

## REPORT OF THE FERC PRACTICE COMMITTEE

This report covers significant Federal Energy Regulatory Commission (FERC or Commission) practice and procedural issues, including appellate court decisions, major FERC orders and rulemakings, and administrative actions, from July 1, 2017, through June 30, 2018.\*

I.	Procedural holdings from the federal courts .....	2
A.	U.S. Court of Appeals for the District of Columbia Circuit.....	3
1.	NRG Power Marketing, L.L.C. v. FERC .....	3
2.	Kansas Corporation Commission v. FERC .....	5
3.	City of Clarksville v. FERC .....	6
4.	Louisiana Public Service Commission v. FERC.....	8
5.	New England Power Generators Ass’n, Inc. v. FERC .....	9
6.	Orangeburg v. FERC .....	10
7.	Ameren Services Company v. FERC .....	11
8.	Old Dominion Electric Cooperative v. FERC.....	12
B.	Other Circuit Court Decisions.....	14
1.	California Public Utilities Commission v. FERC.....	14
2.	New York State Department of Environmental Conservation v. FERC.....	15
II.	Federal Energy Regulatory Commission Headlines and Notable Administrative Actions .....	16
A.	Commissioner Confirmations and Future Departures.....	16
1.	Neil Chatterjee.....	16
2.	Robert Powelson.....	16
3.	Richard Glick .....	17
4.	Kevin McIntyre .....	17
B.	Rulemakings.....	18
1.	Order No. 833-A: Regulations Implementing FAST Act Section 61003 -- Critical Electric Infrastructure Security and Amending Critical Energy Infrastructure Information; Availability of Certain North American Electric Reliability Corporation Databases to the Commission, Order on Clarification and Rehearing.....	18
2.	Grid Reliability and Resiliency Pricing, Notice Inviting Comments, Docket No. RM18-1-000 (Oct. 2, 2017); Order Terminating Rulemaking Proceeding, Initiating New Proceeding, and Establishing Additional Procedures.....	19

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3.	Order No. 841: Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators.....	20
4.	Order No. 842: Essential Reliability Services and the Evolving Bulk-Power System—Primary Frequency Response.....	21
5.	Order No. 845: Reform of Generator Interconnection Procedures and Agreements .....	22
C.	Policy Statements and Notices .....	23
1.	Elimination of Form 80 and Revision of Regulations on Recreational Opportunities and Development at Licensed Hydropower Projects, Notice of Proposed Rulemaking.....	23
D.	Commission Decisions.....	24
1.	Tennessee Gas Pipeline Co., L.L.C.....	24
2.	DTE Midstream Appalachia, L.L.C. ....	25
3.	ALLETE, Inc.....	25
E.	Administrative Litigation and Settlements.....	26
1.	Procedures Governing Rule 602 Settlement Filings, Notice to the Public .....	26
2.	Elimination of the Requirement to Include Draft Commission Letters Orders with Filed Settlements and Certifications of Uncontested Settlements, Notice to the Public.....	27
3.	Revisions to the Model Protective Order and Related Guidance, Notice to the Public.....	27

#### I. PROCEDURAL HOLDINGS FROM THE FEDERAL COURTS

Pursuant to the Federal Power Act (FPA) and the Natural Gas Act (NGA), parties to a FERC proceeding may appeal an order issued by the Commission in the “United States Court of Appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia.”<sup>1</sup> Parties must file their appeal within sixty days after the FERC order, and “upon the application for rehearing, a written petition praying that the order of the FERC be modified or set aside in whole or in part.”<sup>2</sup> “The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the [FERC], shall be final, subject to review by the Supreme Court of the United States. . . .”<sup>3</sup>

The case summaries below address appellate decisions involving notable procedural issues (e.g., standing, failure to raise issue on rehearing) that resulted in the court dispensing with one or more issues without reaching the merits.

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1. 16 U.S.C. § 825/(b) (2011); 15 U.S.C. § 717r(b) (2011).

2. 16 U.S.C. § 825/(b); 15 U.S.C. § 717r(b).

3. 16 U.S.C. § 825/(b); 15 U.S.C. § 717r(b).

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

1. *NRG Power Marketing, L.L.C. v. FERC*

In *NRG Power Marketing, L.L.C. v. FERC (NRG)*, the D.C. Circuit ruled that the FERC exceeded its authority under section 205 of the FPA, when it ordered certain modifications to a regulated entity's rate change proposal.<sup>4</sup> The proceeding involved the proposal of PJM Interconnection, L.L.C., (PJM) a FERC-regulated regional transmission organization, to modify its Minimum Offer Price Rule – a mechanism governing the submission of bids in PJM's forward capacity auctions.<sup>5</sup> The Minimum Offer Price Rule requires new generators to bid at or above a certain price floor established by PJM.<sup>6</sup> Prior to 2012, a new entrant to the capacity market could gain an exception from the Minimum Offer Price Rule by requesting a “unit-specific review” in which the new generator could demonstrate to PJM that its actual costs justified the submission of an offer below the Minimum Offer Price.<sup>7</sup> In addition, the Minimum Offer Price Rule only applied until the generator's bid had been accepted by PJM at the price floor for at least one year, at which point the generator would no longer be subject to the rule and could bid into subsequent auctions below the price floor.<sup>8</sup>

In December 2012, PJM filed with FERC to amend the Minimum Offer Price Rule, replacing the “unit-specific review” exception with two categorical exceptions from the Rule: a “competitive entry exemption,” applicable to unsubsidized resources or to generators that receive subsidies from specific state-sponsored procurement procedures; and a “self-supply exemption,” applicable to load serving entities that generate a portion of their own supply.<sup>9</sup> Additionally, PJM proposed to extend from one year to three years the time for which a generator must have its offer accepted in a capacity auction before the Minimum Offer Price Rule no longer applies to it.<sup>10</sup>

In the underlying proceeding, the FERC declined to accept PJM's filing as proposed, but instead offered several modifications to PJM's filing that would, in FERC's view, make PJM's filing just and reasonable.<sup>11</sup> Specifically, as described by the Court, the FERC stated “that it would accept the proposed competitive entry and self-supply exemptions, but only on the condition that PJM retain the unit-specific review process.”<sup>12</sup> The FERC also required PJM to maintain the previous one-year mitigation period rather than extending it to three, as proposed.<sup>13</sup> PJM

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4. *NRG Power Mktg, L.L.C. v. FERC*, 862 F.3d 108, 117 (D.C. Cir. 2017).

5. *Id.* at 113.

6. *Id.* at 112.

7. *Id.*

8. *Id.*

9. *NRG*, 862 F.3d at 112-13.

10. *Id.* at 113.

11. *Id.* at 113-14.

12. *Id.* at 114.

13. *Id.*

agreed to those changes, and the FERC's orders accepting the revised proposal were appealed.<sup>14</sup>

The court in *NRG* found that the FERC had overstepped its statutory authority in requiring modifications to PJM's proposal.<sup>15</sup> The court noted that under the statutory structure imposed by the FPA, when a regulated entity proposes a rate change under section 205, the FERC is in a "passive and reactive role."<sup>16</sup> When reviewing a proposal under FPA section 205, the court stated that the "FERC may accept or reject the proposal," but cannot "impose a new rate scheme of its own making without the consent of the utility or [RTO] that made the original proposal."<sup>17</sup> The D.C. Circuit has ruled that the FERC has limited authority under FPA section 205 to suggest modifications to a utility's proposal if the FERC's proposed changes represent "a system of rates similar to that previously in effect, and the utility acquiesces."<sup>18</sup> However, even if the utility consents, the FERC's proposed changes cannot constitute an "entirely new rate scheme," and such active participation in the ratemaking process would remove the FERC from its essentially passive and reactive role under FPA section 205.<sup>19</sup> Further "although 'minor deviations' from a proposal are permissible, 'the imposition by the [FERC] of only half of a proposed rate' is not permissible."<sup>20</sup>

The court in *NRG* found that the FERC had gone beyond offering "minor deviations" from *NRG*'s original proposal and instead offered up modifications to PJM's proposal resulting in an "entirely different rate design than the utility's original proposal or the utility's prior rate scheme."<sup>21</sup> The court also noted that in approving the application of the categorical exceptions without eliminating the unit-specific exemption review process, the Commission had approved "only half of a proposed rate," which it is prohibited from doing under FPA section 205.<sup>22</sup> The *NRG* court stated that whenever the FERC "imposes an entirely new rate scheme in response to a utility's proposal, the utility's customers do not have adequate notice of the proposed rate changes or an adequate opportunity to comment on the proposed changes."<sup>23</sup> Accordingly, the fact that PJM acquiesced to the FERC's proposed changes did not resolve the violation of section 205.<sup>24</sup> In this case, the court determined that the FERC had exceeded its authority under the statute and remanded the case to the agency.<sup>25</sup>

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14. *NRG*, 862 F.3d at 114.

15. *Id.*

16. *Id.*

17. *Id.* (citing *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 10 (D.C. Cir. 2002)).

18. *Id.* at 114-15 (internal quotation and citation omitted).

19. *NRG*, 862 F.3d at 115 (quoting *City of Winnfield v. FERC*, 744 F.2d 871, 875-76 (D.C. Cir. 1984)).

20. *Id.* (quoting *Western Res., Inc. v. FERC*, 9 F.3d 1568, 1579 (D.C. Cir. 1993)).

21. *Id.* (internal citation omitted).

22. *Id.* at 116 (quoting *Western Res.*, 9 F.3d at 1579).

23. *Id.* (internal quotation and internal citation omitted).

24. *NRG*, 862 F.3d at 116-17.

25. *Id.* at 117.

## 2. Kansas Corporation Commission v. FERC

On February 6, 2018, the D.C. Circuit dismissed the Kansas Corporation Commission's (KCC) petition for review of Commission decisions in two similar proceedings, holding that the KCC has not suffered an injury in fact sufficient to establish standing.<sup>26</sup> The KCC, the regulatory agency authorized to regulate the rates charged by public utilities for electricity to consumers in Kansas, challenged the Commission's approval of formula rates for future public utilities to use in operating electric transmission facilities within the Southwest Power Pool (SPP) footprint.<sup>27</sup>

In 2015, the Commission approved similar requests to establish formula rates for future affiliates of a holding company by replicating the approved rates for an existing affiliate.<sup>28</sup> Transource Energy, L.L.C. (Transource) and MPT Heartland Development, L.L.C. (MPT Heartland) both formed wholly owned subsidiaries to compete for Kansas-specific transmission projects within SPP.<sup>29</sup> Transource formed Transource Kansas, L.L.C. (Transource Kansas) and MPT Heartland formed Kanstar Transmission, L.L.C. (Kanstar).<sup>30</sup> In their respective filings seeking approval of their proposed transmission formula rate templates and formula rate protocols pursuant to section 205 of the Federal Power Act, Transource Kansas and Kanstar also sought Commission approval of formula rates for additional state-specific subsidiaries to be formed in the future to compete for transmission projects in other SPP states.<sup>31</sup>

KCC protested both requests, arguing that preapproving a formula rate for a future affiliate would violate the FERC's section 205 mandate to ensure just and reasonable rates.<sup>32</sup> FERC granted Transource Kansas' and Kanstar's requests, instructing that "if and when" SPP awarded a transmission project bid to either entity, the entity and SPP would then jointly file to establish the formula rates approved by the Commission as the *pro forma* formula rate templates for future affiliates of those entities to use in other SPP transmission project bids.<sup>33</sup> The Commission rejected the KCC's requests for rehearing of both orders, ruling that preapproving formula rates for Transource Kansas and Kanstar, which did not operate any active transmission facilities at the time of the orders, was no different from preapproving a formula rate for future Transource and Kanstar affiliates.<sup>34</sup>

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26. Kansas Corp. Comm'n v. FERC, 881 F.3d 924, 926 (D.C. Cir. 2018).

27. *Id.* at 928.

28. *Transource Kansas, L.L.C.*, 151 F.E.R.C. ¶ 61,010 at P 1 [hereinafter *Transource Kansas*], *order denying reh'g*, 154 F.E.R.C. ¶ 61,011 at P 4 (2016) [hereinafter *Transource Kansas Rehearing Order*]; *Kanstar Transmission, L.L.C.*, 152 F.E.R.C. ¶ 61,209 at P 1 [hereinafter *Kanstar*], *order denying reh'g*, 155 F.E.R.C. ¶ 61,167 at P 2 (2016) [hereinafter *Kanstar Rehearing Order*].

29. *Transource Kansas*, *supra* note 28, at P 3; *Kanstar*, *supra* note 28, at P 4.

30. *Transource Kansas*, *supra* note 28, at P 3; *Kanstar*, *supra* note 28, at P 4.

31. *Transource Kansas*, *supra* note 28, at P 3; *Kanstar*, *supra* note 28, at P 4.

32. *Kansas Corp. Comm'n*, 881 F.3d at 928.

33. *Transource Kansas*, *supra* note 28, at P 81; *Kanstar*, *supra* note 28, at P 84.

34. *Transource Kansas Rehearing Order*, *supra* note 28, at P 17; *Kanstar Rehearing Order*, *supra* note 28, at P 9 (denying the KCC's request for rehearing "for the same reasons the Commission denied its similar arguments" in the *Transource Kansas Rehearing Order*).

The KCC appealed to the D.C. Circuit, and the court consolidated the two appeals.<sup>35</sup>

On appeal, the KCC asserted that the Commission acted unlawfully by approving the formula rates for entities that did not yet exist to implement at some point in the future.<sup>36</sup> The KCC argued that the Commission erred by allowing future affiliates of Transource and MPT Heartland to replicate the formula rates approved for Transource Kansas and Kanstar without having to establish the justness and reasonableness of those rates through a section 205 filing.<sup>37</sup> The KCC argued that the Commission's decisions improperly imposed a higher burden of proof on entities like the KCC to establish that the rates are unjust and unreasonable in a later section 206 proceeding.<sup>38</sup>

The court held that KCC failed to affirmatively demonstrate that it had suffered harm sufficient to establish constitutional standing, stating that “[a] harm that will not occur unless a series of contingencies occurs at some unknown future time is not concrete, particularized, actual and imminent.”<sup>39</sup> The court found that the KCC did not establish a “substantial probability” that a long chain of possible events would occur.<sup>40</sup> The court also found that for the KCC to suffer the harm it alleged, all of the following would have to occur: (1) one of the parent holding companies submits a bid to SPP for a transmission project; (2) “SPP awards the bid to the parent company” of a subsidiary to be formed at that time; (3) the subsidiary seeks to implement the approved formula rates; and (4) the KCC believes that the rates are unjust and unreasonable and commences a section 206 proceeding.<sup>41</sup> Without such a showing, the court found that KCC's alleged harm was too speculative and attenuated to confer standing.<sup>42</sup>

### 3. City of Clarksville v. FERC

The United States Circuit Court for the District of Columbia found that the City of Clarksville, Tennessee (Clarksville) is exempt from regulation under section 7 of the NGA, and vacated the FERC's underlying orders to the extent that they asserted jurisdiction over Clarksville.<sup>43</sup> The dispute concerned Clarksville's transport of natural gas, under a service agreement with the City of Guthrie, Kentucky (Guthrie), to a meter and regulating station just shy of the Tennessee/Kentucky border, where Guthrie receives the gas into a pipeline that crosses into Kentucky.<sup>44</sup> Clarksville argued that because it is a municipality as defined by the NGA, it is exempt from the requirement to obtain authorization under section 7 of

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35. *Kansas Corp. Comm'n*, 881 F.3d at 924.

36. *Id.* at 926.

37. *Id.* at 928-29.

38. *Id.* at 929; *see also* 16 U.S.C. § 824e(a).

39. *Kansas Corp. Comm'n*, 881 F.3d at 925.

40. *Id.* at 930 (quoting *American Petroleum Inst. v. EPA*, 216 F.3d 50, 63 (D.C. Cir. 2000)).

41. *Id.*

42. *Id.* at 931.

43. *City of Clarksville, Tenn. v. FERC*, 888 F.3d 477, 479-83 (D.C. Cir. 2018).

44. *Id.* at 480.

the NGA to transport and sell gas to Guthrie for resale and consumption to Kentucky.<sup>45</sup> The FERC found that it had jurisdiction over Clarksville's sales and transportation of natural gas to Guthrie, and that the public convenience and necessity required it to issue to Clarksville a case-specific certificate of limited jurisdiction to authorize the service.<sup>46</sup>

In vacating the FERC's determination, the court relied on section 7(c) of the NGA, which provides that "[n]o natural-gas company or person which will be a natural gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission . . . , unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity."<sup>47</sup> The court also relied on elements within the NGA's definitions of a "natural gas company," a "person," and a "corporation."<sup>48</sup>

The court concluded that this language clearly and unambiguously means that a municipality such as Clarksville is not a natural gas company or a person, and held that section 7(c) of the NGA precludes the FERC from regulating, through certificates of public convenience and necessity, natural gas sales by municipalities acting as municipalities.<sup>49</sup> The court cited a number of decisions spanning the last half-century in which it stated that the FERC has reached the same conclusion.<sup>50</sup>

The court rejected the FERC's argument that a municipality can be a jurisdictional "person" and by extension a "natural gas company" under the NGA.<sup>51</sup> In *United States v. California Public Utilities Commission*, the Supreme Court decided that to apply the definition of "person" contained in section 3 of the Federal Power Act to exclude a municipality would result in a regulatory gap with regard to a company's wholesale sales of electricity to a municipality in another state and could not have been Congress' intent in enacting that statute.<sup>52</sup> The court distinguished the instant case from *California Public Utilities Commission* by concluding that it is not clear that the FERC's lack of jurisdiction over Clarksville's sale of natural gas to Guthrie would create a regulatory gap, since the record contained evidence to suggest that either the state or the locality could regulate the sale.<sup>53</sup> The court also noted that, even if a regulatory gap did exist, it was not the sort of gap that concerned Congress in its enactment of the NGA, which was intended to protect customers from being taken advantage of by natural gas companies.<sup>54</sup>

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45. *Id.* at 483.

46. *Id.* at 481.

47. *Id.* at 483 (quoting 15 U.S.C. § 717f(c)(1)(A)).

48. *City of Clarksville*, 888 F.3d at 483 ("[T]he NGA defines a 'natural-gas company' as a 'person' 'engaged in the transportation or sale for resale of natural gas in interstate commerce.' The Act defines a 'person' to include 'an individual or corporation,' and specifies that a corporation 'shall not include municipalities.'" (internal citations omitted)(quoting 15 U.S.C. § 717f(c)(1)(A)(1), (2), (6)(2012))).

49. *City of Clarksville*, 888 F.3d at 483.

50. *Id.*

51. *Id.* at 484.

52. *Id.*

53. *Id.* at 484-85.

54. *City of Clarksville*, 888 F.3d at 485.

The court also rejected the FERC's argument that, even if a municipality cannot be a natural gas company, Clarksville's interpretation of the NGA is too narrow, because the NGA provides the FERC with jurisdiction over three separate areas (transportation of natural gas in interstate commerce, sale for resale of natural gas in interstate commerce, and natural gas companies engaged in such transportation or sale).<sup>55</sup> The FERC argued that because the transaction between Clarksville and Guthrie constitutes the transportation and sale for resale of natural gas in interstate commerce, the fact that it is a municipality is irrelevant.<sup>56</sup> The court stated that the articulation by section 1(b) of the NGA of these three areas of jurisdiction does not mean that Congress gave the Commission jurisdiction over everything within those three areas.<sup>57</sup> The court noted that Clarksville did not acquiesce to the FERC's jurisdiction, citing precedent suggesting that acquiescence is a factor to be considered.<sup>58</sup> The court also distinguished its own precedent, in which it had affirmed the FERC's determination that it could regulate a municipality where its facilities crossed state lines because it is authorized to act as a municipality only within state lines, from this case, where Clarksville acts only within Tennessee, its state of incorporation, with respect to sales to Guthrie.<sup>59</sup>

#### 4. Louisiana Public Service Commission v. FERC

On March 6, 2018, in *LPSC v. FERC*, the DC Circuit concluded that because the Commission demonstrated a default position against ordering refunds where a rate design (rather than a rate) is found to be unjust and unreasonable, the Commission's decision to deny refunds to the Louisiana Public Service Commission (LPSC) was consistent with this position and adequately explained.<sup>60</sup> In this case, the LPSC challenged "Entergy's allocation of capacity costs among its various operating companies."<sup>61</sup> The LPSC also challenged the Commission's failure to order refunds where it was found that the Louisiana customers had paid unjust and unreasonable rates.<sup>62</sup> The DC Circuit was convinced that the FERC had a general policy of ordering refunds when consumers paid unjust and unreasonable rates, and found that the Commission failed to provide a reasoned explanation for its departure from this policy of ordering refunds.<sup>63</sup> On appeal from remand, the DC Circuit found that the Commission had in fact demonstrated through its precedent that it has a default position of not issuing refunds in where a rate design is found to be unjust and unreasonable, and that no further explanation was necessary, as that position was not departed from.<sup>64</sup> The DC Circuit found it reasonable that the

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55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* (citing *Public Service Co. of North Carolina, Inc. v. FERC*, 587 F.2d 716, 720 (5<sup>th</sup> Cir. 1979)).

59. *City of Clarksville*, 888 F.3d at 486 (citing *Intermountain Mun. Gas Agency v. FERC*, 326 F.3d 1281 (D.C. Cir. 2003)).

60. *Louisiana Pub. Serv. Comm'n v. FERC*, 883 F.3d 929, 931 (D.C. Cir. 2018).

61. *Id.* at 931.

62. *Id.* at 932.

63. *Id.*

64. *Id.*



Commission applied its default position and did not order refunds for Louisiana customers where Entergy's rate design was found to be unjust and unreasonable.<sup>65</sup>

#### 5. New England Power Generators Ass'n, Inc. v. FERC

In its January 2018 opinion in *New England Power Generators Association, Inc. v. FERC*, the D.C. Circuit reaffirmed that it lacks jurisdiction to consider a petition for review of a FERC order where the petitioner has not filed a request for rehearing before the agency in the proceedings below, thus failing to exhaust the administrative remedies provided in Federal Power Act (FPA) section 313(a).<sup>66</sup> In the proceeding below, in Case No. 16-1023, the FERC had rejected a proposal submitted in an ISO New England, Inc. tariff proceeding regarding scarcity pricing rules.<sup>67</sup> The petitioner, New England Power Generators Association (NEPGA), sought clarification of that order, but did not seek rehearing and did not raise the same issue in its clarification request to the Commission that it raised in its brief to the court.<sup>68</sup> Although no party to the appeal raised the jurisdictional challenge with respect to FPA section 313(a), the court ruled that it has an "independent obligation" to assure itself of jurisdiction, "even where the parties fail to challenge it."<sup>69</sup>

The court found it also lacked jurisdiction to review the issue raised by NEPGA under FPA section 313(b), as argued by the FERC in its brief, because NEPGA had never raised the issue before FERC.<sup>70</sup> The court made very clear that not only must the party seeking appellate review have sought rehearing, but also "the party petitioning for judicial review must itself have raised the same objections it seeks to raise in court."<sup>71</sup>

The court rejected NEPGA's argument that it had a reasonable ground for not exhausting its administrative remedies because the issue raised on appeal from the tariff proceeding was "inextricably linked" to the issue before the court in Case No. 1024, the appeal of a complaint proceeding consolidated with the appeal of the tariff proceeding.<sup>72</sup> The court found that the "reasonable ground" exception "is reserved for an 'extraordinary situation,' such as when a Commission practice is admitted or adjudged to be unlawful," and that applying the exception to this case would render the FPA's "strict jurisdictional bar toothless for Commission-initiated [FPA] § 206 proceedings, as any complaint would be 'inextricably linked' to the earlier agency proceedings."<sup>73</sup>

In addition to dismissing NEPGA's petition for review of the FERC's ruling in Case No. 1023, the court ruled on the merits of the Case No. 1024, the complaint

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65. *Louisiana. Pub. Serv. Comm'n*, 883 F.3d at 933.

66. *New England Power Generators Ass'n, Inc. v. FERC*, 879 F.3d 1192, 1197 (2018); *see also* 16 U.S.C. 8251(a).

67. *New England Power*, 879 F.3d at 1197; *ISO New Eng. Inc.*, 147 F.E.R.C. ¶ 61,172 (2014), *reh'g denied*, 153 F.E.R.C. ¶ 61,223 at P 52 (2015).

68. *New England Power*, 879 F.3d at 1198.

69. *Id.* at 1197.

70. *Id.* at 1198.

71. *Id.*

72. *Id.* at 1199.

73. *New England Power*, 879 F.3d at 1199.

order—denying that petition.<sup>74</sup> The court upheld the Commission’s determination that NEPGA had not satisfied its burden to show that ISO New England’s existing rates were unjust and unreasonable.<sup>75</sup> The court held that the FERC’s judgement on technical and policy-based determinations is entitled to “judicial respect,” concluding that the FERC had confronted the evidence presented by NEPGA and properly found it insufficient.<sup>76</sup> The court also held that the FERC’s change in course in a second complaint proceeding in reaction to new information “does not indicate that its initial course was necessarily arbitrary and capricious when charted.”<sup>77</sup>

#### 6. Orangeburg v. FERC

On July 14, 2017, the D.C. Circuit vacated in part and remanded the FERC’s approval of a Joint Dispatch Agreement (JDA) between Duke Energy Corporation and Progress Energy, Inc. filed as part of their 2011 merger, which governed “the interstate dispatch of power from the generation systems of their subsidiaries.”<sup>78</sup> In addition to the merits of the case, the D.C. Circuit considered the threshold issue of whether the Petitioner, the City of Orangeburg, South Carolina, had Article III standing.<sup>79</sup>

As background for the underlying proceeding, Orangeburg had entered into a contract for wholesale power from Duke Energy Carolinas, L.L.C. (Duke), which was later cancelled by Duke pursuant to an escape clause provision because of actions by the North Carolina Utilities Commission (NCUC).<sup>80</sup> Specifically, the NCUC had imposed retail regulatory conditions on Duke’s future power sales as a condition of Duke’s merger with another utility, which NCUC determined in a 2009 Declaratory Order would impact Duke’s wholesale contract with Orangeburg.<sup>81</sup> Because the NCUC’s Declaratory Order impacted Orangeburg’s wholesale contract, Orangeburg sought relief with the FERC through a petition for Declaratory Order, which the Commission dismissed.<sup>82</sup> The JDA incorporated the same NCUC conditions that resulted in cancellation of the Orangeburg/Duke contract, which Orangeburg protested and FERC approved.<sup>83</sup> The FERC also denied Orangeburg’s request for rehearing of the FERC’s order approving the JDA.<sup>84</sup>

In the D.C. Circuit proceeding, FERC argued that Orangeburg lacked Article III standing.<sup>85</sup> The Court explained that, under the Federal Power Act, judicial review is provided “only to those parties ‘aggrieved’ by an order issued by FERC,

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74. *Id.* at 1202.

75. *Id.* at 1200.

76. *Id.*

77. *Id.* at 1201.

78. *Orangeburg, South Carolina v. FERC*, 862 F.3d 1071, 1076 (D.C. Cir. 2017).

79. *Id.* at 1077.

80. *Id.* at 1074-76.

81. *Id.* at 1074-75.

82. *Id.* at 1076.

83. *Orangeburg*, 862 F.3d at 1076.

84. *Id.* at 1077.

85. *Id.*

and a party is ‘aggrieved’ only if it has Article III standing.”<sup>86</sup> In order to satisfy this standard, Orangeburg would be required to show: “actual or imminent injury in fact, fairly traceable to the challenged agency action that will likely be redressed by a favorable decision.”<sup>87</sup> According to the D.C. Circuit, Orangeburg did suffer an injury-in-fact, because it is unable to purchase wholesale power from Duke on the terms it desires, and “[t]he lost opportunity to purchase a desired product is a cognizable injury, even though Orangeburg *can* purchase, and *has* purchased, wholesale power from another source.”<sup>88</sup> Due to the conditions included in the JDA, the D.C. Circuit determined that Orangeburg will once again be unable to purchase from Duke reliable power at a low cost.<sup>89</sup> Therefore, Orangeburg “has demonstrated an ‘imminent’ or ‘certainly impending’ risk of losing out on an opportunity to purchase its desired product – the most reliable and lowest cost power from Duke.”<sup>90</sup> Therefore, the D.C. Circuit held that “Orangeburg has standing to challenge FERC’s approval because, among other reasons, the city has demonstrated an imminent loss of the opportunity to purchase a desired product . . . and because that injury is fairly traceable to the Commission’s approval of the agreement at issue.”<sup>91</sup>

#### 7. Ameren Services Company v. FERC

On June 22, 2018, the D.C. Circuit upheld the FERC’s decision to reject a proposal by Midcontinent Independent System Operator (MISO) to conduct cost allocation for interregional projects using a cost-avoidance method.<sup>92</sup> Before reaching the merits of the petitioners’ arguments, the D.C. Circuit concluded that MISO had standing and that the dispute was ripe, but that the petitioners failed to exhaust one of their arguments before the FERC.<sup>93</sup>

MISO submitted the filing at issue to comply with Order 1000’s interregional project coordination and cost-allocation provisions.<sup>94</sup> This filing included a cost-allocation methodology regarding one of MISO’s neighboring transmission planning regions, the Southeastern Regional Transmission Planning organization (SERTP).<sup>95</sup> MISO proposed to allocate costs using a cost-avoidance method in which costs allocated to MISO for an interregional project would correspond to costs of the regional projects rendered unnecessary by the interregional project.<sup>96</sup>

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86. *Id.*

87. *Id.* at 1077.

88. *Orangeburg*, 862 F.3d at 1077-78.

89. *Id.* at 1079.

90. *Id.* at 1079-80.

91. *Id.* at 1074.

92. *Ameren Servs. Co. v. FERC*, No. 16-1150, slip op. at 2-3 (D.C. Cir. June 22, 2018).

93. *Id.* at 7.

94. *See generally* Order No. 1000, *Transmission Planning and Cost Allocation by Transmission Owning and Operating Pub. Utils.*, F.E.R.C. STATS. & REGS. ¶ 31,323 (2011), *order on reh’g*, Order No. 1000-A, 139 F.E.R.C. ¶ 61,132, *order on reh’g and clarification*, Order No. 1000-B, 141 F.E.R.C. ¶ 61,044 (2012), *aff’d sub nom.* *South Carolina Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014).

95. *Ameren Servs. Co.*, No. 16-1150, slip op. at 4-5.

96. *Id.* at 5.

With respect to the displaced projects, MISO proposed to include in its cost calculation those projects that had been identified in the regional transmission plan, but not yet approved.<sup>97</sup>

The Commission rejected MISO's cost-allocation methodology because it excluded from its cost calculation the displaced projects that had been approved in MISO's transmission plan, which the Commission determined would result in an improper allocation of costs.<sup>98</sup> Specifically, the Commission stated that MISO would bear a lesser share of costs relative to SERTP than would be warranted based on the share of an interregional project's benefits that MISO would receive.<sup>99</sup> The Commission also concluded that MISO would more likely pursue a beneficial interregional project if approved regional projects were included in the cost-allocation analysis.<sup>100</sup>

The transmission providers forming MISO filed a petition for review, and MISO intervened to support them.<sup>101</sup> The D.C. Circuit concluded that, whether or not the petitioners had standing, MISO, the intervenor, had standing because MISO was the direct object of the challenged action.<sup>102</sup>

The D.C. Circuit concluded that the petitioners' claims were ripe for review.<sup>103</sup> The court was not persuaded, as the Commission argued, that the claims were unripe because it was unclear whether any approved regional projects would be displaced as a result of the Commission's decision.<sup>104</sup> The court explained that review was appropriate because the court could review the adequacy of the Commission's explanation without knowing whether the Commission orders resulted in displacement of approved projects.<sup>105</sup> However, as the court next discussed, the petitioners failed to raise with specificity one of their arguments to the FERC in a request for rehearing.<sup>106</sup> Thus, the court stated it could not reach the merits of the petitioners' argument that the FERC improperly shifted the burden to the petitioners to prove the rates in MISO's filing were just and reasonable.<sup>107</sup> On the merits, the D.C. Circuit explained that the FERC adequately addressed the petitioners' concerns about the effects of displacing approved regional projects.<sup>108</sup>

#### 8. Old Dominion Electric Cooperative v. FERC

On June 15, 2018, the D.C. Circuit upheld the FERC's order declining to retroactively waive tariff provisions on the basis that such waiver would violate

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97. *Id.*

98. *Id.*

99. *Id.* at 6.

100. *Ameren Servs. Co.*, No. 16-1150, slip op. at 6.

101. *Id.* at 7.

102. *Id.* at 8-9.

103. *Id.* at 10.

104. *Id.*

105. *Ameren Servs. Co.*, No. 16-1150, slip op. at 10-11.

106. *Id.* at 12.

107. *Id.*

108. *Id.* at 16.

the filed-rate doctrine and the rule against retroactive ratemaking.<sup>109</sup> The court also denied a motion to intervene in the appeal proceeding.<sup>110</sup>

The issues in the underlying proceeding arise from the January 2014 Polar Vortex, which caused “plunging temperatures trigger[ing] a corresponding surge in the demand for electrical power to heat homes and businesses,” and a “regional spike in the price of natural gas.”<sup>111</sup> Old Dominion Electric Cooperative (ODEC) sought retroactive waiver of the PJM Tariff and PJM Operating Agreement to recover increased operational costs due to the Polar Vortex that it would otherwise be unable to recover because the costs exceeded the cap on the amount it can charge for electricity under the governing tariff.<sup>112</sup>

The court framed the issue as whether granting ODEC the requested waiver would violate either the filed rate doctrine or the rule against retroactive ratemaking.<sup>113</sup> With regard to the filed rate doctrine, the court rejected ODEC’s argument that “recouping its losses would be consistent with the filed rate doctrine because ratepayers were on notice that the Tariff set a market rate for electricity, and the Polar Vortex altered the market rate.”<sup>114</sup> According to the court, the rate is allowed to fluctuate when the terms of the filed rate warn customers of such fluctuation at the time they contract with service, which “comports with the filed rate doctrine because the rate changes are foreordained, not retroactive.”<sup>115</sup> In this case, ODEC’s filed rate included a cap, and the court found that ignoring that cap “would retroactively rewrite the terms of the filed rate” a result forbidden by “[t]he filed rate doctrine and rule against retroactive rulemaking.”<sup>116</sup>

The court also denied a motion to intervene filed by the Independent Market Monitor for PJM, finding that the Market Monitor “has no legally cognizable interest in this case, and thus lacks standing.”<sup>117</sup> The court explained that “all would-be intervenors must demonstrate Article III standing,” meaning that they “must establish injury-in-fact to a legally protected interest, causation, and redressability.”<sup>118</sup> The court went on to describe the Market Monitor, noting that its role is “much in the nature of an auditor” -- “to objectively monitor, investigate, evaluate and report on the PJM Markets.”<sup>119</sup> According to the court, “[b]eyond its contractually assigned tasks, the Monitor has no independent legal interest of its own in the PJM markets,” which “is not enough for Article III.”<sup>120</sup> The court continued, explaining that the Market Monitor is not a contractual party to the tariff, and its “ability to observe the market’s operations and to make recommendations or to inform potentially interested parties of its observations” does not change based on

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109. *Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223, 1232 (D.C. Cir. 2018).

110. *Id.*

111. *Id.* at 1228.

112. *Id.* at 1229-30.

113. *Id.* at 1230.

114. *Old Dominion Elec. Coop.*, 892 F.3d at 1231.

115. *Id.*

116. *Id.* at 1232.

117. *Id.*

118. *Id.* at 1232-33.

119. *Old Dominion Elec. Coop.*, 892 F.3d at 1233.

120. *Id.*

whether ODEC prevails on its claims.<sup>121</sup> The court ultimately determined that, “[b]ecause it lacks any legally cognizable interest or right in this proceeding, the Monitor lacks standing,” and it denied the Market Monitor’s intervention.<sup>122</sup>

## B. Other Circuit Court Decisions

### 1. California Public Utilities Commission v. FERC

On January 8, 2018, the United States Court of Appeals for the Ninth Circuit granted a petition for review filed by the California Public Utilities Commission in two Pacific Gas and Electric Company (PG&E) rate proceedings in which the FERC approved a 50 basis point return on equity (ROE) incentive adder for participation in the California Independent System Operator Corporation.<sup>123</sup> The court held that the Commission’s orders granting the adders were arbitrary and capricious.<sup>124</sup> The Commission’s previous Order 679 provided that the adder would be provided to utilities that join and remain members of a transmission organization in “recognition of the benefits that flow from membership” and the fact that “continuing membership is generally voluntary.”<sup>125</sup> In addition, Order 679 explained that a utility “‘will be presumed to be eligible for the incentive’ if it can demonstrate that it has joined a transmission organization and that its membership is ongoing.”<sup>126</sup> The CPUC argued before the Commission that PG&E’s participation in CAISO was mandated by state law, and thus was not voluntary.<sup>127</sup> The CPUC reasoned that PG&E was not free to leave CAISO and that otherwise granting a generic adder was inconsistent with Order 679.<sup>128</sup> The court found that the Commission’s decision granting the incentive adder for PG&E’s participation in CAISO was arbitrary and capricious because the “FERC did not reasonably interpret Order 679 as justifying summary grants of adders for remaining in a transmission organization.”<sup>129</sup> The court found that FERC’s interpretation of its order was plainly erroneous, that it created a generic adder in violation of the order.<sup>130</sup> The court described the Commission’s interpretation of Order 679 as a post hoc rationalization.<sup>131</sup> The court found that the FERC had a longstanding policy that incentives should only be awarded to induce future behavior, concluded that the Commission failed to explain its departure from longstanding policy, and remanded the case to the FERC for further proceedings consistent with the order.<sup>132</sup>

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121. *Id.* at 1234.

122. *Id.*

123. California Pub. Utils. Comm’n v. FERC, 879 F.3d 966, 971 (9th Cir. 2018).

124. *Id.* at 973.

125. Order No. 679, *Promoting Transmission Investment Through Pricing Reform*, 116 F.E.R.C. ¶ 61,057 (2006) (subsequent history omitted); *Cal. Pub. Util. Comm’n*, 879 F.3d at 974 (quoting Order No. 679 at P 331).

126. *Cal. Pub. Util. Comm’n*, 879 F.3d at 971 (quoting Order 679 at P 327).

127. *Id.* at 972-73.

128. *Id.*

129. *Id.* at 973.

130. *Id.* at 974.

131. *Cal. Pub. Util. Comm’n*, 879 F.3d at 976.

132. *Id.* at 978.

## 2. New York State Department of Environmental Conservation v. FERC

On March 12, 2018, the Second Circuit concluded that the New York State Department of Environmental Conservation (the Department) waived its authority to review a pipeline's request for a water quality certification under the Clean Water Act (CWA).<sup>133</sup> In addition, the Second Circuit concluded that the FERC had jurisdiction over the pipeline.<sup>134</sup>

On November 13, 2015, pursuant to the NGA, Millennium Pipeline Company, L.L.C. (Millennium) filed an application with the FERC for certificate authorization to construct and operate a lateral pipeline.<sup>135</sup> On November 18, 2015, Millennium submitted an application for a water quality certification to the Department, which the Department received on November 23, 2015.<sup>136</sup> On both December 7, 2015 and June 17, 2016, the Department informed Millennium that its application was incomplete.<sup>137</sup>

On November 9, 2016, the FERC issued a certificate under section 7(c) of the NGA approving the project subject to conditions.<sup>138</sup> On July 21, 2017, Millennium sought a determination from the FERC that the Department had waived its CWA authority so that Millennium could proceed with construction.<sup>139</sup> On August 30, 2017, the Department denied Millennium's application.<sup>140</sup> On September 15, 2017, the FERC determined that the Department waived its certification authority for Millennium by failing to act on the pipeline's request for water quality certification within one year, as the CWA requires.<sup>141</sup>

Reviewing the Department's appeal, the Second Circuit first rejected the argument that a state agency's interpretation of a federal statute warrants *Chevron* deference.<sup>142</sup> The court explained that it could not defer to the Department's interpretation unless the federal agency that administers the statute "expressly approved the state's interpretation and implementation."<sup>143</sup> The court stated that the relevant federal agency, the Environmental Protection Agency, "is not involved in reviewing or approving the Department's interpretation of the waiver period."<sup>144</sup>

Turning to section 401, the court explained that a state's action on a certification request "'shall not exceed one year' after 'receipt of such request,'" whether or not the state has received a complete application.<sup>145</sup> Thus, the court concluded "that the Department waived its [certification] authority . . . and that [the] FERC

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133. *New York State Dep't of Env'tl. Conservation v. FERC*, 884 F.3d 450, 456 (2d Cir. 2018).

134. *Id.* at 457.

135. *Id.* at 452.

136. The NGA requires applicants to obtain, among other things, certifications required under federal law. *Id.* at 453 (citing 15 U.S.C. §§ 717n(a)(1), (2) (2012)).

137. *Id.*

138. *N.Y. State Dep't of Env'tl. Conservation*, 884 F.3d at 453.

139. *Id.* at 454.

140. *Id.*

141. *Id.*

142. *Id.* at 455.

143. *N.Y. State Dep't of Env'tl. Conservation*, 884 F.3d at 455.

144. *Id.*

145. *Id.* at 455-56 (citation and internal quotation marks omitted).

properly issued a waiver order permitting Millennium to proceed with construction.”<sup>146</sup>

Next, reviewing an intervenor’s challenge of the FERC’s jurisdiction over Millennium’s application, the court recognized that the pipeline at issue was located entirely in one state—New York—and would only deliver gas to Valley Energy Center.<sup>147</sup> Nevertheless, the court explained, because the pipeline would “receive out-of-state gas from the Millennium mainline,” the pipeline would “transport gas in interstate commerce as part of an integrated system.”<sup>148</sup> Thus, the court concluded, the FERC had jurisdiction over the application.<sup>149</sup>

## II. FEDERAL ENERGY REGULATORY COMMISSION HEADLINES AND NOTABLE ADMINISTRATIVE ACTIONS

### A. *Commissioner Confirmations and Future Departures*

#### 1. Neil Chatterjee

On August 4, 2017, the Senate confirmed Neil Chatterjee as a Commissioner at the FERC.<sup>150</sup> Commissioner Chatterjee “served as [FERC] Chairman from August 2017 to December 2017.”<sup>151</sup> “Prior to joining the Commission, [Commissioner Chatterjee] was [senior] energy policy advisor to U.S. Senate Majority Leader Mitch McConnell (R-KY),” and “worked as a Principal in Government Relations for the National Rural Cooperative Association, and as an aide to House Republican Conference Chairwoman Deborah Pryce (R-OH).”<sup>152</sup> He “will serve out the remainder of a term that ends in June 2021.”<sup>153</sup>

#### 2. Robert Powelson

On August 4, 2017, the Senate confirmed Robert Powelson as a Commissioner at the FERC.<sup>154</sup> Prior to joining the Commission, Commissioner Powelson served as the President of the National Association of Regulatory Utility Commis-

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146. *Id.* at 456.

147. *Id.* at 457.

148. *N.Y. State Dep’t of Env’tl. Conservation*, 884 F.3d at 457 (citing *Michigan Consol. Gas Co. v. Panhandle E. Pipe Line Co.*, 887 F.2d 1295, 1299 (6th Cir. 1989)); *id.* (citing *Oklahoma Nat. Gas Co. v. FERC*, 28 F.3d 1281, 1287 (D.C. Cir. 1994)).

149. *N.Y. State Dep’t of Env’tl. Conservation*, 884 F.3d at 457.

150. *News Release, Senate Confirms Chatterjee, Powelson to FERC*, FEDERAL ENERGY REGULATORY COMMISSION (Aug. 4, 2017), <https://www.ferc.gov/media/news-releases/2017/2017-3/08-04-17.asp#.W7P1KhNKiAw>.

151. *Commissioner Neil Chatterjee Biography*, FEDERAL ENERGY REGULATORY COMMISSION (Dec. 7, 2017), <https://www.ferc.gov/about/com-mem/chatterjee/chatterjee-bio.asp?csrt=8510065127970010853>.

152. *Id.*

153. *News Release: Senate Confirms Chatterjee*, *supra* note 150.

154. *Id.*



sioners, and served as a Commissioner at the Pennsylvania Public Utility Commission for nine years.<sup>155</sup> Additionally, Commissioner Powelson served on the Marcellus Shale Advisory Commission, Drexel University's Board of Trustees, Lincoln University's Board of Directors, and from 1994 to 2008, as the President and Chief Executive Officer of the Chester County (PA) Chamber of Business and Industry.<sup>156</sup> Commissioner Powelson was to serve out the remainder of a term that ends in June 2020; however, on June 28, 2018, he announced plans to leave the Commission in mid-August 2018 to become the President and CEO of the National Association of Water Companies.<sup>157</sup>

### 3. Richard Glick

On November 2, 2017, the Senate confirmed Richard Glick as a Commissioner at the FERC.<sup>158</sup> Commissioner Glick served as "general counsel for the Democrats on the Senate Energy and Natural Resources Committee" beginning February 2016.<sup>159</sup> Additionally, Commissioner Glick served as an energy lobbyist at Avangrid Renewables, PPM Energy, and PacifiCorp, and as an advisor to Department of Energy Secretary Bill Richardson during President Clinton's administration.<sup>160</sup> He will serve out the remainder of a term that ends in June 2022.<sup>161</sup>

### 4. Kevin McIntyre

On November 2, 2017, the Senate confirmed Kevin McIntyre as a Commissioner at the FERC, to serve as Chairman.<sup>162</sup> Chairman McIntyre was formerly "co-leader of the global Energy Practice at the law firm Jones Day, where he" focused on issues involving government regulation of energy markets, electric and natural gas utilities, and oil and natural gas pipelines.<sup>163</sup> Chairman McIntyre also served on the advisory board of the Corporate Counsel Institute at the Georgetown University Law Center and on the Energy Bar Association Charitable Founda-

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155. *Company Overview of National Association of Water Companies*, BLOOMBERG (Oct. 2, 2018), <https://www.bloomberg.com/research/stocks/private/person.asp?personId=417560517&privcapId=113730772&previousCapId=113730772&previousTitle=National%20Association%20of%20Water%20Companies>.

156. *Id.*

157. *Commissioner Robert F. Powelson Statement*, FEDERAL ENERGY REGULATORY COMMISSION (Jun 28, 2018), <https://www.ferc.gov/media/statements-speeches/powelson/2018/06-28-18-powelson.asp#.W7QRsBN-KiAw>.

158. *Commissioner Richard Glick Biography*, FEDERAL ENERGY REGULATORY COMMISSION (last updated Jun. 4, 2018), <https://www.ferc.gov/about/com-mem/glick/glick-bio.asp>.

159. *Id.*

160. *Id.*; Timothy Cama, *Trump Taps Dem Senate Aids for Energy Commission*, THE HILL (Jun. 29, 2017), <https://thehill.com/policy/energy-environment/340028-trump-taps-dem-senate-aide-for-energy-commission>.

161. Cama, *supra* note 161.

162. *Commissioner Kevin J. McIntyre Biography*, FEDERAL ENERGY REGULATORY COMMISSION (last updated Jul. 9, 2018), <https://www.ferc.gov/about/com-mem/mcintyre/mcintyre-bio.asp?csrt=8510065127970010853>.

163. *Id.*

tion's Board of Directors, and authored several treatises on various aspects of energy law.<sup>164</sup> He will "serve out the remainder of a term that ends in June 2018 and a full term that ends in June 2023."<sup>165</sup>

### B. Rulemakings

1. Order No. 833-A: Regulations Implementing FAST Act Section 61003 -- Critical Electric Infrastructure Security and Amending Critical Energy Infrastructure Information; Availability of Certain North American Electric Reliability Corporation Databases to the Commission, Order on Clarification and Rehearing

In Order No. 833-A, the FERC responded to an Edison Electric Institute (EEI) assertion that the Commission either erred or should reconsider five aspects of Order No. 833.<sup>166</sup> The FERC granted clarification for three requests and denied rehearing for all five requests.<sup>167</sup> Order No. 833 incorporated the Fixing America's Surface Transportation Act (FAST Act) into FERC regulations by revising and implementing provisions pertaining to the designation, protection and sharing of Critical Electric Infrastructure Information (CEII).<sup>168</sup>

First, the FERC responded to concerns that the new regulations, specifically 18 C.F.R. 388.113(g)(5)(iii), allow CEII to be shared by the FERC against the objections of the submitter.<sup>169</sup> The FERC noted that this was consistent with the FAST Act and already the case with respect to the balancing of necessity and sensitivity of requested information performed by the CEII Coordinator.<sup>170</sup> EEI also suggested that clearly stating the criteria for determining whether a member of the public can obtain CEII from the FERC would afford submitters a better understanding of the benefits and risks.<sup>171</sup> The FERC response emphasized the case-by-case nature of such requests and section 388.113(g)(5)(iii), which describes the balancing of necessity and sensitivity that the FERC has been using for almost fifteen years.<sup>172</sup> The FERC addressed proposed additions to section 388.113(h)(2), which would require the reporting of unauthorized disclosures, by emphasizing

164. *Trump to Nominate Kevin McIntyre as FERC Chairman*, PIERCE ATWOOD LLP (Jul. 14, 2017), <https://www.pierceatwood.com/update/trump-nominate-kevin-mcintyre-ferc-chairman>.

165. Sam Mintz & Hannah Northey, *Grist for the Rumor Mill: Where's the New FERC Chairman?*, E&E NEWS (Dec. 5, 2017), <https://www.eenews.net/stories/1060068143>.

166. Order No. 833-A, *Regulations Implementing FAST Act Section 61003 – Critical Electric Infrastructure Security and Amending Critical Energy Infrastructure Information*, 163 F.E.R.C. ¶ 61,125 at P 1 (2018) [hereinafter Order No. 833-A].

167. *Id.* at P 5.

168. Order No. 833, *Regulations Implementing FAST Act Section 61003 — Critical Electric Infrastructure Security and Amending Critical Energy Infrastructure Information; Availability of Certain North American Electric Reliability Corporation Databases to the Commission*, 157 F.E.R.C. ¶ 61,123 (2016) (to be codified at 18 C.F.R. pts. 375 and 388) [hereinafter Order No. 833]; Fixing America's Surface Transportation Act, PUB. L. No. 114-94, § 61,003, 129 Stat. 1312, 1773-1779 (2015) (codified at 16 U.S.C. §824o-1) [hereinafter FAST Act].

169. Order No. 833-A, *supra* note 166, at PP 7-9.

170. *Id.* at PP 10-14.

171. *Id.* at PP 15-16.

172. *Id.* at PP 17-21.

that the requirements of that section are intended to be the minimum Non-Disclosure Agreement (NDA) requirements and that the CEII Coordinator may consider other provisions on a case-by-case basis.<sup>173</sup> The FERC responded to concerns that CEII generated by it would be shared without an opportunity for the submitter to comment by noting that the FAST Act does not require a public comment period or stakeholder input and that this is justified by the inherent difference between entity-submitted CEII and FERC-generated CEII.<sup>174</sup> Finally, the FERC responded to an assertion that it erred in declining to identify specific designation criteria and CEII procedures for the Department of Energy (DOE) by noting that the FAST Act does not compel the DOE to change their regulations and that FERC regulations do not limit the DOE's ability to designate information.<sup>175</sup>

2. Grid Reliability and Resiliency Pricing, Notice Inviting Comments, Docket No. RM18-1-000 (Oct. 2, 2017); Order Terminating Rulemaking Proceeding, Initiating New Proceeding, and Establishing Additional Procedures

On September 28, 2017, pursuant to section 403 of the Department of Energy Organization Act, the Secretary of Energy (Secretary) released a proposed rule directing FERC to exercise its authority under sections 205 and 206 of the FPA to develop rules and impose them upon ISOs and RTOs “to ensure that certain reliability and resilience attributes of electric generation resources are fully valued.” (the “Proposed Rule”).<sup>176</sup> The Proposed Rule specifically cited, as the basis for its directives (1) significant retirements of baseload generation, particularly coal and nuclear resources; (2) the 2014 Polar Vortex, which the Proposed Rule maintained exposed issues with grid resilience; and (3) a belief that existing rate structures in organized markets do not compensate resources for all of the value, including resilience, they bring to the transmission grid.<sup>177</sup>

On October 2, 2017, the FERC initiated a rulemaking proceeding, Docket No. RM18-1-000, to address the Proposed Rule, specifically how certain ISO and RTOs should “establish a tariff mechanism for (1) the purchase of energy from an eligible ‘reliability and resilience resource’ and (2) the recovery of costs and return on equity for such resources.”<sup>178</sup> Additionally, on October 4, 2017, the FERC's Office of Energy Policy and Innovation issued a request for information seeking specific comments on and answers to specific questions raised by the Proposed Rule.<sup>179</sup> The Commission received extensive comments across all industry segments.<sup>180</sup>

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173. *Id.* at PP at 22-24.

174. Order No. 833-A, *supra* note 166, at PP 25-30.

175. *Id.* at PP 31-33.

176. 42 U.S.C. § 7173 (2012) [hereinafter DOE Act]; Notice of Proposed Rulemaking, *Grid Resiliency Pricing Rule*, 82 Fed. Reg. 46,940 (Oct. 10, 2017) [hereinafter *Grid Resiliency NOPR*]; *id.* at 46,941.

177. *Grid Resiliency NOPR*, *supra* note 176, at 46,942-43.

178. Order Terminating Rulemaking Proceeding, Initiating New Proceeding and Establishing Additional Procedures, *Grid Reliability and Resilience Pricing*, 162 F.E.R.C. ¶ 61,012 at P 2 (2018).

179. Notice Inviting Comments, *Grid Reliability and Resilience Pricing*, FERC Docket No. RM18-1-000 (Oct. 4, 2017).

180. 162 F.E.R.C. ¶ 61,012 at P 5.

On January 8, 2018, the FERC issued an order terminating the rulemaking proceeding it had initiated in October of the previous year, initiating a new proceeding, and establishing additional procedures to address the issues raised by the Proposed Rule.<sup>181</sup> The FERC terminated the rulemaking proceeding after finding the Proposed Rule did not meet the fundamental legal requirements of FPA section 206.<sup>182</sup> While the Commission terminated the Proposed Rule's proceeding, it initiated a new proceeding, Docket No. AD18-7-000, to address and explore resiliency in the RTOs and ISOs.<sup>183</sup> The Commission's stated goals for the new proceeding are to: (1) establish a common industry-understanding for the term "resilience" and what resilience for the bulk power system requires; (2) understand how each RTO and ISO addresses resilience in its region; and (3) determine whether further Commission action is warranted at this time.<sup>184</sup> The Commission further directed each of the RTOs and ISOs to submit additional information on resilience in its respective footprint.<sup>185</sup>

3. Order No. 841: Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators

On February 15, 2018, the Commission issued a new rule designed to eliminate barriers to the participation of battery storage, flywheel, and other energy storage resources (ESR) in regional wholesale electricity markets.<sup>186</sup> Order No. 841, which is the result of rulemaking process that began in 2015, requires each regional transmission operator (RTO) and independent system operator (ISO) to propose tariff revisions to create ESR "participation models."<sup>187</sup> The participation models must:

- Ensure that an ESR using the participation model is eligible to provide all capacity, energy, and ancillary services that the resource is technically capable of providing in the RTO/ISO markets;<sup>188</sup>
- Ensure that a resource using the participation model can be dispatched and can set the wholesale market clearing price as both a wholesale seller and wholesale buyer consistent with existing market rules that govern when a resource can set the wholesale price;<sup>189</sup>
- Account for the physical and operational characteristics of electric storage resources through bidding parameters or other means;<sup>190</sup>

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181. *Id.* at P 1.

182. *Id.* at P 14.

183. *Id.* at P 18.

184. *Id.*

185. 162 F.E.R.C. ¶ 61,012 at P 19.

186. Order No. 841, *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, 162 F.E.R.C. ¶ 61,127 at P 1 (2018) [hereinafter Order No. 841].

187. *Id.* at PP 3, 8.

188. *Id.* at P 4.

189. *Id.*

190. *Id.*

- Establish a minimum size requirement for participation in the RTO/ISO markets that does not exceed 100 kW;<sup>191</sup> and
- Specify that the sale of power from the market to an ESR that the resource then resells back to those markets must be at the wholesale locational marginal price.<sup>192</sup>

The rule was published in the Federal Register on March 6, 2018.<sup>193</sup> The RTOs/ISOs are required to file their proposed tariff revisions within 270 days of that date (by December 3, 2018), and will have a further 365 days after filing to implement the tariff provisions.<sup>194</sup>

#### 4. Order No. 842: Essential Reliability Services and the Evolving Bulk-Power System—Primary Frequency Response

On February 15, 2018, the FERC issued Order No. 842 to revise the Commission's regulations for new interconnecting large and small generating facilities to ensure those facilities have equipment capable of providing primary frequency response as a condition of interconnection.<sup>195</sup> The Order also establishes uniform minimum operating requirements in the *pro forma* large and small generator interconnection agreements (GIA), including maximum droop and deadband parameters and provisions for timely and sustained response.<sup>196</sup>

*Equipment Requirements by Facility Type:* The rule specifically addresses requirements for equipment capable of providing Primary Frequency Response by type of interconnecting facility and creates exemptions or accommodation for some facility types.<sup>197</sup>

*Operating Requirements for Droop and Deadband:* The Commission requires that the *pro forma* GIA include the proposed operating requirements of a maximum droop setting of 5 percent and deadband setting of  $\pm 0.036$  Hz for primary frequency response.<sup>198</sup> Order 842 specifies that these operating requirements “are *minimum* interconnection requirements for new generating facilities” that are based on the Primary Frequency Control Guideline developed by NERC through a broad-based stakeholder process.<sup>199</sup>

*Timely and Sustained Response to Frequency Deviations:* Order 842 requires modifications to *pro forma* GIAs to require Interconnection Customers ensure that the prime mover governor, plant controls and remote plant controls are coordinated such that timely and sustained response to frequency deviations can be

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191. Order No. 841, *supra* note 186, at P 4.

192. *Id.*

193. Final Rule, *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, 83 Fed. Reg. 9,580 (2018).

194. Order No. 841, *supra* note 186, at P 6.

195. Order No. 842, *Essential Reliability Services and the Evolving Bulk-Power System – Primary Frequency Response*, 162 F.E.R.C. ¶ 61,128 (2018) [hereinafter Order 842].

196. *Id.* at P 1.

197. *See generally id.* at Section II.H.

198. *Id.* at P 58.

199. *Id.*

achieved.<sup>200</sup> The Final Rule was noticed in the Federal Register on March 6, 2018, and became effective on June 4, 2018.<sup>201</sup>

5. Order No. 845: Reform of Generator Interconnection Procedures and Agreements

On April 19, 2018, the Commission issued a Final Rule, Order No. 845, revising its *pro forma* Large Generator Interconnection Procedures (LGIP) and the *pro forma* Large Generator Interconnection Agreement (LGIA) to implement ten specific reforms.<sup>202</sup>

The Final Rule: (1) removed the limitation that interconnection customers may only exercise the option to build a transmission provider's interconnection facilities and standalone network upgrades in instances when the transmission provider cannot meet the dates proposed by the interconnection customer; and (2) required that transmission providers establish interconnection dispute resolution procedures that allow a disputing party to unilaterally seek non-binding dispute resolution.<sup>203</sup>

In addition, the Final Rule: (1) required transmission providers to outline and make public a method for determining contingent facilities; (2) required transmission providers to list the specific study processes and assumptions for forming the network models used for interconnection studies; (3) revised the definition of "Generating Facility" to explicitly include electric storage resources; and (4) established reporting requirements for aggregate interconnection study performance.<sup>204</sup>

Order No. 845 (1) allowed interconnection customers to request a level of interconnection service that is lower than their generating facility capacity; (2) required transmission providers to allow for provisional interconnection agreements that provide for limited operation of a generating facility prior to completion of the full interconnection process; (3) required transmission providers to create a process for interconnection customers to use surplus interconnection service at existing points of interconnection; and (4) required transmission providers to set forth a procedure to allow transmission providers to assess and, if necessary, study an interconnection customer's technology changes without affecting the interconnection customer's queued position.<sup>205</sup>

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200. Order No. 842, *supra* note 195, at P 94.

201. Final Rule, *Essential Reliability Services and the Evolving Bulk-Power System – Primary Frequency Response*, 83 Fed. Reg. 9,639 (2018).

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

203. *Id.* at PP 85, 132-133.

204. *Id.* at PP 199, 236, 275, 305.

205. *Id.* at PP 367, 438, 467, 518-19.

*C. Policy Statements and Notices*

1. Elimination of Form 80 and Revision of Regulations on Recreational Opportunities and Development at Licensed Hydropower Projects, Notice of Proposed Rulemaking

On May 17, 2018, the FERC issued a Notice of Proposed Rulemaking to amend its regulations to eliminate the Licensed Hydropower Development Recreation Report, designated as FERC Form No. 80 (Form 80), and to update public notice obligations and streamline signage requirements.<sup>206</sup>

The FERC proposes to eliminate section 8.11 of its regulations, which requires licensees to file Form 80 every sixth year on April 1.<sup>207</sup> Form 80 solicits information on the use and development of recreation facilities at a FERC-licensed hydropower project.<sup>208</sup> “Form 80 requires licensees to report the number of visits (i.e., recreation days), the use capacity of each type of public recreation facility, and the total annual cost to develop, operate, and maintain the public recreation facilities.”<sup>209</sup> Concurrently with the proposed elimination of section 8.11 of the FERC’s regulations is the proposed elimination of section 141.14, which approved licensee use of Form 80 as prescribed in section 8.11.<sup>210</sup>

The FERC proposes to eliminate Form 80 because the information contained in Form 80 is largely duplicative and less detailed than the information submitted to satisfy project-specific recreation requirements.<sup>211</sup> The periodic reports, submitted every six years, do not effectively inform the FERC that a project is meeting recreation needs.<sup>212</sup> Rather, the FERC often evaluates recreation development and use at licensed projects using information gathered from periodic project inspections and investigations of non-compliance allegations.<sup>213</sup>

Although elimination of section 8.11 would eliminate licensees’ obligation to submit Form 80 data, licensees would still be required to monitor recreational resources to comply with project-specific license requirements and Section 2.7 of the FERC’s regulations, which “requires licensees to develop suitable recreation facilities, provide adequate public access, and determine public recreation needs.”<sup>214</sup>

The FERC also proposes to amend sections 8.1 and 8.2 of its regulations.<sup>215</sup> Section 8.1 requires licensees to publish information about recreational opportunities and recreation-related license conditions.<sup>216</sup> Licensees are required, at a

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206. Notice of Proposed Rulemaking, *Elimination of Form 80 and Revision of Regulations on Recreational Opportunities and Development at Licensed Hydropower Projects*, 163 F.E.R.C. ¶ 61,122 (2018).

207. *Id.* at PP 4, 8; *see also* 18 C.F.R. § 8.11 (2018).

208. 163 FERC ¶ 61,122 at P 4.

209. *Id.*

210. *Id.* at P 13; *see also* 18 C.F.R. § 141.14.

211. 163 F.E.R.C. ¶ 61,122 at P 5.

212. *Id.* at P 6.

213. *Id.*

214. *Id.* at P 9.

215. *Id.* at P 14; *see also* 18 C.F.R. §§ 8.1, 8.2.

216. 163 F.E.R.C. ¶ 61,122 at P 15.

minimum, to publish such information in a local newspaper once a week for a four-week period.<sup>217</sup> The FERC proposes to require licensees, in addition to publishing notice in the local newspaper, to post notice of recreation-related license conditions on its project website.<sup>218</sup>

Section 8.2 requires licensees to post a visible sign at each public access point that specifies “the project name, project owner, project number, directions to project areas available for public recreation, permissible times and activities, other regulations regarding recreation use” and that project recreation facilities are open to the public without discrimination.<sup>219</sup> Section 8.2 also requires that licensees to index its license order and make its FERC-approved recreation plan available for inspection.<sup>220</sup>

The FERC’s proposed amendments to section 8.2 require signs to identify, at a minimum, “the project name and number, and a statement that the project is licensed by the [FERC]; the licensee name and contact information for obtaining additional project recreation information; and permissible times and activities.”<sup>221</sup> The revisions to section 8.2 require licensees to include copies of the approved recreation plan, recreation-related reports, and the license instrument on its project website.<sup>222</sup>

#### D. Commission Decisions

##### 1. Tennessee Gas Pipeline Co., L.L.C.

In an order issued February 27, 2018, the FERC declined to reach the merits of Tennessee Gas Pipeline Company, L.L.C.’s (Tennessee) rehearing request that contended the FERC erred in an earlier order when it granted the Sierra Club’s late intervention because the FERC incorrectly found that Tennessee was not harmed by granting the Sierra Club’s late intervention.<sup>223</sup> The FERC explained that it expects entities to intervene “in a timely manner based on reasonably foreseeable issues arising from the applicant’s filing and the FERC’s notice of the proceeding.”<sup>224</sup> The FERC therefore reiterated that persons desiring to become a party to a “certificate proceeding are to intervene in a timely manner.”<sup>225</sup>

The FERC also took the opportunity to announce that going forward it “will be less lenient in the grant of late interventions” in any Natural Gas Act section 3 or section 7 proceeding.<sup>226</sup> The FERC then explained that if an entity is seeking to intervene out-of-time it must comply with Rule 214 of the FERC’s Rules of Practice and Procedure, and “show good cause why the time limitation should be

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217. *Id.*

218. *Id.* at P 16.

219. *Id.* at P 17.

220. *Id.*

221. 163 F.E.R.C. ¶ 61,122 at P 18.

222. *Id.* at P 19.

223. *Tennessee Gas Pipeline Co.*, 158 F.E.R.C. ¶ 61,110 at P 7 (2017); Motion to Intervene Out-of-Time of Sierra Club, FERC Docket Nos. CP15-148-000, CP15-520-000, CP16-4-000 (July 14, 2016).

224. *Tennessee Gas Pipeline Co., order denying reh’g*, 162 F.E.R.C. ¶ 61,167 at P 51 (2018).

225. *Id.* at P 50.

226. 15 U.S.C. § 717b (2012); 15 U.S.C. § 717f; 162 F.E.R.C. ¶ 61,167 at P 51.



waived” and justify such waiver “by reference to the factors set forth in Rule 214(d)” of the FERC’s Rules of Practice and Procedure.<sup>227</sup> The FERC stated that its clarified policy will apply to any new Natural Gas Act section 3 and section 7 proceeding and any pending section 3 or section 7 proceeding in which the deadline for filing timely interventions has not passed.<sup>228</sup>

## 2. DTE Midstream Appalachia, L.L.C.

On March 15, 2018, the FERC granted the Delaware Riverkeeper Network’s (Delaware Riverkeeper) late motion to intervene.<sup>229</sup> The FERC found that Delaware Riverkeeper’s late intervention was “an example of the increasing practice of participants in natural gas certificate proceedings filing late motions to intervene without properly addressing” the FERC’s late intervention requirements in its regulations.<sup>230</sup> The FERC also ruled that Delaware Riverkeeper’s excuse that it “filed its motion to intervene the day it became aware [some five weeks after the deadline for interventions] an application had been submitted” was not persuasive.<sup>231</sup> Nonetheless, because the timing of the proceeding fell outside of the time line the FERC established in *Tennessee Gas* for implementing its new policy, the FERC granted the intervention.<sup>232</sup> The FERC, however, admonished Delaware Riverkeeper and all other participants that they were “on notice that, going forward as [it] noted in *Tennessee Gas*, [the FERC] will be less lenient in the grant of later intervention.”<sup>233</sup>

## 3. ALLETE, Inc.

On October 4, 2017, the FERC dismissed three filings for lack of jurisdiction.<sup>234</sup> ALLETE, Inc. (ALLETE) filed three agreements related to “pre-construction activities for the Great Northern Transmission Lines” between it and Manitoba Limited.<sup>235</sup> According to FERC, the Agreements need not be filed based on what it refers to as the “rule of reason.”<sup>236</sup> Under Section 205(c) of the FPA, public

227. 18 C.F.R. § 385.214(b)(3) (2018); 162 F.E.R.C. ¶ 61,167 at P 50; 18 C.F.R. § 385.214(d)(1)(i)-(iv) (d) *Grant of late intervention*. (1) In acting on any motion to intervene filed after the period prescribed under Rule 210, [18 C.F.R. § 385.210], the decisional authority may consider whether: (i) the movant had good cause for failing to file the motion within the time prescribed; (ii) any disruption of the proceeding might result from permitting intervention; (iii) the movant’s interest is not adequately represented by other parties in the proceeding; (iv) any prejudice to, or additional burdens upon, the existing parties might result from permitting the intervention . . .

228. 162 F.E.R.C. ¶ 61,167 at P 51.

229. Motion for Leave to Intervene Out-of-Time of the Delaware Riverkeeper Network, FERC Docket No. CP17-409-000 (July 7, 2017).

230. *DTE Midstream Appalachia, L.L.C.*, 162 F.E.R.C. ¶ 61,238 at P 11 (2018) [hereinafter *DTE Midstream*].

231. *Id.*

232. 162 F.E.R.C. ¶ 61,167 at P 51 (The clarified policy will apply to any new Natural Gas Act section 3 and section 7 proceeding and any pending section 3 or section 7 proceeding in which the deadline for filing timely interventions has not passed.).

233. *DTE Midstream*, *supra* note 230, at P 11.

234. *ALLETE, Inc.*, 161 F.E.R.C. ¶ 61,013 at P 1 (2017).

235. *Id.*

236. *Id.* at P 14.

utilities are required to “schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission . . . together with all contracts which in any manner affect or relate to such rates, charges, classification, and services.”<sup>237</sup> The FERC explained that the “rule of reason” determines what agreements affect or relate to electric service, and it provides the FERC with discretion to allow utilities not to make certain filings when they “deal only with matters of ‘practical insignificance.’”<sup>238</sup> The FERC decided that the Agreements are a guide for development activities prior to construction and only in limited respects provide terms and conditions on cost sharing that potentially may affect the rates for future jurisdictional services, and that these activities do not exceed the “‘significant’ threshold contemplated by the rule of reason.”<sup>239</sup> Therefore, the FERC dismissed the filings for lack of jurisdiction, but noted that it retains the authority to request that the Agreements be provided in the future if the costs contemplated in the Agreements will be recovered through FERC-jurisdictional rates.<sup>240</sup>

### *E. Administrative Litigation and Settlements*

#### 1. Procedures Governing Rule 602 Settlement Filings, Notice to the Public

“This Notice provides clarification of the procedures governing certain settlement filings made with the Commission for the purpose of reducing the number of submission errors.”<sup>241</sup> The Notice also establishes a procedure to ensure adequate information in all relevant dockets when settlement filings are made in eTariff format within the Commission’s eFiling application.<sup>242</sup> “When a settlement and related interim rate filings are submitted in eTariff format, the filer is required to identify the specific type of filing by using a numeric code known as a Type of Filing Code (TOFC).”<sup>243</sup> “[W]hen a settlement relates to more than one docket or the filing of a settlement generates a new root docket number, the filer is required to include all dockets in its filing description in eFiling and file an update in all the related dockets.”<sup>244</sup> “This procedure also must be followed when filing motions for interim implementation of settlement rates that implicate more than one docket.”<sup>245</sup> The Notice includes a checklist “as additional guidance for those individuals responsible for filing settlements and interim rate filings.”<sup>246</sup>

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237. *Id.* at P 13 (emphasis in original).

238. *Id.* (quoting Pub. Serv. Comm. of N.Y. v. FERC, 813 F.2d 448, 454 (D.C. Cir. 1987)).

239. 161 F.E.R.C. ¶ 61,013 at P 14.

240. *Id.*

241. Notice to the Public, Procedures Governing Rule 602 Settlement Filings, at P 1 (FERC issued Oct. 13, 2017) [hereinafter Procedures Governing Settlement Filings].

242. *Id.*

243. *Id.* at P 3.

244. *Id.* at P 4.

245. *Id.*

246. Procedures Governing Settlement Filings, *supra* note 241, at P 5.

2. Elimination of the Requirement to Include Draft Commission Letters Orders with Filed Settlements and Certifications of Uncontested Settlements, Notice to the Public

The Notice eliminated the December 1999 requirements that “all certifications of uncontested settlements must include a draft letter order approving the proposed settlement,” and that a “party filing a proposed settlement” must “include a draft [Commission] letter order approving the settlement.”<sup>247</sup> The Notice provided that “all certifications of uncontested settlements to the Commission will not include a draft letter order” and provided that “[p]arties are no longer required to provide a draft letter order approving the uncontested settlement with the settlement package.”<sup>248</sup>

3. Revisions to the Model Protective Order and Related Guidance, Notice to the Public

“The Model Protective Order was revised to include provisions to address the needs of participants when it governs oil pipeline proceedings.”<sup>249</sup> The Revised Protective Order requires that “[f]or proceedings in which there is a designated Presiding Judge, protective order motions should be directed to that Presiding Judge.<sup>250</sup> For proceedings in which there is a designated Settlement Judge but no Presiding Judge, protective order motions should be directed to the Chief Judge.”<sup>251</sup> The Notice also requires that “a Word version of the proposed protective order [] be [] submitted by email to the appropriate judge’s staff.”<sup>252</sup>

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247. Notice to the Public, Elimination of the Requirement to Include Draft Commission Letters Orders with Filed Settlements and Certifications of Uncontested Settlements, at P 1-2 (FERC issued Aug. 17, 2017).

248. *Id.* at P 3.

249. Notice to the Public, Revisions to the Model Protective Order and Related Guidance, at P 1 (FERC Issued July 28, 2017).

250. *Id.* at P 2.

251. *Id.*

252. *Id.*

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