

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, for the period between July 1, 2016, through June 30, 2017.*

I.	Noted Procedural Holdings from the Federal Courts.....	1
A.	U.S. Court of Appeals for the District of Columbia Circuit	2
B.	Other Circuit Court Decisions	6
II.	Federal Energy Regulatory Commission Headlines and Notable Administrative Actions	7
A.	Commissioner Delegation of Further Authority in the Absence of a Quorum	7
B.	Rulemakings	12
C.	Policy Statements.....	15
D.	Administrative Litigation and Settlements	18

I. NOTED 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 FERC “in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia.”¹ Parties must file their appeal within sixty days after the FERC order, and “upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part.”² “The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the [FERC], shall be final, subject to review by the Supreme Court of the United States. . . .”³

The case summaries below address appellate decisions involving 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. *Id.*
3. *Id.*

*A. U.S. Court of Appeals for the District of Columbia Circuit*1. *Public Citizen v. FERC*, Case No. 14-1244 (D.C. Cir. Oct. 25, 2016).

On October 25, 2016, the D.C. Circuit ruled that it lacks jurisdiction to review rates that go into effect due to a voting deadlock among FERC Commissioners.⁴ Specifically, the court found that the notices published by FERC concerning the voting deadlock among four sitting FERC Commissioners over whether to approve certain rates for wholesale generation did not constitute a final, reviewable agency action under either the FPA or Administrative Procedure Act (APA).⁵

The rates at issue in this proceeding were set via the Forward Capacity Auction (FCA) process conducted by ISO-New England (ISO-NE).⁶ Under the FCA process, ISO-NE determines the net amount of capacity required by the region during the calendar year three years hence.⁷ ISO-NE then solicits bids from generators indicating the lowest price it will accept to provide capacity during that year.⁸ “In the ensuing ‘descending clock’ auction, the price continues to fall and bidders continue to exit ‘until the amount of capacity remaining in the auction is equal to’” the amount of capacity which ISO-NE has determined to be sufficient for the auction year.⁹ “At this point, the auction terminates, and ‘all resources remaining in the auction receive capacity obligations at the auction clearing price.’”¹⁰ Where ISO-NE determines that insufficient competition exists between bidders, it retains the power to set the capacity clearing price.¹¹ Under the 2006 FERC-approved settlement agreement that established the FCA process, ISO-NE must then submit these auction results for review by FERC.¹²

On February 28, 2014, ISO-NE filed with FERC the results of the eighth FCA conducted under the terms of the 2006 settlement agreement (FCA 8).¹³ FCA 8 had been determined by ISO-NE to lack sufficient competition, and thus ISO-NE itself had set the capacity clearing price, which resulted in a significant increase in the price of capacity for the auction year relative to what would have resulted from the auction process.¹⁴ *Public Citizen, Inc.*, along with the state of Connecticut, challenged these results on the grounds that the rates established were unduly influenced by the exercise of market power by generators who participated.¹⁵ On September 16, 2014, the Secretary of FERC issued a notice

4. *Pub. Citizen, Inc. v. FERC*, 839 F.3d 1165, 1174 (D.C. Cir. 2016) (citing *Sprint v. Nextel*, 508 F.3d 1129 (D.C. Cir. 2009)).

5. *Id.* at 1173 (citing *Sprint*, 508 F.3d at 1131-32).

6. *Id.* at 1167.

7. *Id.* at 1168 (citing *Blumenthal v. FERC*, 552 F.3d 875, 879 (D.C. Cir. 2014); *ISO New England, Inc.*, 148 F.E.R.C. ¶ 61,201 at P 2 (2014)).

8. *Id.*

9. *Pub. Citizen*, 839 F.3d at 1168.

10. *Id.*

11. *Id.*

12. *Id.* at 1167 (citing *Devon Power L.L.C.*, 117 F.E.R.C. ¶ 61,133 (2006)).

13. *Id.* at 1168.

14. *Pub. Citizen*, 839 F.3d at 1168.

15. *Id.*

indicating that the rates set in FCA 8 would go into effect due to a deadlock among the four sitting FERC Commissioners – while two Commissioners had voted to conduct a review of the challenged rates, the other two Commissioners had voted to approve the rates as filed.¹⁶ The challengers sought rehearing of this notice, in response to which the FERC Secretary issued a second notice explaining the first Notice was not a Commission Order and, consequently, the requests for rehearing were invalid.¹⁷ Petitioners sought review of both notices before the D.C. Circuit.¹⁸

The court first determined that it lacked jurisdiction to review the notices under FPA section 313(b), which permits “[a]ny party . . . aggrieved by an order issued by the Commission . . . [to] obtain a review of such order.”¹⁹ Although the court recognized that it had previously defined “order” in this context to include a wide variety of agency actions, the notices issued by FERC nonetheless failed to constitute such a reviewable order under FERC’s enabling statute, which provides that “[a]ctions of the Commission shall be determined by a majority vote of the members present.”²⁰ The court also cited numerous other appellate decisions in which notices of agency deadlock were found not to constitute agency action.²¹ Conversely, the court rejected the challenger’s analogy to reviews of Federal Election Commission (FEC) deadlocks, which the court noted were explicitly permitted under the FEC’s enabling statutes.²²

The court also found that it lacked jurisdiction under the APA’s more general provisions permitting judicial review of agency action, including the failure to act.²³ The court agreed with FERC that *Sprint Nextel Corp. v. FCC* constituted controlling precedent.²⁴ That case assessed the reviewability of a Federal Communications Commission (FCC) deadlock under a provision of the Communications Act stating a forbearance petition “shall be deemed granted” if the FCC does not deny it within a statutorily-prescribed period.²⁵ The court held that, because the FCC acts by majority vote, ties do not result in Commission action, but rather the petition was granted “by operation of law,” and the deadlock was unreviewable under *Sprint Nextel Corp.*²⁶

The court determined that the FPA’s requirement that FERC ensure that all rates are just and reasonable did not rise to the level of an “inexorable command” for FERC to actively review all filed rates, such that inaction by deadlock would

16. *Id.*

17. *Id.* at 1169.

18. *Id.*

19. *Pub. Citizen*, 839 F.3d at 1169 (quoting 15 U.S.C. § 717r(b)).

20. *Id.* at 1170 (citing *Sprint*, 508 F.3d at 1131-32).

21. *Id.*

22. *Id.* at 1171.

23. *Pub. Citizen*, 839 F.3d at 1171.

24. *Id.* at 1173.

25. *Sprint*, 508 F.3d at 1131.

26. *Id.*

become reviewable under alternate precedent.²⁷ The court dismissed the challenger's petition for lack of jurisdiction.²⁸

2. *New Energy Capital Partners, L.L.C. v. FERC*, Case No. 13-1277 (D.C. Cir. Dec. 2, 2016).

In its December 2016 unpublished opinion in *New Energy Capital Partners, L.L.C. v. FERC*, the D.C. Circuit reaffirmed FERC's authority to reject late intervention requests where the petitioner, New Energy Capital Partners ("New Energy"), failed to demonstrate good cause for late intervention, and failed to raise two of its three arguments challenging FERC's rulings in the proceedings below.²⁹ The court then dismissed New Energy's petition for review of FERC's decision not to reopen the record, finding that New Energy was not a party to the proceedings below and thus had no right to seek review of FERC's order.³⁰

In a hydroelectric relicensing proceeding before FERC, New Energy sought to intervene "almost six years after the last deadline" for intervention had passed, requesting reopening of the record so that it could challenge the licensee's decision to sell project power into the open market.³¹ In its ruling below, FERC rejected New Energy's request for late intervention, finding that "a current licensee's 'decision as to where to sell project power is not a relevant issue in [a] relicensing proceeding,'" and that the licensee "had made known that it might sell power from the [] project into the open market as early as 2002."³² The court found that, although New Energy had timely challenged FERC's first reason for rejecting late intervention, it challenged FERC's second reason for rejecting late intervention for the first time in its reply brief before the court, thus forfeiting the right to raise that argument on appeal.³³ The court found that FERC's second reason for rejecting late intervention remained intact, and thus New Energy could not prevail in its petition for review of the order denying late intervention.³⁴ The court also rejected New Energy's second late-filed objection to FERC's denial of intervention, i.e., that "the closure of [the licensee]'s manufacturing facility amounted to a material *de facto* amendment of its license application, requiring a new opportunity for intervention."³⁵ The court reasoned that New Energy had not raised this objection before FERC either, as required by section 713 of the FPA.³⁶

In rejecting New Energy's petition for review of FERC's order denying reopening of the record, the court found that because New Energy was not an intervenor in the proceeding below, it had no right to appeal FERC's order denying the request to reopen the record, citing FPA section 713(b)'s requirement that "any

27. *Amador County v. Salazar*, 640 F.3d 379 (D.C. Cir. 2011).

28. *Pub. Citizen*, 839 F.3d at 1173.

29. *New Energy Capital Partners v. FERC*, No. 13-1277, slip op. at 1-2 (D.C. Cir. Dec. 2, 2016).

30. *Id.* at 2.

31. *Alcoa Power Generating Inc.*, 144 F.E.R.C. ¶ 61,128 at P 7 (2013).

32. *New Energy Capital Partners v. FERC*, No. 13-1277, slip op. at 2.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals.³⁷ The Court distinguished New Energy's right to appeal the late intervention ruling, holding that "a would-be intervenor is 'a party to the record in a limited sense' sufficient only to appeal 'the matter of intervention.'"³⁸

3. *TNA Merchant Projects, Inc. v. FERC*, Case No. 13-1008 (D.C. Cir. May 19, 2017).

In *TNA Merchant Projects, Inc. v. FERC* ("*TNA Merchant*"), the D.C. Circuit addressed the breadth of FERC's authority to remedy its own mistaken actions.³⁹ In *TNA Merchant*, FERC found that Chehalis, a supplier of reactive power to Bonneville, charged Bonneville rates that were excessive and ordered Chehalis to refund a portion of the revenues collected from Bonneville for reactive service.⁴⁰ The FERC later found that it had mistakenly ordered the refund and that it would be appropriate for Bonneville to repay the refunded sums to Chehalis with interest, Bonneville did not make the repayment and Chehalis sought an order requiring recoupment.⁴¹ The FERC held that it had been mistaken to order the refunds, but that it was powerless to make Chehalis whole because Bonneville was an exempt public utility.⁴² In responding to Chehalis' motion seeking recoupment, FERC stated that because it could not order Bonneville to pay *refunds* under sections 201(f) and 205 of the FPA, it could also not order Bonneville to pay *recoupment*.⁴³

On appeal, the D.C. Circuit held that section 309 of the FPA "affords the agency broad authority to 'remedy its errors' and correct unjust situations."⁴⁴ The court explained that recoupment "is an entirely distinct remedy from a refund."⁴⁵ Where sections 201(f) and 205 of the FPA limit FERC's ability to order refunds from an exempt public utility, the court held that these sections "place no limits" on FERC's ability to grant recoupment under section 309.⁴⁶

The court remanded the case to the FERC to "evaluate the relevant equities" and determine the amount that Chehalis will be permitted to recoup.⁴⁷

37. *New Energy Capital Partners v. FERC*, No. 13-1277, slip op. at 2 (quoting 16 U.S.C. § 8251(b) (2005)).

38. *Id.* (citing *Pub. Serv. Comm'n of N.Y. v. FPC*, 284 F.2d 200, 204 (D.C. Cir. 1960)).

39. *TNA Merch. Projects, Inc. v. FERC*, 857 F.3d 354, 360 (D.C. Cir. 2017).

40. *Id.* at 357.

41. *Id.* at 358.

42. *Id.*

43. *Id.* at 356.

44. *TNA Merch.*, 857 F.3d at 356 (citing *Xcel Energy Servs. Inc. v. FERC*, 815 F.3d 947, 956 (D.C. Cir. 2016)).

45. *Id.* at 359.

46. *Id.* at 356.

47. *Id.* at 363.

4. LSP Transmission Holdings, L.L.C. v. FERC, Case No. 15-1157 (D.C. Cir. June 1, 2017).

In an unpublished opinion, the D.C. Circuit dismissed a petition for review of three FERC orders approving Southwest Power Pool's (SPP) revised open-access tariff pursuant to Order No. 1000.⁴⁸ The challenged tariff provisions concerned SPP's "process for new transmission projects that seek to receive cost allocation."⁴⁹ LSP Transmission Holdings and LS Power (collectively "LSP") argued that some of SPP's criteria for evaluating developer bids are too "duplicative" or "attenuated from rates."⁵⁰ LSP also argued that "SPP improperly 'exclude[s] projects from competition based on state and local laws' such as rights of first refusal and rights of way granted to incumbent utilities."⁵¹ The D.C. Circuit dismissed the petition for review on the basis that LSP did not have standing.⁵²

According to the D.C. Circuit, LSP lacked standing because it suffered no injury-in-fact.⁵³ SPP did not reject any LSP bids, and LSP had "no active bids to develop an SPP project."⁵⁴ LSP was also unable to show that it had suffered injury because SPP approved a project in a state where incumbents are entitled to a right of first refusal, and the project was "awarded to the incumbent because [it] ha[d] exercised that right."⁵⁵ The D.C. Circuit concluded that LSP was no different than "any other party who" may wish to undertake a future SPP project.⁵⁶

LSP questioned whether FERC would view a challenge to SPP's tariff after LSP suffers a concrete injury as a collateral attack on an approved order.⁵⁷ The D.C. Circuit noted that FERC counsel agreed at oral argument that LSP could challenge SPP's tariff when LSP suffers a concrete injury, and FERC would not consider the challenge an improper collateral attack.⁵⁸ Thus, FERC would be estopped from raising the collateral attack defense against a future challenge.⁵⁹

B. Other Circuit Court Decisions

1. Total Gas & Power North America, Inc. v. FERC, 859 F.3d 325 (5th Cir. 2017).

On June 8, 2017, the Fifth Circuit affirmed the U.S. District Court for the Southern District of Texas, holding that a challenge to FERC's authority to impose

48. See generally LSP Transmission Holdings, L.L.C. v. FERC, 2017 U.S. App. LEXIS 9798 (D.C. Cir. 2017).

49. *Id.* at *1.

50. *Id.* at *3.

51. *Id.*

52. *Id.* at *2-3.

53. *Id.*

54. LSP Transmission Holdings, L.L.C., 2017 LEXIS 9798, at *3.

55. *Id.*

56. *Id.* at *4 (quoting N.Y. Reg'l Interconnect, Inc. v. FERC, 634 F.3d 581, 587 (D.C. Cir. 2011)).

57. *Id.* at *4.

58. LSP Transmission Holdings, L.L.C., 2017 LEXIS 9798, at *4-5.

59. *Id.* at *5.

civil penalties for violations of the NGA is not ripe for judicial review unless and until the Commission issues a final order assessing such penalties.⁶⁰ Plaintiff-Appellant TOTAL Gas & Power North America, Inc. (Total) sought declaratory judgment that the authority to adjudicate violations of the NGA and impose penalties under section 22 of NGA, 15 U.S.C. section 717t-1, is exclusively vested in the U.S. District Courts pursuant to section 24 of the NGA, 15 U.S.C. section 717u.⁶¹ Total additionally argued that the imposition of civil penalties by FERC “would violate the Appointments Clause,” the Seventh Amendment, and the Due Process Clause of the Constitution.⁶² The court, however, found that these arguments were not yet ripe for review because FERC had merely initiated an enforcement action and had not made a finding of violations or assessed penalties.⁶³

The court explained that based upon investigation by its Office of Enforcement, FERC had issued an order to show cause prior to Total filing its motion for declaratory judgment.⁶⁴ However, FERC had only reached the eighth step in a defined fourteen-step process for assessing civil penalties under the NGA.⁶⁵ The FERC “ha[d] not made any conclusive determination that Total violated the NGA, nor ha[d] it assessed a civil penalty,” and remained free to “terminate [the] proceeding at any point during these steps.”⁶⁶ While the Court did not rule on the merits and found that Total could bring the same action if such penalties were later assessed, it held that FERC had the undisputed authority to conduct a proceeding and propose penalties, and that Total’s action at present was predicated on potential future events and thus not ripe.⁶⁷

The Court also rejected Total’s arguments that any additional potential expense that might be incurred in defending against the Commission’s proceedings constituted tangible harm sufficient to render its action ripe.⁶⁸

II. FEDERAL ENERGY REGULATORY COMMISSION HEADLINES AND NOTABLE ADMINISTRATIVE ACTIONS

A. *Commissioner Delegation of Further Authority in the Absence of a Quorum*

1. Order Delegating Further Authority to Staff in Absence of Quorum,

60. Total Gas & Power N. Am., Inc. v. FERC, 859 F.3d 325, 325-26 (5th Cir. 2017).

61. *Id.* at 325, 327.

62. Total Gas & Power N. Am., Inc., 859 F.3d at 334; *see generally* U.S. CONST. art. II, § 2, cl. 2; *see also* U.S. CONST. amends. V, VII.

63. Total Gas & Power N. Am., Inc., 859 F.3d at 332-33, 335-36.

64. *Id.* at 330.

65. *Id.* at 328-30, 332 (citing *Statement of Administrative Policy Regarding the Process for Assessing Civil Penalties*, 117 F.E.R.C. ¶ 61,317 at PP 2, 7-8 (2006); *Revised Statement of Enforcement*, 123 F.E.R.C. ¶ 61,156 at PP 23-37, 54-71 (2008)).

66. *Id.* at 335-36.

67. *Id.* at 337-39.

68. Total Gas & Power N. Am., Inc., 859 F.3d at 337.

Docket No. AD17-10-000 (Feb. 3, 2017).

When Commissioner Norman Bay announced that he would resign as Chairman of the Commission as of February 3, 2017, his departure would leave only two sitting commissioners who, by statute, cannot transact Commission business.⁶⁹ Before his departure, the three FERC Commissioners issued the “Order Delegating Further Authority to Staff in Absence of Quorum” (Delegation Order) to allow certain FERC business to continue.⁷⁰ The Delegation Order provided that it will remain in effect for up to 14 days after “a quorum is reestablished.”⁷¹ The stated purpose of the Delegation Order was “to protect the public interest” and continue the Commission’s general practice of not allowing rate “filings to go into effect by operation of law.”⁷² In the absence of FERC action within the statutorily-prescribed time frame, rate filings “would take effect without suspension, refund protection, or the ability for protesting parties to appeal.”⁷³ Without the Delegation Order, FERC staff would have lacked authority to act on contested rate filings submitted under the FPA and the NGA, or to initiate investigations under those acts.⁷⁴

The Delegation Order granted the Director of the Office of Energy Market Regulation (OEMR) the authority to address: (1) rate and other filings under section 4 of the NGA, section 205 of the FPA, and section 6(3) of the Interstate Commerce Act (ICA); (2) requests for waivers and extensions of time; and (3) uncontested settlement proposals.⁷⁵ In the absence of a quorum, the OEMR can accept and suspend filings made under section 4 of the NGA, section 205 of the FPA, and section 6(3) of the ICA and make such filings effective: (a) subject to refund and further Commission order; or, (b) subject to refund and hearing and settlement judge procedures.⁷⁶

“For initial rates or rate decreases filed [under] section 205 of the FPA, for which suspension and refund protection are unavailable,” the Delegation Order authorized staff to institute section 206 proceedings to protect customers’ interests.⁷⁷ Additionally, the Delegation Order authorized staff to: extend the time for action on certain matters; act on uncontested filings; and act on requests for waiver of tariff terms and conditions, “rate schedules and service agreements, including waivers related to, e.g., capacity release and capacity market rules.”⁷⁸

69. See generally 42 U.S.C. § 7171(e) (2012) (requiring that “a quorum for the transaction of business shall consist of at least three members present”).

70. *Agency Operations in the Absence of a Quorum; Order Delegating Further Authority to Staff in Absence of Quorum*, 82 Fed. Reg. 10,568, 158 F.E.R.C. ¶ 61,135 at P 1 (2017) [hereinafter Delegation Order].

71. *Id.* at P 2.

72. *Id.* at PP 1, 3.

73. *Id.* (citing *Pub. Citizen*, 839 F.3d 1165).

74. *Id.*

75. 15 U.S.C. § 717c (2012); 16 U.S.C. § 824d (2012); 49 U.S.C. § 6(3) (1988).

76. Delegation Order, *supra* note 70, at P 4.

77. *Id.*

78. *Id.* at P 5 (“The Commission delegates the authority to extend the time for action on matters where such extension of time is permitted by statute”). This includes filings and notices made under sections 203 and 215 of the FPA and uncontested filings made pursuant to section 4 of the NGA, section 205 of the FPA, or section 6(3) of the ICA.

Finally, the Delegation Order authorized the Director of OEMR to accept uncontested settlements.⁷⁹

The Delegation Order preserved “[a]ll pre-existing delegations of authority by the Commission to its Staff” as provided for in the FERC rules.⁸⁰ The Delegation Order reiterated that the “authority to issue tolling orders already rests with the Secretary,” and that the Commission will act on timely requests for rehearing once it regains a quorum.⁸¹

Following is a summary of the cases that have raised questions about the limits and lawfulness of the Delegation Order.

2. Wyoming Pipeline Authority Request for Rehearing of the Delegation Order, Docket No. AD17-10-000.

The Wyoming Pipeline Authority (WPA) filed a request for rehearing of the Delegation Order, asserting that the Commission cannot legally delegate authority to its staff “when the Commission itself lacks authority to take the delegated action due to a lack of a quorum.”⁸² WPA argued that the Commission’s authority is limited to that expressly granted to it by Congress, and that its staff’s authority is likewise limited.⁸³ This means, WPA argued, that if “the Commission cannot act due to lack of a quorum,” then neither can its staff.⁸⁴ Specifically addressing the Secretary’s authority to issue tolling orders, WPA argued that “[t]he implicit assumption underlying the delegation to the Secretary of authority to issue tolling orders is that the Commission could always countermand such action.”⁸⁵

WPA further argued that the National Labor Relations Act cases upon which FERC relied to justify the Secretary’s tolling order authority are inapposite.⁸⁶ *UC Health v. NLRB* involved a vacancy of only two out of five board members, which meant the board still had a quorum.⁸⁷ The delegated action at issue in *Advanced Disposal Services East v. NLRB* was subsequently cured through a lawful board vote.⁸⁸ WPA argued that although some actions may be subsequently ratified by the Commission, other matters cannot be later ratified or undone, such as compliance with statutory deadlines applicable to requests for rehearing.⁸⁹ WPA withdrew its request for rehearing on March 21, 2017 without explanation.⁹⁰

79. Delegation Order, *supra* note 70, at P 7.

80. *Id.* at P 2, n.5.

81. *Id.* at P 4, n.10.

82. Request for Rehearing of the Wyoming Pipeline Authority: Agency Operations in the Absence of a Quorum, F.E.R.C. Docket No. AD17-10-000 at 3 (Mar. 6, 2017) [hereinafter Wyoming Request for Rehearing].

83. *Id.* at 3-4.

84. *Id.* at 4.

85. *Id.*

86. *Id.* at 5 (contesting the Delegation Order’s reliance on *UC Health v. NLRB*, 803 F.3d 669, 670, 672, 675-81 (D.C. Cir. 2015) and *Advanced Disposal Servs. East, Inc. v. NLRB*, 820 F.3d 592 (3d Cir. 2016)).

87. *Id.* at 5.

88. Wyoming Request for Rehearing, *supra* note 82, at 5.

89. *Id.* at 5-6.

90. Withdrawal of Request for Rehearing of the Wyoming Pipeline Authority, Docket No. AD17-10-000 (Mar. 21, 2017).

3. *East Kentucky Power Coop.*, Notice That, In Absence of Final Determination by Commission Due to Absence of Quorum, Application is Deemed Denied, 158 F.E.R.C. ¶ 62,188 (2017).

The Delegation Order did not authorize Staff to accept and suspend contested filings made under the Public Utilities Regulatory Policy Act (PURPA).⁹¹ PURPA section 210(m)(3) and section 292.310(a) of FERC's regulations require the Commission to "make a final determination within 90 days" of an application to terminate a mandatory purchase obligation.⁹² The FPA and NGA do not require a "final" action within a prescribed period of time.⁹³ The notice issued in *East Kentucky Power Coop.* exemplified how FERC staff addressed PURPA filings while the Commission lacked a quorum.⁹⁴

On November 4, 2016, the East Kentucky Power Cooperative (East Kentucky) filed an application to terminate its mandatory purchase obligation under PURPA.⁹⁵ Under PURPA section 210, the Commission's final determination on East Kentucky's application was due by March 7, 2017.⁹⁶ Without a quorum, the Commission could not issue the final determination.⁹⁷ Instead, the Secretary issued a notice denying the application, without prejudice to refile.⁹⁸ East Kentucky subsequently refiled its application in FERC Docket Nos. QM17-3 and QM17-5.⁹⁹

4. *Allegheny Defense Project v. FERC*, No. 17-1098 (D.C. Cir. 2017) (pending)

Pending before the D.C. Circuit is *Allegheny Defense Project v. FERC*, which challenges the validity of a tolling order issued by the FERC Secretary while the Commission lacked a quorum.¹⁰⁰ The Allegheny Defense Project, joined by other environmental interest groups (collectively, Allegheny), filed a petition for review of an order granting a certificate of public convenience (Certificate Order) under

91. Notice that Application is Deemed Denied, *East Kentucky Power Coop.*, 158 F.E.R.C. ¶ 62,188 (2017) [hereinafter *East Kentucky Denied*].

92. 16 U.S.C. § 824a-3(m)(3) (2012); 18 C.F.R. § 292.310(a) (2016).

93. 16 U.S.C. § 824d(d); 15 U.S.C. § 717c(d).

94. *East Kentucky Denied*, 158 F.E.R.C. ¶ 62,188 (2017).

95. *Id.* (citing 16 U.S.C. §§ 824a-3(m)(1); 824a-3(m)(3); 18 C.F.R. §§ 292.309(a), 292.310(a) (2016)).

96. *Id.*

97. *Id.* The Director of OEMR has the authority to approve uncontested applications. See 18 C.F.R. § 375.307(a)(5) (2012). East Kentucky's application was contested and could not be approved by the Director of OEMR.

98. *Id.* at n.5.

99. See Application to Terminate the Obligation of East Kentucky Power Cooperative, Inc. to Purchase Power from Qualifying Facilities Larger than 20 Megawatts, Docket No. QM17-3-000, F.E.R.C. Accession No. 20170313-5366, *denied via notice*, 159 F.E.R.C. ¶ 62,265 (2017); see also Application to Terminate the Obligation of East Kentucky Power Cooperative, Inc. to Purchase Power from Qualifying Facilities Larger than 20 Megawatts, Docket No. QM17-5-000, FERC Accession No. 20170609-5119, *final determination due by Sept. 7, 2017*.

100. See *Transcon. Gas Pipe Line Co.*, 158 F.E.R.C. ¶ 61,125 (2017) [hereinafter *Certificate Order*]; *Allegheny Defense Project v. FERC*, No. 17-1098 (D.C. Cir. 2017).

section 7 of the NGA, which was issued on February 3, 2017, the last day the Commission had a quorum.¹⁰¹

Allegheny filed a timely request for rehearing of the Certificate Order on February 10, 2017.¹⁰² Under the NGA, a request for rehearing is denied by operation of law unless FERC acts within thirty days of the filing of any such request.¹⁰³ However, consistent with general practice, on March 13, 2017, the Commission Secretary issued an order tolling the Commission's statutory deadline to act on requests for rehearing.¹⁰⁴

Allegheny sought review of the Certificate Order in the D.C. Circuit.¹⁰⁵ In its petition for review, Allegheny asserted that its February 10 request for rehearing was denied by operation of law under the NGA because the Commission did not "act" on the request within 30 days.¹⁰⁶ Allegheny argued that the Commission Secretary "issued an invalid 'tolling order,'" because the Commission's Secretary could not issue the Tolling Order when the Commission itself could not issue such an order.¹⁰⁷

The FERC moved to dismiss the petition for lack of jurisdiction, arguing that Allegheny's petition was "incurably premature" because appellate courts only have jurisdiction to review "final agency action[s]."¹⁰⁸ The FERC asserted that the Certificate Order was not a final agency action because there were still requests for rehearing pending.¹⁰⁹ The FERC also argued that Allegheny's petition was not denied by operation of law because the Secretary's Tolling Order extended the time for the Commission to act on Allegheny's rehearing request.¹¹⁰ According to FERC, the Secretary maintained the authority to issue Tolling Orders for the following two reasons. First, the Delegation Order expressly preserved "[a]ll pre-existing delegations of authority by the Commission to its staff," which includes the 1995 delegation to the Secretary to "[t]oll the time for action on requests for

101. Petition for Review, *Allegheny Project v. FERC*, D.C. Cir. No. 17-1098 (Mar. 23, 2017). Similar petitions raising the same arguments have been filed. *See* Petition for Review, *Nesbit v. FERC*, No. 17-1127 (D.C. Cir. 2017); *see also* Petition for Review, *Indianapolis Power & Light Co. v. FERC*, No. 17-2084 (D.C. Cir. 2017); Order Granting Joint Motion For Voluntary Dismissal Of Petition Without Prejudice To Refiling, No. 17-2084 (7th Cir. 2017); Certificate Order, *supra* note 100.

102. Request for Rehearing of February 3, 2017 order of Allegheny Defense Project, Sierra Club, Concerned Citizens of Lebanon County, Lebanon Pipeline Awareness, Clean Air Council, Heartwood, and Lancaster Against Pipelines under CP15-138 (Feb. 10, 2017).

103. 15 U.S.C. § 717r(a).

104. *See* *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs. into Markets Operated by the Cal. Indep. Sys. Operator & the Cal. Power Exchange*, 95 F.E.R.C. ¶ 61,173 (2001) (discussing tolling order practice); Order Granting Rehearing for Further Consideration re: *Transcon. Gas Pipe Line Co.*, Docket No. CP15-138 (Mar. 13, 2017) (Tolling Order).

105. Petition for Review, *Allegheny Project v. FERC*, D.C. Cir. No. 17-1098 (Mar. 23, 2017).

106. *Id.* at 2.

107. *Id.*

108. Motion to Dismiss for Lack of Jurisdiction, *Allegheny Project v. FERC*, D.C. Cir. No. 17-1098 at 1, 5 (Apr. 28, 2017).

109. *Id.*

110. *Id.* at 6-7.

rehearing.”¹¹¹ Second, D.C. Circuit precedent provides that “a staff member to whom authority is delegated while an agency has a quorum retains that authority during periods when the agency lacks a quorum.”¹¹²

In its response, Allegheny reiterated its earlier argument that because the Commission did not have the authority to issue an order on rehearing for want of a quorum, FERC staff also lacked authority to issue the Tolling Order.¹¹³ Allegheny thus maintained that its request for rehearing had been denied as a matter of law due to absence of any authorized FERC action.¹¹⁴ Allegheny argued that the Delegation Order was an attempt to circumvent the statutory quorum mandate.¹¹⁵ Allegheny further argued that it would be deprived of its right to seek judicial review of the Certificate Order and due process in a timely manner, if the Commission were to retain jurisdiction over the matter while being unable to act on it.¹¹⁶ Alternatively, Allegheny argued that the Secretary’s tolling order authority could apply only to “stand-alone” requests for rehearing and could not apply to requests paired with other motions, such as Allegheny’s motion to stay.¹¹⁷ As of August 2017, FERC’s motion remained pending before the D.C. Circuit.

B. Rulemakings

1. 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, Final Rule, 157 F.E.R.C. ¶ 61,123 (2016).

In Order No. 833, FERC revised parts 375 and 388 of its regulations to implement the Fixing America’s Surface Transportation (FAST) Act.¹¹⁸ These revisions include changes with regard to designating, protecting, and sharing

111. *Id.* at 8 (citing Delegation Order at P 2, n.5); *see also* Delegation of Authority to the Secretary, the Director of the Office of Electric Power Regulation and the General Counsel, 60 Fed. Reg. 62,326 (Dec. 6, 1995), FERC STATS. & REGS. ¶ 31,030 (1995) (codified in 18 C.F.R. § 375.302(v)).

112. *Id.* at 9 (citing *UC Health v. NLRB*, 803 F.3d 669, 670, 672, 675-81 (D.C. Cir. 2015); *SSC Mystic Oper. Co. v. NLRB*, 801 F.3d 302, 308-09 (D.C. Cir. 2015), and *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 684 n.4 (2010)). The FERC relied on *UC Health* and *SSC Mystic* in its Delegation Order as support for Staff’s exercise of delegated authority while the Commission lacked quorum. WPA disputed FERC’s reliance on *UC Health* in its Request for Rehearing of the Delegation Order.

113. Petitioners’ Response In Opposition To Respondent’s Motion To Dismiss For Lack Of Jurisdiction, at 4-9, *Allegheny Project v. FERC*, D.C. Cir. No. 17-1098 (May 8, 2017).

114. *Id.*

115. *Id.* at 4-5, 7-8 (citing *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 476 (D.C. Cir. 2009)).

116. *Id.* at 9-11.

117. *Id.* at 14-15 (quoting Delegation of Authority to the Secretary, the Director of the Office of Electric Power Regulation and the General Counsel, 60 Fed. Reg. 62,326, 62,327 (Dec. 6, 1995) (codified in 18 C.F.R. § 375.302(v))).

118. 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].

Critical Electric Infrastructure Information and amendments to existing regulations on Critical Energy Infrastructure Information.¹¹⁹ In its order, FERC refers to Critical Electric/Energy Infrastructure Information together as “CEII.”¹²⁰

The FERC amended section 388.113 to address all “procedures for submitting, designating, handling, sharing and disseminating [CEII] submitted to or generated by [FERC],” while revised section 388.112 will address only privileged information.¹²¹ Order No. 833 amends section 388.113 to: (1) establish “criteria and procedures for designating information as CEII;” (2) further define the prohibitions on the unauthorized disclosure of CEII; (3) impose sanctions on FERC personnel and others for the unauthorized disclosure of CEII; and (4) sets forth procedures for voluntarily sharing CEII.¹²² Order No. 833 also amended section 375.309 of FERC’s regulations to clarify that the FERC General Counsel has authority to respond to administrative appeals on the designations regarding CEII and amended section 375.313 to delegate certain authority to a CEII coordinator.¹²³

2. Notice of Proposed Rulemaking, Data Collection for Analytics and Surveillance and Market-Based Rate Purposes, 156 F.E.R.C. ¶ 61,045 (July 21, 2016).

The FERC issued a Notice of Proposed Rulemaking (NOPR), which is intended to streamline and consolidate the collection of market-based rate information with additional new information that FERC will collect for “analytics and surveillance purposes.”¹²⁴ Through the NOPR, “[FERC] proposes to revise its regulations to” add new data submittal requirements for “market-based rate (MBR) sellers and entities” that trade virtual products or hold financial transmission rights (FTRs) in organized wholesale markets (Virtual/FTR Participants).¹²⁵ Specifically, FERC proposes certain data collection requirements that would be applicable only to MBR sellers, including changes to the electronic format through which MBR sellers submit required data.¹²⁶ The NOPR also requires that both MBR sellers and Virtual/FTR Participants holders submit data regarding their “Connected Entities,” consisting of certain upstream, downstream, and common owners, employees, and entities with which the MBR seller or Virtual/FTR Participant has a specified type of contractual relationship.¹²⁷ Under the NOPR, FERC outlines the requirements for initial submissions of and “ongoing updates to [] Connected Entity Information.”¹²⁸

119. *Id.* at P 1.

120. *Id.*

121. *Id.* at P 8.

122. *Id.* at P 6.

123. Order No. 833, *supra* note 118, at P 80.

124. Notice of Proposed Rulemaking, *Data Collection for Analytics and Surveillance and Market-Based Rate Purposes*, 156 F.E.R.C. ¶ 61,045 (2016) [hereinafter NOPR]; *see id.* at P 2.

125. *Id.* at P 11.

126. *Id.* at P 13.

127. *Id.* at PP 51-52.

128. *Id.* at P 44.

3. Order No. 834, *Civil Monetary Penalty Inflation Adjustments*, Final Rule, 158 F.E.R.C. ¶ 61,017 (2017).

Order No. 834 adjusted “the maximum civil monetary penalt[y]” amounts “that may be imposed under the [FPA], [NGA], [] Natural Gas Policy Act of 1978 (NGPA), and the Interstate Commerce Act (ICA).”¹²⁹ The action was taken pursuant to the Federal Civil Penalties Inflation Adjustment Improvements Act of 2015, which directed agencies to issue a final rule making inflation adjustments to “each ‘civil monetary penalty’ provided by law within the agency’s jurisdiction.”¹³⁰ Among the penalty amounts that were adjusted, the maximum penalties of \$1,193,970 per violation per day under section 316A of the FPA, section 22 of the NGA, and section 504(b)(6)(A)(i) of the NGPA, were adjusted in each case to \$1,213,503 per violation per day.¹³¹ The final rule became effective January 24, 2017.¹³²

4. Disruptive Conduct at Commission Open Meetings

Disruptive conduct at FERC’s Open Meetings became a significant issue throughout 2016, as many meetings were interrupted by persons in the public audience.¹³³ The FERC sought to revise its rules to limit such behavior in 2015.¹³⁴ In Order No. 806, FERC looked to open meeting regulations of the FCC and the Rural Telephone Bank to clarify the term “observe” in the open meeting rules does not include disruptive behavior and that observers that disrupt meetings may be removed.¹³⁵ The order further provides that documents or comments offered by “unscheduled presenters” at FERC open meetings will not be included in the record or considered by FERC because such statements could constitute “potential violations of the Government in the Sunshine Act . . . ex parte [] provisions of the Administrative Procedure Act, and [FERC]’s ex parte communications rule.”¹³⁶ Finally, FERC amended its regulations to permit members of the public to use electronic audio or “visual recording equipment to record open meetings in a non-disruptive manner.”¹³⁷ The FERC revised 18 C.F.R. section 375.203 to provide as follows:

(b) Public participation in open meetings.

(1) Members of the public are invited to listen and observe at open meetings.

129. Order No. 834, *Civil Monetary Penalty Inflation Adjustments*, F.E.R.C. STATS. & REGS. ¶ 31,390 (2017), 82 Fed. Reg. 8,137 (2017) (to be codified at 18 C.F.R. pts. 250 and 385).

130. *Id.* at 8,138 (citing Sec. 701, Pub. Law 114–74, 129 Stat. 584, 599).

131. *Id.* at P 8.

132. *Id.*

133. Order No. 806, *Disruptive Conduct at Commission Open Meetings*, 150 F.E.R.C. ¶ 61,178 at P 2, FERC STATS. & REGS. ¶ 31,366 (2015), 80 Fed. Reg. 13,223 (Mar. 13, 2015).

134. *Id.* at P 1.

135. *Id.* at P 7; 7 C.F.R. § 1600.3 (2011); *see also* 150 F.E.R.C. ¶ 61,178 at P 7 n.2 (citing regulations of the FCC, Rural Telephone Bank, Equal Employment Opportunity Commission (29 C.F.R. § 1612.3), the Securities Exchange Commission (17 C.F.R. § 200.410), and the Commission on Civil Rights (45 C.F.R. § 702.52)).

136. Order No. 806, *supra* note 133, at P 8 (citing 18 C.F.R. § 385.2201).

137. *Id.* at P 9.

(i) "Observe" does not include participation or disruptive conduct, and persons engaging in such conduct will be removed from the meeting.

(ii) The right of the public to observe open meetings does not alter those rules which relate to the filing of motions, pleadings, or other documents. Unless such pleadings conform to the other procedural requirements, pleadings based upon comments or discussions at open meetings, as a general rule, will not become part of the official record, will receive no consideration, and no further action by the Commission will be taken thereon.

(2) To the extent their use does not interfere with the conduct of open meetings, electronic audio and visual recording equipment may be used by a seated observer at an open meeting.¹³⁸

C. Policy Statements

1. Notice of Document Labelling Guidance for Documents Submitted to or Filed With the Commission or Commission Staff (April 14, 2017) (Unreported).

In a notice issued April 14, 2017, FERC instructed filers to label submissions or filings to FERC in accordance with its Controlled Unclassified Information (CUI) labeling system.¹³⁹ The labeling requirements are in addition to the requirements for CEII in 18 C.F.R. section 388.113 and the protections for documents containing privileged information or information within the scope of protective orders and agreements in FERC proceedings.¹⁴⁰ The CUI labeling system requires submitted or filed documents to be labeled in the top center header of each page containing such information.¹⁴¹ For documents containing CEII, each page of the document containing CEII should include "CUI//CEII."¹⁴² The FERC reminded filers to clearly segregate the portions of the document containing CEII and indicate in their filings "how long the CEII label should apply."¹⁴³ For documents containing information that "18 C.F.R. [section] 388.112 recognizes as privileged, and documents containing information within the scope of protective orders and agreements in [FERC] proceedings," the header should include "CUI//PRIV" and identify within the document those specific portions of the document which are privileged or within the scope of a protective order or agreement.¹⁴⁴ Finally, for documents containing multiple information types, the header should reference each information type, e.g., "CUI//CEII//PRIV," and the

138. *Id.* at P 2 of Part 375.

139. Notice of Document Labelling Guidance for Documents Submitted to or Filed With the Commission or Commission Staff, 82 Fed. Reg. 18632 (Apr. 20, 2017) [hereinafter April 14 Notice].

140. 18 C.F.R. § 388.112(b) (2017).

141. *See generally* April 14 Notice, *supra* note 139.

142. *Id.*; *see also* 18 C.F.R. § 388.113(c)(1-2) (2017).

143. April 14 Notice, *supra* note 139; *see generally* Fixing America's Surface Transportation Act, Pub. L. No. 114-94, § 61,003, 129 Stat. 1312, 1773-1779 (2015) (The CEII label application should not exceed five years unless redesignated by the CEII Coordinator).

144. *Id.*

document should otherwise comply with the sections governing the procedures for each document type included.¹⁴⁵

2. Changes to eTariff Filing Codes.

The FERC issued two Notices in 2016 through which it made changes to the eTariff filing codes. The FERC adopted the eTariff filing protocol beginning in 2008 with its issuance of Order No. 714 (Docket No. RM01-5-000).¹⁴⁶ Jurisdictional natural gas and oil pipelines and electric companies are required to use the eTariff protocols in filing their tariffs with the Commission.¹⁴⁷

In *Electronic Tariff Filings*, Docket Nos. RM01-5-000, RM12-17-000 “Notice of Changes to eTariff Part 284 Type of Filing Codes” (Sept. 6, 2016), FERC made changes to the eTariff filing codes to reflect its adoption of optional notice procedures applicable to intrastate natural gas pipelines that provide interstate transportation services under section 311 of the NGPA.¹⁴⁸ The FERC adopted the optional notice procedures in 2013 under Order No. 781 (Docket No. RM12-17-000). The optional notice procedures, codified at 18 C.F.R. section 284.123(g), provide a streamlined mechanism for FERC approval of intrastate pipeline rate and operating statement filings.¹⁴⁹ Such filings are deemed to be effective, without the issuance of a FERC order, if no protests are filed within a 60-day period (or if any protests are unresolved at the end of a specified period).¹⁵⁰ New filing codes specific to the optional notice procedures are intended to facilitate staff processing of intrastate pipeline eTariff filings.¹⁵¹ The Notice further announces other changes and clarifications to the intrastate pipeline eTariff filing codes.¹⁵²

In *Electronic Tariff Filings*, Docket No. RM01-5-000 “Notice of Additional eTariff Type of Filing Codes” (Dec. 1, 2016), which was effective January 3, 2017, the Chief Administrative Law Judge initiated a process that requires eTariff filing of all settlements in Part 35, 154, 284 and 341 proceedings set for trial-type evidentiary hearing and/or settlement judge procedures before a Presiding Judge or Settlement Judge.¹⁵³ The FERC added a requirement of unique eTariff filing codes for the filing of settlements by entities regulated under the FPA (separate codes for traditional cost-based and for market-based rate proceedings), NGA, NGPA and Oil Pipeline Program.¹⁵⁴

3. Order No. 832, Regulations Implementing the FOIA Improvement Act

145. *Id.*; see also 18 C.F.R. §§ 388.112, 113 (2017).

146. Order No. 714-A at 1, *Electronic Tariff Filings*, 147 F.E.R.C. ¶ 61,115 (2014), 73 Fed. Reg. 57,515 (May 15, 2014).

147. *Id.*

148. *Id.*; Order No. 781 at P 2, *Revisions to Procedural Regulations Governing Transportation by Intrastate Pipelines*, 144 F.E.R.C. ¶ 61,034 (2013).

149. *Id.* at P 16.

150. *Id.* at P 19.

151. *Id.* at P 9.

152. *Id.* at P 1.

153. *Notice of Additional eTariff Type of Filing Codes*, Doc. No. RM01-5-000 (Dec. 1, 2016).

154. *Id.*

of 2016 and Clarifying the FOIA Regulations, 157 F.E.R.C. ¶ 61,116 (2016).

On November 17, 2016, FERC issued a final rule revising its regulations to implement the directives of the FOIA Improvement Act of 2016 (“FOIA Improvement Act”) and to clarify its FOIA regulations.¹⁵⁵ The FERC’s Final Rule revises its regulations to implement the FOIA Improvement Act directives in five ways. First, it revises section 388.106 to codify that records “that have been requested [three] or more times” and determined eligible for public disclosure may be “available in the public reference room at the Commission’s headquarters or on [its] website.”¹⁵⁶ Second, it revises section 388.107 to reflect that material that would otherwise be exempt under the deliberative process privileged that is twenty-five years or older is no longer exempt.¹⁵⁷ Third, it revises section 388.108 to codify the Department of Justice’s “foreseeable harm” standard, whereby “agencies ‘shall withhold information’ under the FOIA ‘only if the agency reasonably foresees that disclosure would harm an interest protected by an exemption’ or ‘disclosure is prohibited by law’ . . . or [is] ‘otherwise exempted from disclosure under [FOIA] [Exemption] 3.’”¹⁵⁸ The FERC also revises section 388.108 to codify the Act’s requirement that agencies “make reasonable efforts to segregate and release nonexempt material.”¹⁵⁹ Fourth, it revises section 388.109 to “waive processing fees, under certain unusual circumstances [described in 388.110], where the agency’s response was delayed.”¹⁶⁰ Certain exceptions apply, such as where the responsive materials are more than 5,000 pages and FERC has discussed or attempted to discuss limiting the request’s scope.¹⁶¹ It also revises section 388.110 to require that “all determination letters must notify the requester that they can seek assistance from the FOIA Public Liaison;” and to require that “[e]ach adverse FOIA determination letter must notify the requester of the option to seek dispute resolution services from [the] Office of Government Information Services (OGIS).”¹⁶² Finally, it codifies an exemption for filing “an administrative appeal from 45 days to at least 90 days,” and that agencies must “advise requesters that they may seek the assistance of OGIS when the agency extends the response time by ten or more days for unusual circumstances.”¹⁶³

Also, consistent with the administrative appeal provisions in section 388.110, the FERC clarifies in section 375.309 that “the General Counsel or a designee will provide determinations in response to FOIA administrative appeals.”¹⁶⁴

155. Order No. 832, *Regulations Implementing the FOIA Improvement Act of 2016 and Clarifying the FOIA Regulations*, 157 F.E.R.C. ¶ 61,116 (2016).

156. *Id.* at P 5.

157. *Id.* at P 6.

158. *Id.* at P 7.

159. *Id.*

160. Order No. 832, *supra* note 155, at P 8.

161. *Id.* at P 5 of Part 388.

162. *Id.* at P 9.

163. *Id.* at P 10.

164. *Id.* at P 4.

D. Administrative Litigation and Settlements

1. Settlement Negotiations Before Administrative Law Judges, Notice to the Public (Aug. 30, 2016) (Acting C.J. Cintron).

This notice, later revised, set forth a requirement to promote good-faith negotiations in settlement proceedings at FERC.¹⁶⁵ The notice stated that, at settlement conferences convened in-person, participants must have “present in-person representatives” who possess full authority to negotiate and accept settlement terms.¹⁶⁶ In the alternative, participants must have “immediate access to such persons.”¹⁶⁷ Finally, the notice stated that, if a participant cannot comply with this procedure because of special circumstances, then it must make a request “directly with the settlement judge.”¹⁶⁸

2. Motions to Place Interim Settlement Rates into Effect, Notice to the Public (Aug. 30, 2016) (Acting C.J. Cintron).

On August 30, 2016, the Chief Administrative Law Judge issued a Notice to the Public regarding motions to “place interim settlement rates into effect.”¹⁶⁹ The notice required any requests to place settlement rates into effect to not be made as part of a tariff or settlement filing but to be made via a separate motion.¹⁷⁰ The motion “must specifically reference the lower settlement rates and show that the interim rate is in fact lower.”¹⁷¹ The “motions to place interim rates into effect must reference the docket number assigned by the Commission to the tariff filing,” as well as the docket number assigned to the settlement proceedings.¹⁷²

3. Addendum to Prior Notices on Procedures for Handling Exhibits and Developing the Electronic Hearing Record (Oct. 18, 2016) (Acting C.J. Cintron).

This supplemental notice specifically addresses “exhibit numbering and descriptions.”¹⁷³ The notice states that “all exhibits must be numbered so as to include at least one preceding zero (0) digit.”¹⁷⁴ Through an example, the notice shows how to determine the appropriate number of preceding 0s for each exhibit.¹⁷⁵ The notice also explains that the numbering requirement applies to all

165. NOTICE TO THE PUBLIC: SETTLEMENT NEGOTIATIONS BEFORE ADMINISTRATIVE LAW JUDGES (Aug. 30, 2016).

166. *Id.*

167. *Id.*

168. *Id.*

169. NOTICE TO THE PUBLIC: MOTIONS TO PLACE INTERIM SETTLEMENT RATES INTO EFFECT (Aug. 30, 2016).

170. *Id.* at P 1.

171. *Id.*

172. *Id.* at P 2.

173. NOTICE TO THE PUBLIC: ADDENDUM TO PRIOR NOTICES ON PROCEDURES FOR HANDLING EXHIBITS AND DEVELOPING THE ELECTRONIC HEARING RECORD at P 1 (Oct. 18, 2016).

174. *Id.* at P 2.

175. *Id.*

exhibit references.¹⁷⁶ The purpose of this requirement is to ensure “exhibits are numerically ordered in e-Library.”¹⁷⁷ In addition, the notice requests that participants “provide a full description of each exhibit in the ‘Description’ column of the Joint Exhibit List” (included in the notice).¹⁷⁸ The notice provides an example to illustrate the appropriate level of detail.¹⁷⁹

4. Clarification and Revision of Previous Notice to the Public on Settlement Negotiations Before Administrative Law Judges, Notice to the Public (Dec. 6, 2016) (C.J. Cintron).

In response to the August 30, 2016 notice to the public, *Settlement Negotiations Before Administrative Law Judges*, several state commissions jointly submitted comments expressing their concerns about their ability to comply with this notice’s requirements.¹⁸⁰

The December 6, 2016 notice to the public revises the language of the August 30, 2016 notice “to provide greater clarity.”¹⁸¹ The December 6, 2016 notice still requires, at settlement conferences convened in-person, that participants have representatives “with authority to negotiate and if appropriate, accept or approve settlement terms.”¹⁸² But this notice expressly recognizes that “formal approval may still be required from a participant’s officials or leadership” after an agreement in principle is reached.¹⁸³

5. Amended Notice to the Public on Information to Be Provided With Settlement Agreements and Guidance on the Role of Settlement Judges, Notice to the Public (Dec. 15, 2016) (C.J. Cintron).

On December 15, 2016, FERC Chief Administrative Law Judge Cintron issued an Amended Notice to the Public on Information to be Provided with Settlement Agreements and Guidance on the Role of Settlement Judges.¹⁸⁴ Then-Chief Administrative Law Judge Wagner had issued the original Notice on October 15, 2003.¹⁸⁵ The original Notice outlined five questions that parties must address in the Explanatory Statement that accompanies settlement agreements filed with FERC.¹⁸⁶ The Amended Notice modified these five questions to four.¹⁸⁷ Accordingly, parties must now address the following four questions in the Explanatory Statement:

176. *Id.* at P 3.

177. *Id.* at P 2.

178. ADDENDUM TO PRIOR NOTICES, *supra* note 173, at P 4.

179. *Id.*

180. NOTICE TO THE PUBLIC: CLARIFICATION AND REVISION OF PREVIOUS NOTICE TO THE PUBLIC ON SETTLEMENT NEGOTIATIONS BEFORE ADMINISTRATIVE LAW JUDGES 1-4 (Dec. 6, 2016).

181. *Id.* at P 5.

182. *Id.*

183. *Id.*

184. NOTICE TO THE PUBLIC: AMENDED NOTICE TO THE PUBLIC ON INFORMATION TO BE PROVIDED WITH SETTLEMENT AGREEMENTS AND GUIDANCE ON THE ROLE OF SETTLEMENT JUDGES (Dec. 15, 2016).

185. *Id.* at P 1.

186. *Id.* at P 1.

187. *Id.* at P 2.

- Does the settlement affect other pending cases?
- Does the settlement involve issues of first impression?
- Does the settlement depart from Commission precedent (if so, identify by case name(s) and docket number[s])?
- Does the settlement seek to impose a standard of review other than the ordinary just and reasonable standard with respect to any changes to the settlement that might be sought by either a third party or the Commission acting *sua sponte*?¹⁸⁸

The Amended Notice further states that “the presiding administrative law [] or settlement judge [] . . . need only address these questions” in their certification of the settlement to the Commission if a discussion of these issues would “aid the Commission in resolving the case.”¹⁸⁹ The Amended Notice also reiterates that, under FERC’s Rules of Practice and Procedure, presiding administrative law or settlement judges overseeing filed offers of settlement “may request that the participants correct any errors or deficiencies in the filed documents before certification to the Commission.”¹⁹⁰

6. Revisions to the Model Protective Order and Related Guidance, Notice to the Public (June 29, 2017) (C.J. Cintron).

This notice requires participants to use a revised Model Protective Order (available on the Commission’s Administrative Litigation webpage) as of the date of the issuance of the notice.¹⁹¹ The notice also provides that where a Presiding Judge has been designated, the participant should direct the motion to the Presiding Judge.¹⁹² Where, however, a Settlement Judge has been designated but not a Presiding Judge, the participant should direct the motion to the Chief Judge.¹⁹³ In either case, after filing the motion, the participant must email a Word version of the proposed protective order “to the appropriate judge’s staff.”¹⁹⁴

188. *Id.*

189. NOTICE TO THE PUBLIC: AMENDED NOTICE TO THE PUBLIC ON INFORMATION TO BE PROVIDED WITH SETTLEMENT AGREEMENTS AND GUIDANCE ON THE ROLE OF SETTLEMENT JUDGES at P 2.

190. *Id.* at P 3.

191. NOTICE TO THE PUBLIC: REVISIONS TO THE MODEL PROTECTIVE ORDER AND RELATED GUIDANCE at P 1 (June 29, 2017).

192. *Id.* at P 2.

193. *Id.*

194. *Id.*

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Valerie L. Green	Maurice Moss
Sara Greenberg	Julian N. Mowatt
Nicholas J. Guidi	Sarah J. Mugel

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Stacy Myers
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Daniel W. Nugent
Kimberly L. Osborne
Liam J. Paskvan
Delia D. Patterson
John P. Perkins
David R. Poe
Christopher J. Polito
Sarah Rafie
James M. Ralph
Brett Richard Rendina
William E. Rice
Randall S. Rich
Mary-Kaitlin Rigney
Brandon N. Robinson
Jacquelyne M. Rocan

Sharon Rose
Cheryl Feik Ryan
Sandra E. Safro
Kenneth A. Sosnick
Kenneth R. Stark
Jason Vincent Steele
Kevin M. Sweeney
F. Alvin Taylor
Maeve C. Tibbetts
Elizabeth Trinkle
Paul C. Varnado
Anne Vogel
Samuel Taylor Walsh
Conor B. Ward
Ambrea Watts
William Weaver
Richard D. Winders
David P. Yaffe