence and Security Center's supply chain risk management framework, and (ii) build on existing guidelines and standards, including the National Institute of Standards and Technology's 800-series publications, and the Critical Infrastructure Protection Reliability Standards (CIP Standards) developed by the North American Electric Reliability Corporation (NERC) and approved by FERC.[134]

The RFI also stated that the DOE sought to use a "phased process" to prioritize the review of the most critical equipment based on function and impact to the overall BPS. The RFI explained that this process will allow the Secretary of Energy to establish "pre-qualification criteria" for BPS components that support "defense critical electric infrastructure" and "other critical loads and critical transmission feeders (69 kV and above) reported under" the CIP Standards developed by NERC and approved by FERC.[135] Comments in response to the RFI were due on August 24, 2020.[136]

On December 17, 2020, the DOE, pursuant to the EO, issued a Prohibition Order "prohibiting the acquisition, importation, transfer, or installation of specified [BPS] electric equipment that directly serves Critical Defense Facilities (CDFs)."[137] CDFs are facilities designated as such by the Secretary of Energy that are "located in the 48 contiguous States and the District of Columbia that are—(1) critical to the defense of the United States; and (2) vulnerable to a disruption of the supply of electric energy provided to such facility by an external provider."[138] The Prohibition Order "applies to a limited number of [Responsible Utilities] and specific BPS electric equipment from the People's Republic of China that poses an undue risk to the BPS, the security or resilience of critical infrastructure, the economy, national security, or safety and security of Americans."[139] For purposes of the Prohibition Order, "Responsible Utilities" are those utilities that own or operate "Defense Critical Electric Infrastructure (DCEI) . . . that actively serves a CDF."[140]

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133. *Id.* at 41,023-24.

134. *Id.* at 41,024.

135. *Id.*

136. Comments are available at https://www.regulations.gov/docket?D=DOE-HQ-2020-0028.

137. U.S. DEP'T OF ENERGY, PROHIBITION ORDER SECURING CRITICAL DEFENSE FACILITIES (6450-01-P), at 1 (Dec. 17, 2020), https://www.energy.gov/sites/prod/files/2020/12/f81/BPS%20EO%20Prohibition%20Order%20Securing%20Critical%20Defense%20Facilities%2012.17.20%20-%20SIGNED.pdf [hereinafter Prohibition Order].

138. 16 U.S.C. § 824*o*-1(c) (2018).

139. U.S. DEP'T OF ENERGY, SECURING THE UNITED STATES BULK-POWER SYSTEM EXECUTIVE ORDER, https://www.energy.gov/oe/bulkpowersystemexecutiveorder (updated Dec. 18, 2020). *See also* Press Release, U.S. DEPT. OF ENERGY, SECRETARY OF ENERGY SIGNS ORDER TO MITIGATE SECURITY RISKS TO THE NATION'S ELECTRIC GRID (Dec. 17, 2020), https://www.energy.gov/articles/secretary-energy-signs-order-mitigate-security-risks-nations-electric-grid [hereinafter DOE Press Release].

140. Prohibition Order, *supra* note 137, at 6. DCEI "means any electric infrastructure located in any of the 48 contiguous States or the District of Columbia that serves a facility designated [as a CDF] by the Secretary

The Prohibition Order "prohibits utilities that supply CDFs at a service voltage of 69kV or above from acquiring, importing, transferring, or installing BPS electric equipment, and is specific to select equipment manufactured or supplied by persons owned by, controlled by, or subject to the jurisdiction or direction of the People's Republic of China."[141] "Regulated Equipment" subject to the Prohibition Order specifically includes: (i) power transformers with low-side voltage rating of 69 kV or higher and associated control and protection systems; (ii) generator step up transformers with high-side voltage rating of 69 kV or higher and associated control and protection systems; (iii) circuit breakers operating at 69 kV or higher; (iv) reactive power equipment (Reactors and Capacitors) rated at 69 kV or higher; and (v) associated software and firmware installed in any equipment or used in the operation of items (i)-(iv).[142] "Regulated Equipment" also includes "digital components that control the operation of Regulated Equipment and are manufactured or supplied by persons owned by, controlled by, or subject to the jurisdiction or direction of" the People's Republic of China.[143] The list of equipment subject to the Protective Order is substantially narrower than the definition of "bulk-power system electric equipment" in the EO.

In the Prohibition Order, the DOE expressly leaves open the possibility of further actions in connection with the EO, noting that the Prohibition Order "is in addition to other action that the Secretary may undertake pursuant to [the EO], including, but not limited to, rulemaking and further orders of the Secretary."[144]

IV. Court Decisions

A. National Association of Regulatory Utility Commissioners v. Federal Energy Regulatory Commission, Transmission Access Policy Study Group, et al., United States Court of Appeals for the District of Columbia Circuit, Decision: No. 19-1142, July 10, 2020

On July 10, 2020, the United States Court of Appeals for the District of Columbia Circuit (Court) issued its decision (Decision) No. 19-1142 (consolidated with Case No. 19-1147) in National Association of Regulatory Utility Commissioners, v. Federal Energy Regulatory Commission, Respondent, Transmission Access Policy Study Group, et al., and Intervenors on Petitions for Review of Orders of FERC.[145]

The petitions in this case center on Order No. 841 – Electric Storage Participation in Markets Operated by Regulated Transmission Organizations and Independent System Operators, Order 841 (Order).[146] The principal argument of the Petitioners in this case is that Order 841 over-steps jurisdictional boundaries by

pursuant to [16 U.S.C. § 824*o*-1(c)], but is not owned or operated by the owner or operator of such facility." 16 U.S.C. § 824*o*-1(a)(4).

141. DOE Press Release, *supra* note 139, at 1. *See also* Prohibition Order, *supra* note 137, at 6.

142. *See* Prohibition Order, *supra* note 137, Attachment 1 (listing "Regulated Equipment").

143. *Id.* at 6.

144. *Id.* at 10.

145. Nat'l. Ass'n. of Regulatory Util. Comm'r. v. FERC, 963 F.3d 1177 (D.C. Cir. 2020).

146. *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, 18 C.F.R. 35 (2018).

prohibiting States from restricting electric storage resources that are located on distribution systems and retail systems from participating in wholesale energy markets.[147]

In the Decision, the Court first confirms its position regarding the separation of federal and state regulatory jurisdiction.[148] The Court explains that through authority provided to FERC by Congress under the Federal Power Act (Act)[149] that the Commission has the responsibility to ensure wholesale electric rates are "just and reasonable."[150] The Court further explains that this Authority provides FERC with the power to enact certain rules and orders to address economic and regulatory barriers and to promote competition in the wholesale electric markets.[151] The Court also confirms in the Decision that Congress, through the Act, provided states with the jurisdiction of facilities for intrastate commerce or for use of facilities for electric energy that is only consumed by the party transmitting the energy, with the exception of what is specifically allowed for in the Act. The Court cites the Act, (16 U.S.C. § 824(b)(1)).[152]

The Court continues to explain in the Decision that the fundamental purpose of Order 841 was to "remove existing barriers to the participation of electric storage resources" (ESRs) in organized wholesale electric markets.[153] The Court notes that the Order acknowledges that certain ESRs such as batteries have "unique physical and operational characteristics" that distinguish them from more traditional resources, since they are able to "both inject energy into the grid and receive energy from it."[154] And, that Order No. 841 further requires each wholesale market to form participation models that ensure ESRs' eligibility "to provide all capacity, energy, and ancillary services that [they are] technically capable of providing in the RTO/ISO markets."[155]

The Decision notes that the Order 841-A[156] Final Rule denied rehearing on commenters' requests to allow States to opt-out from participation. The Court further notes in the Decision that the FERC in its Order 841-A explained that because of its authority to regulate RTO/ISO markets, the FERC has the same authority to determine which resources are eligible to participate in wholesale markets.[157]

Petitions for review were filed with the Court: 1) by National Association for Regulatory Utility Commissioners (NARUC) No. 19-1142; and 2) by American Public Power Association et al. collectively referred to as "Local Utility Peti-

147. *Nat'l. Ass'n. of Regulatory Util. Comm'r.,* 963 F.3d at 1182.

148. *Id.*

149. *Id.* at 1181 (citing 16 U.S.C. §§ 791- 823).

150. *Id.*

151. *Id.*

152. *Nat'l. Ass'n. of Regulatory Util. Comm'r.,* 963 F.3d at 1182.

153. *Id*.

154. *Id*; *See* Order No. 841, 162 F.E.R.C. ¶ 61,127, at PP 2, 7.

155. *Nat'l. Ass'n. of Regulatory Util. Comm'r.,* 963 F.3d at 1183.

156. *Id.* (citing *Electric Storage Participation in Mkts Operated by Reg'l Transmission Orgs. & Indep. Sys. Operators*, Order 841-A, 167 F.E.R.C. ¶ 61,154 (2019)).

157. *Id.*

tioners" No. 19-1147.[158] The Court consolidated these petitions. The Court notes in the Decision that both petitioners argue that FERC has over-stepped its jurisdictional bounds in preventing States from prohibiting behind the meter resources from participating in wholesale markets; and, Local Utility Petitioners also argue that the FERC decision not to offer an opt-out provision to States is arbitrary and capricious.[159] After concluding that the petitioner arguments are "ripe for judicial resolution,"[160] the Court refers to *FERC v. Elec. Power Supply Ass'n* (*EPSA*)[161] for direction as to how to evaluate these arguments.[162] The Court indicates that *EPSA* guides it to ask the following questions to evaluate the petitions: 1) whether the prohibition against state bans on participation affect directly wholesale markets; and, 2) whether the FERC has in effect regulated state facilities.[163]

With regard to the first question, the Court concluded that FERC's prohibition against state bans on participation indeed directly affects wholesale rates and associated regulations and rules.[164] The Decision states "Order 841 solely targets the manner in which an ESR may participate in wholesale markets. This action is intentionally designed to increase wholesale competition, thereby reducing wholesale rates."[165] As to the second question, the Court affirmed that FERC's action does not "usurp state power" and does not re-draw any jurisdictional lines.[166] The Court upheld its reasoning that "because the FERC has the exclusive authority to determine who may participate in the wholesale markets, the Supremacy Clause – not Order 841 – requires the States not to interfere."[167] The Court concludes that Order 841 rules and regulations are confined to federal transactions and are subject to "ordinary principles of federal presumption," and they do not exceed the FERC's authority under the Act.[168] Lastly, the Court takes up the issue of whether the Order is "arbitrary and capricious." the Court rejected this argument stating that "the FERC's decision to reject a state opt-out was adequately explained."[169] Despite Petitioners' arguments, the Court concluded that FERC did not violate the Federal Power Act's State and Federal jurisdictional split, and that the Order was not "arbitrary and capricious".[170]

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158. *Id.* Other filers of this petition are: National Rural Electric Cooperative Association, Edison Electric Institute, and American Municipal Power Inc.

159. *Nat'l. Ass'n. of Regulatory Util. Comm'r.,* 963 F.3d at 1184.

160. *Id.*

161. FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 773 n.5 (2016).

162. *Nat'l. Ass'n. of Regulatory Util. Comm'r.,* 963 F.3d at 1184.

163. *Id.*

164. *Id.*

165. *Id.* at 1186.

166. *Id.* at 1188.

167. *Id*. at 1187 (citing Miss. Power & Light Co. v. Miss. ex rel. Moore, 487 U.S. 354, 374 (1988)).

168. *Id.* at 1189.

169. *Nat'l Ass'n. of Regulatory util. Comm'r.*, 963 F.3d at 1189.

170. *Id.* at 1190.

B. American Lung Association, et al. v. EPA No. 19-1140 (D.C. Cir.).

In *American Lung Association v. EPA* (*American Lung*)[171] a panel of the U.S. Court of Appeals for the D.C. Circuit vacated the Trump Environmental Protection Agency's (EPA) Affordable Clean Energy Rule (ACE Rule).[172] The ACE Rule purported to repeal and replace the Obama EPA's proposed Clean Power Plan (CPP).[173] The CPP established greenhouse-gas performance standards for existing fossil-fueled power plants. The Supreme Court in 2016 stayed CPP pending judicial review. The CPP has never taken effect. Following vacatur of the ACE Rule, the appeals court issued an order granting EPA's unopposed motion to stay implementation of the CPP, thereby removing any immediate requirement that states file plans implementing the CPP's greenhouse gas performance standards.[174] EPA is expected to use the duration of the stay to craft a new rulemaking setting different emission controls and implementation deadlines consistent with the appeals court decision In *American Lung*.

The CPP would have applied to all fossil-fueled power plants, and EPA projected it would slash power sector emissions of greenhouse gasses by 32 percent from 2005 levels by 2030. ACE applied only to coal-fired plants and, according to EPA's estimate, would reduce emissions by less than one percent by 2030 compared to business as usual. The court vacated ACE because its repeal and replacement of CPP was based "squarely on the erroneous legal premise" that section 111 of the Clean Air Act[175] allowed the EPA Administrator to set performance standards for stationary sources, such as power plants, only in accordance with the best system of emission reduction (BSER) that could be applied "to" or "at" the stationary source.[176] CPP, in contrast, set performance standards for power plants based not only on technological improvements to the existing source, such as improved heat rates, but also on what the court referred to as "generation-shifting" away from high-emission energy sources, such as coal, to less-emitting natural gas or zero-emitting wind, solar or other renewables.

"Read faithfully," the court concluded, section 111 "lacks the straight jacket that EPA imposes" in ACE.[177] Indeed, the court explained that cabining BSER to improvements within the source's fence could actually increase greenhouse gas emissions due to a "rebound effect" in which on-site, technological

171. *Am. Lung*, No. 1140, (D.C. Cir. 2021).

172. 84 Fed. Reg. 32520 (July 8, 2019).

173. 80 Fed. Reg. 64,662 (Oct. 23, 1015).

174. Order, Am. Lung, 2021 U.S. App. LEXIS 1333 (D.C. Cir. Feb. 22, 2021). In a February 12, 2021 memorandum to EPA Regional Administrators, Acting Assistant Administrator Joseph Goffman explained that reinstatement of the CPP "would not make sense" since "the deadline for states to submit State Plans under the CPP has already passed and, in any event, ongoing changes in electricity generation mean that the emission reduction goals that CPP set for 2030 have already been achieved."

175. 42 U.S.C. § 7411.

176. *Am. Lung*, slip op. at 147.

177. *Id.* at 59.

improvements to a coal-fired power station make it economical for a power plant to increase its generation and emissions.[178]

American Lung further vacated EPA's extension in ACE of the compliance deadlines that CPP had set for states to file implementation plans for meeting the CPP performance standard for power plants. The court found that EPA's failure to explain the need for any extension was arbitrary and capricious.[179]

One of the *American Lung* judges dissented in part, contending that EPA can do nothing so "major" as regulating power plant greenhouse gas emissions absent an explicit directive from Congress,[180] despite the Supreme Court's contrary directives in *Massachusetts v. EPA*,[181] and *American Electric Power Co., Inc. v. Connecticut*.[182] He also argued that regulation of hazardous pollution from power plants pursuant to CAA section 212[183] precluded EPA from regulating greenhouse gas emissions under section 111.

C. In the Matter of the Joint Application of Westar Energy, Inc. and Kansas Gas and Electric Co., 460 P.3d 821 (Kan. 2020).

On April 3, 2020, the Supreme Court of Kansas reversed a Kansas Corporation Commission (KCC) order approving a surcharge imposed by Westar Energy, Inc. and Kansas Gas and Electric Company (Utilities) on residential distributed generation (DG) customers, finding that the surcharge was an unlawful price discrimination.[184] The Utilities argued that the surcharge was necessary to resolve a "free rider" problem and to ensure that DG customers paid their fair share of fixed costs.[185] The Court found that the demand charge violated the plain text of KAN. STAT. ANN. § 6-117d (1980), which it described as an "anti-discrimination provision that prohibits utilities from charging DG customers a higher price than non-DG customers for the same service."[186] To ascertain the Kansas Legislature's intent when passing the statute, the Court discussed its historical context, including the energy crises of the 1970s, the "growing concerns that fossil fuels were contributing to global climate change," and the passage of

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178. *Id.* at 35 ("as efficiency upgrades make coal-based energy cheaper, coal-fired power plants will have an incentive to run more often, thereby increasing their overall emissions.").

179. *Id.* at 16, 145-46.

180. *Id.*, dissent slip op. at 15-16 (Walker, J. dissenting) (invoking "major question" doctrine), *contra* slip op. at 80 (finding no major questions that have not previously been resolved).

181. 549 U.S. 497, 532 (2007) (greenhouse gasses are "air pollutants" covered by the CAA), 532-35 (instructing EPA to make "endangerment finding" for greenhouse gasses, which EPA did, thereby triggering CAA requirement to set performance standard).

182. 564 U.S. 410, 424-25 (2011) (affirming CAA authority to regulate greenhouse gas emissions).

183. *Am. Lung*, dissent slip op. at 27 (contending regulation of power plant mercury emission under §112 [42 U.S.C. §7412] precludes regulation of greenhouse gas emissions under § 111), *contra* slip op. at 119-32 (distinguishing Congress's intent to regulate hazardous pollutants under § 112 and emissions regulation under § 111).

184. *In re* Westar Energy, Inc., 460 P.3d 821, 827 (Kan. 2020). The surcharge, which was a flat "demand charge" of $3 in winter and $9 in summer, was approved by the KCC as part of a non-unanimous settlement following the Utilities' 2018 rate case. *Id.* at 822, 827.

185. *Id.* at 822.

186. *Id.* at 826.

the Public Utilities Regulatory Policies Act of 1978.[187] When section 6-117d was enacted, the Court explained there was a "widely held belief that incentivizing consumer generation of electricity was economically beneficial to the entire electric generation system," including through load management control and diversification of consumer demand.[188]

With this historical context in mind, the Court rejected the Utilities' argument that section 6-117d was preempted by a more recent and specific statute, KAN. STAT. ANN. § 66-1265(e) (2014), which allows utilities to propose separate rate structures applying to DG customers who began operating their resource after 2014.[189] The Court reasoned that section 6-117d addresses the *price* charged by utilities, whereas section 66-1265(e) addresses the *structure* of rates, and both statutes can coexist without conflict.[190]

187. *Id.* at 823-25.

188. *Id.* at 825.

189. *In re Westar Energy, Inc.*, 460 P.3d at 825-26.

190. *Id.* at 826-27.

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