

REPORT OF THE FINANCE & TRANSACTIONS COMMITTEE

The following developments concerning finance and transactions occurred during the year 2016.*

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I. FERC ORDER ADOPTING NEW RETURN ON EQUITY METHODOLOGY FOR ELECTRIC UTILITIES APPEALED TO UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

On December 6, 2016, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) heard oral arguments in a case¹ challenging several related Federal Energy Regulatory Commission (FERC or Commission) orders² that modified the methodology FERC uses in making rate of return on equity

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1. *Emera Maine v. FERC*, Docket Nos. 15-1118, 15-1119, & 15-1121 (D.C. Cir. argued Dec. 6, 2016).

2. See *Coakley v. Bangor Hydro-Elec. Co.*, 147 F.E.R.C. ¶ 61,234 (2014) (Opinion No. 531); *Coakley v. Bangor Hydro-Elec. Co., et al.*, 149 F.E.R.C. ¶ 61,032 (2014) (Opinion No. 531-A); *Coakley v. Bangor Hydro-Elec. Co.*, 150 F.E.R.C. ¶ 61,165 (2015) (Opinion No. 531-B).

(ROE) determinations in electric utility rate proceedings. The appeal stems from a complaint proceeding at FERC where the ROE component of rates charged by New England Transmission Owners (NETOs) under ISO New England Inc.'s (ISO-NE) open access transmission tariff (OATT) was challenged as being unjust and unreasonable under the Federal Power Act (FPA).³

In *Opinion No. 531*, the Commission adopted a two-step discounted cash flow (DCF) approach to the ROE determination, the convention in the natural gas and oil pipeline rate context, which takes into account both short-term and long-term equity growth projections.⁴ FERC had previously relied on only a short-term growth projection (a one-step DCF) in ROE determinations for electric utilities.⁵ The Commission further made a tentative finding that the long-term growth projection included in the DCF calculation be based on long-term growth estimates in gross domestic product (GDP), and also ruled that it would halt its practice of making post-hearing ROE adjustments based on changes in the U.S. Treasury bond market.⁶ In *Opinion No. 531-A*, after a paper hearing on the issue, the Commission affirmed its tentative finding in *Opinion No. 531* that GDP is the appropriate long-term growth rate to use.⁷

The underlying rate dispute involved a Commission-authorized base ROE of 11.14% established in 2006.⁸ The complainants, a consortium of New England attorney generals, state utility commissions, and consumer advocates,⁹ alleged that the 11.14% base ROE is unjust and unreasonable because capital market conditions have significantly changed since that base ROE was established.¹⁰ Complainants argued that, following the U.S. housing market collapse, the subsequent financial crisis, and economic recession, bond yields were lower and, thus, capital costs for utilities were, too.¹¹ After an evidentiary hearing where complainants and NETOs submitted respective DCF analyses, the presiding administrative law judge (Presiding Judge) agreed with the complainants and issued an Initial Decision finding the NETOs' current 11.14% base ROE to be unjust and unreasonable.¹² The Presiding Judge found that Commission ROE precedent in determining a just and reasonable rate required a reduction of the authorized base ROE to 9.70%, prospectively, based on changed capital market conditions.¹³ The Presiding Judge's ROE ruling was based on a traditional one-step DCF methodology.¹⁴

In *Opinion No. 531*, the Commission agreed with the Presiding Judge that a lower ROE was warranted in the instant proceeding but further took the opportunity to modify the Commission's entire approach to ROE determinations for

3. 147 F.E.R.C. ¶ 61,234, at P 1.

4. *Id.* at P 8.

5. *Id.*

6. *Id.* at PP 8, 11-12.

7. 149 F.E.R.C. ¶ 61,032, at P 10.

8. 147 F.E.R.C. ¶ 61,234, at P 2.

9. *See id.* at n.8 (listing all of the individual complainants).

10. *Id.* at P 13.

11. *Id.* at P 3.

12. 147 F.E.R.C. ¶ 61,234 at P 5.

13. *Id.*

14. *Id.*

electric utilities.¹⁵ According to the Commission, the time was ripe “to revisit [the Commission’s] historical use of DCF analyses to determine the allowed ROE in [electric] utility cases, given the evolution of the electric industry since [restructuring].”¹⁶ The Commission cited to its prior reasoning in support of the divergence of DCF methodologies used in electric versus natural gas and oil rate cases that “significant differences exist in the electric utility industry and the natural gas pipeline industry which warrant the continued use of different growth rates in the DCF models for each.”¹⁷ According to the Commission, it previously would have been inappropriate “to reflect an estimate of long-term growth in dividends in the DCF model [for electric utilities] . . . [because] investors would be unlikely to place much weight on long-term forecasts [given that] uncertainties regarding the future were so great [due to restructuring].”¹⁸ Now, however, “the investor uncertainty due to the type of changes anticipated [when restructuring began] has diminished.”¹⁹

Employing a two-step DCF methodology based on the existing record in the proceeding, the Commission made a tentative finding, subject to the provision of additional record evidence, that the just and reasonable base ROE for the NETOs is 10.57%.²⁰ The Commission affirmed this finding in *Opinion No. 531-A*.²¹ The 10.57% figure is, of course, lower than the NETOs’ previous Commission-authorized ROE of 11.14%.²² However, had the Commission applied its convention of choosing the midpoint of the zone of reasonableness as the just and reasonable ROE, it would have resulted in an ROE of 9.39%.²³

In announcing the new approach to determine base ROEs for electric utilities, the Commission stated that it considered the concerns raised by both transmission customers and transmission owners.²⁴ The Commission reasoned that it must “meet the requirements of *Hope* and *Bluefield* that ROE be set at a level sufficient to attract investment in interstate electric transmission . . . [s]uch investment helps promote efficient and competitive electricity markets, reduce costly congestion, enhance reliability, and allow access to new energy resources, including renewables.”²⁵

A practical effect of employing the two-step DCF methodology that incorporates a long-term growth rate is to produce a narrower zone of reasonableness from which the Commission will derive a just and reasonable rate.²⁶ The Commission reasoned that the two-step DCF methodology is less likely to produce anomalous results that are not only inconsistent with the theory of the constant growth DCF

15. *Id.* at PP 7-12.

16. *Id.* at P 32.

17. 147 F.E.R.C. ¶ 61,234, at P 28.

18. *Id.* at P 35.

19. *Id.*

20. *Id.* at P 142.

21. 149 F.E.R.C. ¶ 61,032, at P 10.

22. 147 F.E.R.C. ¶ 61,234, at PP 3-5.

23. *Id.* at P 142.

24. *Id.* at P 12.

25. *Id.* at P 150.

26. *Id.* at PP 36-37.

methodology, but that create a less reliable zone of reasonableness defined by two divergent equity growth rates.²⁷ Further, “the [addition of the] long-term growth projection will aid in normalizing any distortions that might be reflected in short-term data limited to a narrow segment of the economy.”²⁸ The Commission also provided a caveat to its new stated preference of using the two-step DCF methodology that “the Commission may consider the extent to which economic anomalies may have affected the reliability of DCF analyses in determining where to set a public utility’s ROE within the range of reasonable returns established by the two-step constant growth DCF methodology.”²⁹

Additionally, the Commission found as significant other record evidence that ROEs authorized by New England state utility commissions are higher than an ROE set at the midpoint of the zone of reasonableness, which puts interstate electric transmission investments at a competitive disadvantage.³⁰ Thus, the Commission noted that “the discrepancy between state ROEs and the 9.39[%] midpoint serves as an indicator that an upward adjustment to the midpoint here is necessary to satisfy *Hope* and *Bluefield*.”³¹ The Commission supported this finding by explaining that the risks faced by investors in interstate electric transmission infrastructure, such as long delays in transmission siting, greater project complexity, environmental impact proceedings, liquidity risk, and shorter investment history, differ from those faced in state-regulated electric distribution.³² The Commission also found that evidence demonstrating anomalous capital market conditions and alternative benchmark ROE methodologies supported establishing the just and reasonable base ROE at the midpoint of the upper half of the zone of reasonableness.³³

In *Emera Maine v. FERC*, petitioners are challenging three issues, two of which are relevant to this discussion: (1) whether the Commission had statutory authority to find NETOs’ pre-existing 11.14% base ROE unjust and unreasonable, when that return fell within the zone of reasonable returns determined for the proxy group in the discounted cash flow analysis; and, (2) whether substantial evidence supported the Commission’s determination to depart from its general policy of using the midpoint of the zone of reasonableness and to place NETOs’ base ROE at the midpoint of the upper half of the zone.³⁴

II. FERC ISSUES NOTICE OF INQUIRY ON INCOME TAX ALLOWANCE POLICY

On December 15, 2016, FERC issued a Notice of Inquiry (NOI) relating to its long-standing policy allowing for the recovery of income tax costs in rates

27. 147 F.E.R.C. ¶ 61,234, at P 37.

28. *Id.* at P 38 (quoting *Transcon. Gas Pipe Line Corp.*, 84 F.E.R.C. ¶ 61,084, at P 61,423, *reh’g denied*, Opinion No. 414-B, 85 F.E.R.C. ¶ 61,323 (1998) (internal quotation marks omitted)).

29. *Id.* at P 41.

30. *Id.* at ¶ 62,473 (Comm’r Norris, dissenting in part).

31. *Id.* at P 148.

32. 147 F.E.R.C. ¶ 61,234, at P 149.

33. *Id.* at PP 142-53.

34. Brief of Respondent Federal Energy Regulatory Commission, Docket Nos. 15-1118, 15-1119 & 15-1121 (D.C. Cir. Apr. 26, 2016).

charged by jurisdictional entities including oil and gas pipelines and electric utilities.³⁵ The inquiry was in response to a July 2016 decision of the D.C. Circuit in *United Airlines, Inc., et. al. v. Federal Energy Regulatory Commission*, 827 F.3d 122 (2016) (the *United Airlines* decision).³⁶ Departing from a prior circuit court decision in 2007 upholding FERC's income tax allowance (ITA) policy, the *United Airlines* decision held that FERC had not adequately demonstrated that the ITA did not result in double recovery of taxes for investors in partnerships; this was because partnerships do not themselves pay taxes, which are instead passed through to the partners.³⁷

As background to the NOI, FERC explained that the relationship between its income tax allowance and return on equity policies “have evolved in the past two decades” to address the increasing deployment of regulated partnership businesses in recent years.³⁸ This has come principally in the form of Master Limited Partnerships (MLPs) acquiring FERC-regulated oil and gas pipelines.³⁹ MLPs do not pay income taxes. Instead income tax obligations and benefits are passed through to the partners.⁴⁰ Since partnerships are not themselves taxable entities, FERC has historically grappled with the question of whether to include an allowance for income taxes in the revenue requirement for regulated entities held by partnerships.⁴¹ In May 2005, following more than a decade of policy evolution and judicial holdings, FERC settled on an income tax allowance policy for pass-through entities.⁴² The policy was summarized as follows:

[A] tax-paying corporation, a partnership, a limited liability corporation, or other pass-through entity would be permitted an income tax allowance on the income imputed to the corporation, or to the partners or the members of pass-through entities, provided that the corporation or the partners or the members, have an actual or potential income tax liability on that public utility income.⁴³

This approach was supported by the D.C. Circuit in *ExxonMobil Oil Corporation v. Federal Energy Regulatory Commission et al.*, 487 F.3d 945 (D.C. Cir. 2007).⁴⁴ The case came in response to shipper challenges to rates charged by an oil pipeline owned by a partnership, SFPP, L.P. (SFPP).⁴⁵ Among other things, the shippers argued that an ITA in this setting would amount to a “phantom tax”

35. Notice of Inquiry, *Inquiry Regarding the Comm'n's Pol'y for Recovery of Income Tax Costs*, Docket No. PL17-1-000, 157 F.E.R.C. ¶ 61,210 at P 1 (Dec. 15, 2016) (“NOI”).

36. *Id.*

37. *Id.* at PP 1-2, 13-16.

38. *Id.* at P 3.

39. 157 F.E.R.C. ¶ 61,210 (citing *Composition of Proxy Groups for Determining Gas and Oil Pipeline Return on Equity*, 123 F.E.R.C. ¶ 61,048 (2008) (*Proxy Group Policy Statement*); *Inquiry Regarding on Income Tax Allowances*, 111 F.E.R.C. ¶ 61,139 (2005) (*Income Tax Policy Statement*)).

40. *Id.*, at PP 5-6. MLPs have come to comprise more than a third of U.S. oil and gas pipeline assets. \$333 billion in oil and gas pipeline MLPs reported by the Master Limited Partnership Association—approximately \$950 billion in industry market capitalization. *Oil & Gas Pipelines – Company List*, YAHOO.COM (last updated Feb. 10, 2017), <https://biz.yahoo.com/p/125mkt.html>.

41. *Policy Statement on Income Tax Allowances*, 111 F.E.R.C. ¶ 61,139 at PP 2-3 (2005).

42. *Id.* at PP 31-32.

43. *Id.* at P 32.

44. *ExxonMobil Oil Corp. v. FERC*, 487 F.3d 945 (D.C. Cir. 2007) (*ExxonMobil*).

45. *Id.* at 947-48.

not borne by the partnership entity.⁴⁶ In its decision, the court dissented from this view, pointing out that FERC policy called for “a tax allowance only to the extent [SFPP] can demonstrate—in a rate proceeding—that its partners incur ‘actual or potential’ income tax liability on their respective shares of the partnership income.”⁴⁷

In July 2016, the D.C. Circuit remanded FERC’s ITA policy back to FERC in its *United Airlines* decision.⁴⁸ Again, the case came in response to shipper challenges to FERC orders on rates charged by SFPP in the wake of the *ExxonMobil* decision. This time, the shippers argued that, notwithstanding taxes incurred directly by partners, partnership ITAs still constituted double-recovery of taxes,⁴⁹ as FERC’s policy of determining appropriate ROEs for corporate or partnership ownership structures at the entity level would effectively grant a higher return to an investor in a partnership than an investor in a corporation.⁵⁰ In the *United Airlines* decision, the court found that FERC had not sufficiently demonstrated that partnerships were not double-recovering tax liabilities when an ITA was present in rates.⁵¹ Specifically, the court found that the combination of FERC’s ITA and ROE policies did not comport with the U.S. Supreme Court’s findings in the *Hope Natural Gas Company* decision of 1944, that “the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks.”⁵²

The December 2016 NOI invited comments on proposed adjustments to FERC’s ITA and/or ROE policies based on the issues raised in the *United Airlines* decision. The NOI called for comments to be submitted by the end of January 2017.

III. FERC ISSUES POLICY STATEMENT ON HOLD HARMLESS COMMITMENTS UNDER FPA SECTION 203

On May 19, 2016, FERC issued a final policy statement to provide guidance regarding future implementation of hold harmless commitments offered by applicants as ratepayer protection mechanisms to mitigate adverse effects on rates that may result from transactions subject to section 203 of the FPA.⁵³ FERC issued a proposed policy statement on hold harmless commitments in January 2015, which the final policy statement adopts, clarifies and withdraws in part.⁵⁴ The final policy statement provides guidance in four areas: (1) the scope and definition of the costs that should be subject to hold harmless commitments, (2) controls and procedures applicants offering hold harmless commitments should implement to track

46. *Id.* at 954.

47. *Id.*

48. *United Airlines, Inc., v. FERC*, 827 F.3d 122, 127 (D.C. Cir. 2016).

49. *Id.* at 127.

50. *Id.* at 134.

51. *Id.* at 136.

52. *Id.* (quoting *Fed. Power Comm’n v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944)).

53. Policy Statement, *Policy Statement on Hold Harmless Commitments*, 155 F.E.R.C. ¶ 61,189 (2016).

54. Proposed Policy Statement, *Policy Statement on Hold Harmless Commitments*, 150 F.E.R.C. ¶ 61,031 (2015).

the costs from which customers will be held harmless, (3) rejection of hold harmless commitments that are limited in duration, and (4) clarification that, in connection with certain types of FPA section 203 transactions, an applicant may be able to demonstrate that the transaction will not have an adverse effect on rates without the need to make any hold harmless commitment.⁵⁵

FERC adopted as general guidance the proposed list of transaction-related costs as specifically set out in its proposed policy statement, and further clarified through its discussion those transaction-related costs, including transition costs, capital costs, internal labor costs, and costs of transactions that are not completed and costs incurred prior to announcement.⁵⁶

IV. FEDERAL HOUSING ADMINISTRATION ANNOUNCES IT WILL INSURE MORTGAGES WITH PACE LOANS

In July 2016, the Federal Housing Administration (FHA) and the U.S. Department of Housing and Urban Development (HUD) announced that the FHA would begin insuring mortgages that also carry liens created by energy retrofit renovations undertaken under the auspice of the Property Assessed Clean Energy (PACE) program.⁵⁷ Under the PACE program, homeowners can obtain financing for improvements that increase a home's energy efficiency, such as new heating or cooling systems, or install renewable energy facilities, like roof-top solar panels.⁵⁸ The upfront costs of these improvements are covered by state and local governments and are repaid over an agreed term through the residence's property tax bill.⁵⁹ For states and municipalities, a PACE program increases local and regional energy efficiency, deployment of renewable energy generation, and provides a stimulus for economic development and jobs in the fast-growing "green" economy.⁶⁰

In order for the FHA to insure mortgages with PACE loans, the liens for the PACE loans must be subordinate to the mortgage. In order to minimize any risk to the FHA, lenders who use PACE loans must escrow PACE payments as they would property taxes. "Additionally, purchasers of homes with existing PACE obligations will be responsible for any unpaid balance of the obligation."⁶¹ As a precursor to allowing the FHA to insure mortgages with PACE associate liens, in 2015, the HUD affirmed the priority status of FHA loans over any PACE loans.⁶² Additionally, PACE loans must meet the following requirements to qualify for FHA insurance on mortgages:

55. 155 F.E.R.C. ¶ 61,189, at P 2.

56. *Id.* at P 34.

57. Ben Lane, *FHA to Begin Insuring Mortgages with PACE Loans*, HOUSINGWIRE (July 19, 2016), <http://www.housingwire.com/articles/37571-fha-to-begin-insuring-mortgages-with-pace-loans>.

58. *Id.* at 1.

59. *Id.*

60. U.S. DEP'T ENERGY, BEST PRACTICE GUIDELINES FOR RESIDENTIAL PACE FINANCING PROGRAMS (Nov. 18, 2016), <https://energy.gov/sites/prod/files/2016/11/f34/best-practice-guidelines-RPACE.pdf>.

61. Lane, *supra* note 57, at 2.

62. Ben Lane, *HUD Moves to Officially Revise FHA Lien Pecking Order*, HOUSINGWIRE (Aug. 24, 2015), <http://www.housingwire.com/articles/34852-hud-moves-to-officially-revise-fha-lien-pecking-order>.

- The escrow payment for the PACE assessment must be made in the same manner as the property tax payment;
- The obligation will not accelerate and only a delinquent portion of the PACE obligation has superior status to an FHA-insured mortgage;
- There are no restrictions on the transfer of the property;
- The existence of, and information on, any PACE loan is apparent and available to “mortgagees, appraisers, borrowers and other parties to an FHA-insured mortgage” through public records; and
- “In the event of the sale, including foreclosure sale . . . the PACE assessment remains with the property . . . [and] the buyer will assume the obligation and will be responsible for the payments on the outstanding PACE amount.”⁶³

An Obama administration announcement stated that the change in FHA policy and use of PACE loans represent a desire to expand access to clean energy technologies to every American family with the option to transition to solar energy and make improvements to their homes to cut their energy bills.⁶⁴

V. WINDS OF CHANGE: DEVELOPMENTS IN OFFSHORE WIND ENERGY IN 2016

A. *Federal Regulators Unveil Vision for Offshore Wind*

In September 2016, the U.S. Department of Energy (DOE) and the U.S. Department of Interior published the National Offshore Wind Strategy.⁶⁵ The report noted that a technical potential of 2,058 gigawatts (GW) of offshore wind capacity is accessible in U.S. waters using existing technology.⁶⁶ The DOE estimates that this potential is equivalent to an energy output of 7,203 terawatt-hours per year sufficient to supply almost double the total electric generation of the United States in 2015.⁶⁷ “Although there has been activity in both state and federal waters, the 2016 *Offshore Wind Energy Resource Assessment for the United States* reports that more than 88% of the technical offshore wind resource potential capacity area (over 606,000 [square kilometers]) in the United States is in federal waters.”⁶⁸

63. Lane, *supra* note 57, at 2.

64. Press Release, the White House, Fact Sheet: Obama Administration Announces Clean Energy Savings for All Americans Initiative (July 19, 2016), <https://www.whitehouse.gov/the-press-office/2016/07/19/fact-sheet-obama-administration-announces-clean-energy-savings-all>.

65. U.S. DEP’T ENERGY & U.S. DEP’T INTERIOR, DOE/GO-102016-4866, NATIONAL OFFSHORE WIND STRATEGY: FACILITATING THE DEVELOPMENT OF THE OFFSHORE WIND INDUSTRY IN THE UNITED STATES (Sept. 2016), <https://www.boem.gov/National-Offshore-Wind-Strategy/> [hereinafter NATIONAL OFFSHORE WIND STRATEGY].

66. *Id.* at 9.

67. *Id.*

68. *Id.* at 11.

B. The Block Island Wind Farm: the First Utility-Scale Offshore Wind Farm to Reach Commercial Operation in the United States

1. Project Development and Infrastructure

On December 12, 2016, the first utility-scale offshore wind project in the United States reached commercial operation.⁶⁹ Located three miles southeast of Block Island, off the coast of Rhode Island, the 30 megawatts (MW) Block Island Wind Farm (BIWF), has five, 6 MW wind turbine generators, four submarine inter-array cables connecting the wind turbine foundations, and a 34.5 kilovolt (kV) export cable running from the northernmost wind turbine generator to an interconnection point on Block Island at the site of the Block Island Power Company's (BIPCo) existing power generation facility.⁷⁰ The BIWF was developed by Deepwater Wind Block Island, LLC (DWBI). National Grid constructed the key electrical infrastructure required to connect the BIWF to Block Island and the Rhode Island mainland, which it called "sea2shore."⁷¹ The sea2shore project was divided into three main areas: substation works, land cable construction, and submarine transmission cable construction.⁷² Hereinafter, BIWF and sea2shore are collectively referred to as the "Project."

Previously, Block Island relied on the BIPCo's diesel-fueled generators, which received fuel delivered by trucks that were ferried to Block Island.⁷³ Since the amount of energy generated by BIWF is more than sufficient to meet Block Island's own electricity demand of approximately 4 MW, excess energy supplied by the BIWF will be redirected to the Rhode Island mainland via the sea2shore transmission system.⁷⁴ By connecting Block Island to the Rhode Island mainland grid via the bi-directional submarine transmission cable, power can be transmitted from Block Island to the Rhode Island mainland, and vice versa.⁷⁵

2. Regulatory Framework and Permitting

Several federal, state and local agencies have regulatory jurisdiction over the Project based on the location of its different components. Federal authority over the ocean and seabeds extends beyond state waters out to 200 nautical miles, while

69. Press Release, Deepwater Wind, America's First Offshore Wind Farm Powers Up (Dec. 12, 2016), <http://dwwind.com/press/americas-first-offshore-wind-farm-powers/>.

70. *Construction Activities*, DEEPWATER WIND, <http://dwwind.com/biwf-construction/> (last visited Mar. 29, 2017); TETRA TECH EC, INC., BLOCK ISLAND WIND FARM AND BLOCK ISLAND TRANSMISSION SYSTEM ENVIRONMENTAL REPORT /CONSTRUCTION AND OPERATIONS PLAN 1-1 (Sep. 2012), <http://dwwind.com/wp-content/uploads/2014/08/Environmental-Report-Section-1.pdf> [hereinafter DEEPWATER WIND, ENVIRONMENTAL REPORT].

71. *Sea2shore Project Overview*, NATIONAL GRID U.S., <http://sea2shoreri.com/project-overview/> (last visited Mar. 12, 2017) [hereinafter *Sea2shore Project Overview*].

72. NationalGridUS, *National Grid: Sea2Shore*, YOUTUBE (Dec. 12, 2016), <https://www.youtube.com/watch?v=cF-f-cxGxVg> [hereinafter *National Grid: Sea2Shore*].

73. U.S. ENERGY INFO. ADMIN., RHODE ISLAND: STATE PROFILE AND ENERGY ESTIMATES (last updated June 16, 2016), <https://www.eia.gov/state/analysis.cfm?sid=RI#44>.

74. Press Release, National Grid, A Historic Achievement - National Grid Customers Are the First in the U.S. to Receive Offshore Wind Power (Dec. 12, 2016), https://www9.nationalgridus.com/aboutus/a3-1_news2.asp?document=10744.

75. *Sea2shore Project Overview*, *supra* note 71.

state authority extends three nautical miles from the shoreline.⁷⁶ The wind turbine generators, export cabling, and segments of the submarine transmission cable are located in state territorial waters. Certain segments of the submarine transmission cable are also located on the outer coastal shelf (OCS) in federal territorial waters and under the U.S. Bureau of Ocean Energy Management's (BOEM) jurisdiction. The substations, upland cabling, and related Project facilities are located onshore in Washington County, Rhode Island.

a. Rhode Island Environmental Laws

At the state level, two agencies had significant regulatory bearing with respect to environmental permits: the Rhode Island Coastal Resources Management Council (RICRMC) and the Rhode Island Department of Environmental Management (RIDEM). The Project required both an assent and a submerged lands lease in respect to the BIWF and the submarine transmission cable in state waters.⁷⁷ On November 17, 2014, the RICRMC approved two joint licenses and assents for the Project, as well as a submerged lands lease for construction to take place "in, above, or beneath" Rhode Island waters.⁷⁸ The RICRMC assent also constituted federal consistency concurrence under the Federal Coastal Zone Management Act.⁷⁹ In addition to RICRMC approval, the Project also obtained environmental approvals from the RIDEM, including Deepwater Wind Water Quality Certificates, deeming the BIWF and submarine transmission cable in compliance with state water quality regulations and the Clean Water Act for the protection of fish and wildlife, as well as the recreational use and navigation of Rhode Island inland and coastal waters.⁸⁰ The "RIDEM issued the project a Freshwater Wetland permit for certain onshore construction activities."⁸¹

b. Federal Permits and Environmental Laws

Because part of the submarine transmission cable fell within federal waters, the Project required permits from the U.S. Army Corps of Engineers (USACE) and the BOEM.⁸² Federal agencies must conduct an analysis of environmental impacts of a federal action under the National Environmental Policy Act (NEPA)

76. *Federal Offshore Lands*, BUREAU OCEAN ENERGY MGMT., <https://www.boem.gov/Federal-Offshore-Lands/> (last visited Jan. 10, 2016).

77. TETRA TECH EC, INC., REQUEST FOR THE TAKING OF MARINE MAMMALS INCIDENTAL TO THE CONSTRUCTION OF THE BLOCK ISLAND WIND FARM 1 (Jun. 24, 2013), http://www.nmfs.noaa.gov/pr/pdfs/permits/biwf_iha_application2014.pdf.

78. 46 R.I. GEN. LAWS § 46-23-6(4)(i) (2007); Press Release, Rhode Island Coastal Resources Management Council, CRMC Council Approves Final DWW Permits (Nov. 17, 2014), http://www.crmc.ri.gov/news/2014_1117_dww.html.

79. 16 U.S.C. §§ 1451-1464 (1990) (The Coastal Zone Management Act (CZMA) requires that federal actions likely to affect any land or water use or natural resource of the coastal zone are consistent with enforceable policies of a state's federally-approved coastal management program).

80. *See also* Press Release, Deepwater Wind, Block Island Wind Farm Receives First Major Project Permits (May 8, 2014), <http://dwwind.com/press/block-island-wind-farm-receives-first-major-project-permits-2>.

81. *Id.* at 1.

82. *Id.*

in consultation with other branches of government, agencies, and stakeholders.⁸³ The NEPA requires that an Environmental Assessment (EA), and in some cases, an Environmental Impact Statement (EIS), be prepared.⁸⁴

In accordance with the NEPA, the USACE prepared an EA to determine whether the Project would have a significant impact on the environment and whether an EIS was required.⁸⁵ The EA evaluated the reasonably foreseeable impacts of construction, operation, maintenance, and decommissioning of the wind turbine generators and the submarine transmission cable.⁸⁶ The Department of the Interior and the BOEM participated in preparation of the EA as cooperating agencies with jurisdiction.⁸⁷ On September 4, 2014, the USACE (in consultation with the National Marine Fisheries Service) issued the EA, a Finding of No Significant Impact and a permit, subject to certain conditions.⁸⁸ The National Marine Fisheries Service also issued an Incidental Harassment Authorization, authorizing the take of marine mammals by harassment incidental to construction of the BIWF.⁸⁹ The BOEM conducted an independent review of the EA, finding that it was NEPA compliant, issuing a right-of-way grant to the Project in respect of the submarine transmission cable located in federal OSC waters and approving the General Activities Plan (GAP) with certain modifications on October 27, 2014.⁹⁰

Deepwater Wind prepared an Environmental Report to support the NEPA EA, as well as other environmental analysis required to obtain federal, state and local approvals and permits.⁹¹ To this end, Deepwater consulted with the U.S. Fish and Wildlife Service, the National Oceanic and Atmospheric Administration, the National Marine Fisheries Service, the U.S. Environmental Protection Agency, the U.S. Coast Guard, as well as the RICRMC's Habitat Advisory Board and Fisheries Advisory Board, the RIDEM, and the Rhode Island State Historic Preservation Office.⁹²

As part of the package of agreements required by the Project, National Grid filed a Large Generator Interconnection Agreement (LGIA) between National

83. 40 C.F.R. §§ 1500-1508 (2005).

84. *National Environmental Policy Act Review Process*, ENVTL. PROT. AGENCY (last updated Jan. 24, 2017), <https://www.epa.gov/nepa/national-environmental-policy-act-review-process>; 40 C.F.R. §§ 1508.4, 1508.13, 1508.16, 1508.20; 40 C.F.R. § 1502.

85. BUREAU OF OCEAN ENERGY MANAGEMENT, FINDING OF NO SIGNIFICANT IMPACT: BLOCK ISLAND WIND FARM AND BLOCK ISLAND TRANSMISSION SYSTEM (Oct. 27, 2014), https://www.boem.gov/BITS_FONSI/.

86. *Id.*

87. *Id.*

88. U.S. ARMY CORPS ENG'RS, PERMIT AUTHORIZING BLOCK ISLAND WIND FARM PROJECT (Sept. 4, 2014), <http://www.nae.usace.army.mil/Portals/74/docs/Topics/DeepwaterWind/BlockIslandPermit.pdf>.

89. Barry Cassell, *NOAA Issues 'Take' Permit For 30 MW Wind Energy Project*, WINDACTION (Sept. 9, 2014), http://www.windaction.org/posts/41187-noaa-issues-take-permit-for-30-mw-wind-energy-project#.WHTmO_6Qw5g.

90. *Block Island Transmission System*, BUREAU OCEAN ENERGY MGMT., <https://www.boem.gov/Block-Island-Transmission-System/> (last visited Mar. 29, 2017).

91. DEEPWATER WIND, ENVIRONMENTAL REPORT, *supra* note 70.

92. *See generally* Press Release, Deepwater Wind, Block Island Wind Farm Now Fully Permitted (Sep. 5, 2014), <http://dwwind.com/press/block-island-wind-farm-now-fully-permitted/>; DEEPWATER WIND, ENVIRONMENTAL REPORT, *supra* note 70, at 6-7.

Grid and DWBI to permit DWBI to interconnect with National Grid's transmission facilities.⁹³ FERC accepted the LGIA by delegated letter order on September 2, 2014.⁹⁴

3. Financing for the Project

In March 2015, Deepwater Wind announced that it had obtained \$268 million in term loan debt for the Project from Société Générale (SG) and Key Bank.⁹⁵ The term loan facility matures in December 2021.⁹⁶ Of the \$268 million, SG provided \$218.5 million and Key Bank provided \$49.5 million.⁹⁷ SG also provided \$29.5 million in letters of credit with a six-year tenor. Deepwater Wind contributed \$70 million in cash equity.⁹⁸ DE Shaw is Deepwater Wind's majority owner.⁹⁹

The Project does not include an engineering, procurement and construction agreement to "wrap" the obligations of the various contractors under the Project and, instead, each contractor is responsible for its portion of work.¹⁰⁰ The offtaker for the Project is National Grid pursuant to a twenty-year power purchase agreement.¹⁰¹ The Project's price is set under the power purchase agreement at \$0.24 per KWh in the first full year of commercial operations and escalating over time to 47.9 cents per KWh.¹⁰² Due to a reliance on diesel generators, the Block Island residents are expected to see energy cost savings despite the high price under the power purchase agreement.¹⁰³

In October 2016, GE Energy Financial Services and Citi provided tax equity financing in an undisclosed amount for the Project.¹⁰⁴ GE Renewable Energy supplied five of the six turbines for the Project and is also providing long-term services and maintenance for the Project.¹⁰⁵

93. *Filing of Large Generator Interconnection Agreement with Deepwater Block Island Wind, LLC*, Docket No. RD10-5-000 at 1 (F.E.R.C. Jul. 24, 2014).

94. *Letter Order Accepting New England Power Company's 7/24/13 Submittal of a Large Generator Interconnection Agreement with Deepwater Block Island, LLC*, Docket No. ER14-2496-000 at 2 (F.E.R.C. Sep. 2, 2014).

95. Press Release, Deepwater Wind, Block Island Wind Farm Now Fully Financed (Mar. 2, 2015), <http://dwwind.com/press/block-island-wind-farm-now-fully-financed/>.

96. Jinjoo Lee, *Block Island Offshore Wind, US*, PROJECT FIN. & INFRASTRUCTURE J. (Aug. 4, 2015), <https://ijglobal.com/articles/95878/block-island-offshore-wind-us>.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. Lee, *supra* note 96.

102. Megan Geuss, *First Offshore Wind Farm in US Waters Delivers Power to Rhode Island*, ARS TECHNICA (Dec. 13, 2016), <http://arstechnica.com/science/2016/12/first-offshore-wind-farm-in-us-waters-is-delivering-power-to-rhode-island/>.

103. *Id.*

104. Mike Lawrence, *GE Energy, Citi Invest in Block Island Wind Project*, CAPE COD TIMES (Oct. 11, 2016).

105. *Id.*

C. Offshore Wind Development in New York: 2016 Regulatory Reforms

Certain aspects of Rhode Island's regulatory approach to the development of offshore wind are being adopted by the state of New York to streamline the regulatory process and encourage offshore wind development.¹⁰⁶

In August 2016, the New York Public Service Commission (NYPSC) approved a new Clean Energy Standard (NYCES) mandating 50% clean energy generation in the state.¹⁰⁷ At the end of October 2016, the NYPSC and the New York State Energy Research and Development Authority (NYSERDA) jointly issued the Blueprint for the New York State Offshore Wind Master Plan, a proposal for eligibility for compliance under the NYCES and procuring qualifying Renewable Energy Credits thereunder (the Blueprint).¹⁰⁸

The NYSEDA is now working towards the development of its New York State Offshore Wind Master Plan to clearly document the process for environmental permitting (the Master Plan).¹⁰⁹ By the end of 2017, it is expected that the NYSEDA will have finalized the Master Plan, which is expected to include a comprehensive strategy for developing offshore wind resources in New York.¹¹⁰ The Master Plan will adopt approaches to improve the speed, cost and effectiveness of the stages in the development process and in a way that considers environmental impacts.¹¹¹

For the Master Plan, New York is examining a 16,740 square-mile area of the ocean, from the south shore of Long Island and New York City to the continental shelf break, for potential future sites for offshore wind.¹¹² The Blueprint notes that while most of New York's renewable energy projects have been built upstate thus far, offshore wind presents an opportunity for downstate development with New York City and Long Island accounting for over 45% of the state's annual electricity usage.¹¹³

D. Statoil Declared Provisional Winner of Offshore Wind Energy Lease off the Coast of New York

On December 16, 2016, Statoil Wind US, LLC, was declared the provisional winner of the BOEM offshore wind energy area lease sale auction for a site off the

106. *Order Adopting a Clean Energy Standard*, Case 15-E-0302 at 25 (N.Y. Pub. Serv. Comm'n Aug. 1, 2016), <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7b44C5D5B8-14C3-4F32-8399-F5487D6D8FE8%7d>.

107. *Id.*

108. N.Y. ENERGY RES. & DEV. AUTH. & N.Y. DEP'T PUB. SERV., CASE 15-E-0302: CLEAN ENERGY STANDARD PHASE I IMPLEMENTATION PLAN PROPOSAL (Oct. 31, 2016) <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={CD1F257F-98DD-487C-BB5D-321D9CF6E9D4}>.

109. N.Y. ENERGY RES. & DEV. AUTH., BLUEPRINT FOR THE NEW YORK STATE OFFSHORE WIND MASTER PLAN (2016), <https://www.nyseda.ny.gov/-/media/Files/Publications/Research/Biomass-Solar-Wind/New-York-State-Offshore-Wind-Blueprint.pdf> [hereinafter NYSEDA BLUEPRINT].

110. *Id.* at 2.

111. *Id.* at 7.

112. *Id.* at 8.

113. *Id.* at 6.

coast of Long Island, New York.¹¹⁴ The site lease covers a wind energy area of approximately 79,350 acres that Statoil claims has the potential to accommodate more than 1 GW of offshore wind energy, with a phased development expected to start with 400-600 MW.¹¹⁵ Six bidders (including the NYSERDA) participated in over twenty rounds of bids of up to \$14.5 million.¹¹⁶ Following thirty-one rounds of bids and two remaining bidders, the final bid was placed by Statoil at \$42,469,725.¹¹⁷ This is the highest price a federal offshore wind lease sale has obtained.¹¹⁸

Before development and construction can commence on the project, in addition to state, local and other regulatory requirements, several BOEM requirements must first be met, including: (1) the Department of Justice Federal Trade Commission must undertake an anti-competitiveness review of the auction, (2) Statoil must pay the BOEM the winning bid amount and provide the BOEM with financial assurance, (3) during the preliminary one-year lease term, Statoil must submit to the BOEM for approval a Site Assessment Plan (SAP) detailing its proposal for the project, (4) after SAP's approval, Statoil will have four and a half years to submit to the BOEM a Construction and Operation Plan (COP), (5) the BOEM must conduct an environmental review of the proposed project and reassess alternatives and (6) if the BOEM approves the COP, Statoil will have twenty-five years to construct and operate the project.¹¹⁹ If successful, the NYSERDA indicated that the offshore wind project would be a potential energy source for New York to meet the Clean Energy Standard mandate that 50% of New York's electricity be obtained from renewable sources by 2030.¹²⁰

Traditionally, building offshore wind projects in the United States involve two parts (1) obtaining a site lease from the BOEM and (2) securing a power purchase agreement.¹²¹ The NYSERDA, who came in second place in the auction, indicated in its Master Plan that it is attempting to streamline the process, minimize risk, and reduce project costs to building offshore wind projects in New York by first obtaining wind energy leases from the BOEM and auctioning off both the site lease and a power purchase agreement to the highest bidding developer.¹²²

114. Melissa Sustaita, *Statoil Wins US Wind Lease Sale Off New York*, OFFSHORE ENG'R (Dec. 16, 2016), <http://www.oedigital.com/regions/arctic/item/14220-statoil-wins-us-wind-lease-sale-off-new-york>.

115. *Id.*

116. BUREAU OCEAN ENERGY MGMT., BIDS RECEIVED FOR LEASE SALE ATLW-5 OFFSHORE NEW YORK (Dec. 15, 2016), <https://www.boem.gov/Bid-Summary-ATLW-6/>.

117. *Id.*

118. Barry Cassell, *Statoil the Winner of US Federal Lease Auction for Wind Area Offshore of New York*, RENEWABLE ENERGY WORLD (Dec. 20, 2016), <http://www.renewableenergyworld.com/articles/2016/12/statoil-the-winner-of-us-federal-lease-auction-for-wind-area-offshore-of-new-york.html>.

119. *Id.*; *Wind Energy Commercial Leasing Process Fact Sheet*, BUREAU OCEAN ENERGY MNGMT. (last updated Sept. 15, 2015), https://www.boem.gov/BOEM-Fact-Sheets/#Renewable_Energy_Fact_Sheets.

120. NYSERDA BLUEPRINT, *supra* note 109, at 2.

121. *Id.* at 7.

122. *Id.*

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