

## REPORT OF THE FINANCE AND TRANSACTIONS COMMITTEE

The following developments concerning finance and transactions occurred during the year 2019.\*

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### I. FERC PURPA REFORM EFFORTS

On September 19, 2019, the Federal Energy Regulatory Commission (FERC or the Commission) issued a Notice of Proposed Rulemaking (NOPR) proposing to revise its regulations implementing section 201 and 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA) in light of changes to the energy industry since 1978.<sup>1</sup> PURPA was enacted to reduce the country's dependence on fossil fuels by providing incentives to encourage the development of qualifying facilities (QF).<sup>2</sup> QF are either small power production facilities, which are typically renewable generation resources that largely do not rely on fossil fuels, or cogeneration facilities, which make more efficient use of fossil fuels.<sup>3</sup>

Circumstances have changed since the Commission implemented PURPA in the 1980s.<sup>4</sup> Advances in technology and the discovery of new natural gas reserves have resulted in plentiful supplies of relatively inexpensive natural gas.<sup>5</sup> Unlike in the 1980s, when the electric industry was made up principally of vertically integrated utilities, today the electric industry provides open access transmission and there are vibrant wholesale electric markets in much of the United States where independent generators can sell their power at competitive prices.<sup>6</sup>

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\* The Finance & Transactions Committee thanks Glenn Camus, Zori Ferkin, and Frederic Brassard for their contributions to this Report.

1. *Qualifying Facility Rates and Requirements, Implementation Issues under the Public Utility Regulatory Policies Act of 1978*, 168 F.E.R.C. ¶ 61,184 (2019).

2. *Id.* at P 2.

3. *Id.* at P 4.

4. *Id.* at P 19.

5. *Id.*

6. 168 F.E.R.C. ¶ 61,184 at P 26.

In addition, federal and state programs provide further incentives for the development of renewable resources.<sup>7</sup> Given changes in the energy industry since the 1980s, the NOPR proposes to revise the Commission's PURPA Regulations to permit states more flexibility to rely on competitive prices in setting QF rates and to make certain other changes to address implementation issues that have arisen over the years.<sup>8</sup>

The NOPR includes a number of changes, including the following:

First, with respect to QF rate, the NOPR proposes to grant state regulatory authorities the flexibility to require that energy rates (but not capacity rates) in QF power sales contracts and other legally enforceable obligations vary in accordance with changes in the purchasing utility's avoided costs at the time the energy is delivered.<sup>9</sup> The NOPR also proposes to grant states the flexibility to set "as-available" QF energy rates based on market factors or, at the state's discretion, to continue setting QF rates under the existing PURPA regulations.<sup>10</sup>

Second, the NOPR proposes to replace the "one-mile rule" for determining whether generation facilities should be considered part of a single facility for purposes of determining whether it is a qualifying small power production facility.<sup>11</sup> The NOPR proposes a tiered approach under which facilities one mile or less apart would be treated as the same facility, facilities more than one mile but less than 10 miles apart would be presumed to be different facilities, but that presumption could be rebutted, and facilities 10 or more miles apart would be treated as separate facilities.<sup>12</sup>

Third, the NOPR proposes to revise the Commission's regulations implementing PURPA section 210(m) that provide for termination of a utility's obligation to purchase from a QF with nondiscriminatory access to certain markets.<sup>13</sup> The rebuttable presumption that QF with a net capacity at or below 20 MW do not have nondiscriminatory access to those markets would be reduced from 20 MW to 1 MW (but would remain at 20MW from cogeneration facilities).<sup>14</sup> This proposed change recognizes that competitive markets have matured since the Commission first implemented section 210(m) of PURPA and the mechanics of participation in such markets are improved and better understood.<sup>15</sup>

Fourth, the NOPR proposes to clarify that a QF is entitled to a contract or legally enforceable obligation when it is able to demonstrate commercial viabil-

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7. *Id.* at P 3.

8. FED. ENERGY REG. COMM'N, OPEN COMMISSION MEETING: STAFF PRESENTATION (Sept. 19, 2019), <https://www.ferc.gov/CalendarFiles/20190919134440-E-1-Discussion-item.pdf>.

9. 168 F.E.R.C. ¶ 61,184 at P 32.

10. *Id.* at PP 32-33.

11. *Id.* at P 94.

12. *Id.* at PP 100-02.

13. *Id.* at P 118.

14. 168 F.E.R.C. ¶ 61,184 at 118.

15. *Id.* at P 126.

ity and financial commitment to construct its facility pursuant to objective and reasonable criteria determined by the state.<sup>16</sup>

Fifth, the NOPR proposes to allow a party to protest a self-certification or self-recertification of a QF without being required to file a separate petition for declaratory order and to pay the associated filing fee.<sup>17</sup>

## II. BANKRUPTCY COURT VS FERC JURISDICTION OVER REJECTION OF POWER PURCHASE AGREEMENTS

On December 12, 2019, the United States Court of Appeals for the Sixth Circuit (Sixth Circuit) issued a long-awaited decision in the dispute between FirstEnergy Solutions Corp. (FirstEnergy), FERC, and certain power purchase contract counterparties.<sup>18</sup>

The main issue addressed in this decision was how to reconcile the bankruptcy court's jurisdiction under the Bankruptcy Code to authorize a debtor's rejection of FERC-governed power purchase agreements (PPAs) and the jurisdiction of FERC under the Federal Power Act (FPA) over rates, terms, and conditions of PPAs incorporating "filed rates."<sup>19</sup> The Sixth Circuit held that, in considering whether to allow FirstEnergy to reject the PPAs, the bankruptcy courts must consider the impact of rejecting PPAs based on the public interest to ensure that rejecting the contracts is the more equitable outcome, while affording FERC with the opportunity to have a say in the analysis:

[t]o recap, when a Chapter 11 debtor moves the bankruptcy court for permission to reject a filed energy contract that is otherwise governed by FERC, via the FPA, the bankruptcy court must consider the public interest and ensure that the equities balance in favor of rejecting the contract, and it must invite FERC to participate and provide an opinion in accordance with the ordinary FPA approach, within a reasonable time.<sup>20</sup>

Section 365 of chapter 11 of the United States Bankruptcy Code provides a debtor the ability to reject contracts, allowing a debtor to escape contract obligations and leaving counterparties with unsecured claims in the bankruptcy case.<sup>21</sup> PPAs are "executory contracts" that generally may be rejected in bankruptcy.<sup>22</sup> However, under sections 205 and 206 of the FPA, FERC has exclusive jurisdiction over the rates, terms, and conditions of contracts for sale of electric energy at wholesale interstate commerce.<sup>23</sup> Contracts for such sales, such as PPAs, must be filed with FERC, and the rates, terms, and conditions of such contracts must be "just and reasonable."<sup>24</sup> Under judicial precedent known as the "filed rate

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16. *Id.* at P 136.

17. *Id.* at P 148.

18. *In re FirstEnergy Solutions Corp.*, 945 F.3d 431 (6th Cir. 2019).

19. *Id.* at 436.

20. *Id.* at 454-55.

21. *Id.* at 461.

22. *Id.* at 445-46.

23. *FirstEnergy*, 945 F.3d at 457.

24. *Id.* at 456.

doctrine,” PPAs on file with FERC are the equivalent of Federal regulations, and no party to such a contract may amend the rates, terms, or conditions, or terminate the contract, without making a filing with FERC and obtaining FERC authorization.<sup>25</sup> In cases involving a unilateral effort by a party to amend or terminate a PPA that was previously mutually agreed upon by a seller and a purchaser, FERC typically applies a “public interest standard” in determining whether such amendment or termination is “just and reasonable.”<sup>26</sup>

Based on its view that the bankruptcy court does not have exclusive jurisdiction, the Sixth Circuit held that the bankruptcy court could enjoin FERC from issuing an order that would require FirstEnergy to continue to perform under the PPAs or limit FirstEnergy to seeking abrogation of the PPAs under the FPA, but it could not enjoin FERC from initiating or continuing proceedings with respect to its jurisdiction over the PPAs or interfering with the bankruptcy court’s jurisdiction: “the public necessity of available and functional bankruptcy relief is generally superior to the necessity of FERC’s having complete or exclusive authority to regulate energy contracts . . . [, which] means that . . . the PPAs are not de jure regulations but, rather, ordinary contracts susceptible to rejection in bankruptcy.”<sup>27</sup> Although the court found that there is a public interest in both “necessities” under the Bankruptcy Code and the FPA, it concluded that the bankruptcy court’s jurisdiction—while not exclusive—is concurrent with and is primary or superior to FERC’s jurisdiction.<sup>28</sup> Accordingly, the court found that FirstEnergy “can reject the contracts subject to proper bankruptcy court approval and FERC cannot independently prevent it.”<sup>29</sup>

This is a different conclusion from the decision issued earlier in the year by the United States Bankruptcy Court in San Francisco in the Pacific Gas & Electric (PG&E) bankruptcy case which held that FERC has no “concurrent jurisdiction” over determining whether PG&E can reject PPAs under which it purchases electric energy and that PG&E did not need approval from FERC to reject these PPAs.<sup>30</sup> The Sixth Circuit’s FirstEnergy decision determining that the bankruptcy court and FERC have concurrent jurisdiction and requiring the bankruptcy court to apply a heightened rejection standard means that debtors filing for chapter 11 in a jurisdiction within the Sixth Circuit may now face more hurdles in seeking to reject PPAs.<sup>31</sup> The next chapter of this jurisdictional debate may be addressed by the Ninth Circuit, which is considering an appeal to the PG&E decision.<sup>32</sup>

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25. *Id.*

26. *NRG Power Mktg., LLC v. Maine Pub. Util. Comm’n*, 558 U.S. 165, 167 (2010); *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 530 (2008).

27. *FirstEnergy*, 945 F.3d at 445-46.

28. *Id.* at 446.

29. *Id.*

30. *In re PG&E Corp.*, 603 B.R. 471, 476 (Bkrcty. N.D. Cal. 2019).

31. *FirstEnergy*, 945 F.3d at 459.

32. *Petition, Pacific Gas & Electric Corp. et al. v. FERC* (9th Cir.) (No. 19-16833).

### III. IMPLEMENTING SECTION 36 OF THE FEDERAL POWER ACT

In 2019, FERC began implementing section 36 of the FPA, enacted as section 3005 of the “America’s Water Infrastructure Act of 2018.”<sup>33</sup> Section 36 requires FERC, when determining the length of a new hydroelectric license, to give equal weight to investments made during the existing license term and those to be made under the new license.<sup>34</sup> FERC policy sets a default term of a hydroelectric license at 40 years.<sup>35</sup> FERC may, however, establish a longer term of up to 50 years in some circumstances, providing a licensee a longer period over which to recover significant capital investments in its project.<sup>36</sup> Under section 36(b)(2) of the FPA, the Commission will consider in setting the term for the next license those project-related investments by the licensee over the term of the existing license that FERC determines

(A) resulted in redevelopment, new construction, new capacity, efficiency modernization, rehabilitation or replacement of major equipment safety improvements, or environmental, recreation, or other protection, mitigation or enhancement measures conducted over the term of the existing license; and (B) were not expressly considered by the Commission as contributing to the length of the existing license term in any order establishing or extending the existing license term.<sup>37</sup>

Section 36 also provides for a licensee that is not yet in the process of obtaining a new license to nevertheless receive a determination from FERC with respect to whether any planned, ongoing or completed investment meets the criteria under section 36(b)(2).<sup>38</sup> Pursuant to section 36(c) FERC must, within 60 days of receiving a request from a licensee, make the determination.<sup>39</sup> FERC may not however quantify in such a determination the number of years that will be added to the license term.<sup>40</sup> The length of the license term will be decided in the context of the application for the new license.<sup>41</sup>

FERC’s first decision applying section 36 concerned PG&E’s application for a new license for the Poe Hydroelectric Project.<sup>42</sup> Pursuant to its delegated authority in the re-licensing process, FERC staff issued a new 40-year license for the project in December 2018.<sup>43</sup> In January 2019, PG&E filed a request for rehearing asking that the Commission modify the license term from 40 years to 50 years based upon more than \$54 million it had spent on specific capital im-

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33. 33 U.S.C. § 3005 (2020).

34. 16 U.S.C. § 823g(b)(2) (2020).

35. Policy Statement, *Policy Statement on Establishing License Terms for Hydroelectric Projects*, 161 F.E.R.C. ¶ 61,078 (2017).

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

37. 16 U.S.C. § 823g(b)(2).

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Pacific Gas and Electric Company*, 167 F.E.R.C. ¶ 61,047 at P 4 (2019).

43. *Pacific Gas and Electric Company*, 165 F.E.R.C. ¶ 62,172 (2018).

provements to enhance the power and developmental purposes of the project and facilitate compliance with anticipated environmental conditions of a new license.<sup>44</sup> Although PG&E did not raise section 36, FERC relied on it and based its decision to grant the requested 50 year license upon determinations that the investments “were related to improving the operational efficiency of the project and modernizing and rehabilitating the project works and therefore qualify under the 2018 Water Infrastructure Act . . . .”<sup>45</sup>

In *Public Utility District No. 1 of Chelan County, Washington*,<sup>46</sup> FERC considered for the first time a licensee request for a determination on project investments over the term of the existing license under section 36. The licensee claimed that it had invested “heavily” in its project in excess of the requirements of its existing license.<sup>47</sup> FERC found that turbine and generator improvements at two of the project’s powerhouses “will enhance the efficiency and reliability of the Rock Island Project” and qualified under section 36(b)(2) as “rehabilitation or replacement of major equipment.”<sup>48</sup> Similarly, FERC determined that an estimated \$4 million investment to replace two manually-operated spillway bay gate hoists with automatic hoists met the section 36(b)(2) criteria for a “safety improvement.”<sup>49</sup> FERC found that the spillway improvement would “allow remote gate operation and increase gate capacity, improving the safety and reliability of the spillway.”<sup>50</sup>

FERC also considered whether the licensee’s expenditures of over \$44 million to implement a Habitat Conservation Plan for certain species of Columbia River salmon met the criteria in section 36(b)(2) for investments that resulted in “environmental . . . protection, mitigation, or enhancement measures.”<sup>51</sup> The Commission found that the implementation investments assisted in the recovery, protection and habitat enhancement of the fish, they “appear[ed] to be the type” of investment that “can meet” the section 36(b)(2) criteria.<sup>52</sup> However, the Commission said that the licensee may wish to provide additional information during the re-licensing process to “clarify the nature of these measures,” such as

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44. 167 F.E.R.C. ¶ 61,047 at PP 7-8.

45. *Id.* at P 11. In comments filed in response to PG&E’s rehearing request, the California Department of Fish and Wildlife said that the investments PG&E described did not meet the qualifications set forth in the 2017 Policy Statement. FERC, however, determined that it did not need to address whether the investments would have qualified under the Policy Statement, having found that the investments qualified under Section 36. FERC noted that the list of investments it must consider under Section 36 is broader than the list of activities allowed under the 2017 Policy Statement. *Id.* at PP 5, 11, n.18.

46. *Determination on Project Investments Under Section 36 of the Federal Power Act*, 168 F.E.R.C. ¶ 61,083 (2019).

47. *Id.* at P 6.

48. *Id.* at P 9.

49. *Id.* at P 12.

50. *Id.*

51. 168 F.E.R.C. ¶ 61,083 at P 14.

52. *Id.*

explaining how the measures specifically were implementing its obligations under the Habitat Conservation Plan.<sup>53</sup>

Finally, FERC considered whether the licensee's estimated \$40 million plan to construct or update office, warehouse, and storage facilities at the Project met the criteria under section 36.<sup>54</sup> Based on the information provided by the licensee, FERC said that it could not determine whether these investments met the criteria under section 36(b)(2).<sup>55</sup> Specifically, FERC was "not certain that Congress intended for [it] to consider ancillary facilities, such as office buildings, that do not have a demonstrated direct hydropower purpose, may not be necessary for project operation, and may have other uses."<sup>56</sup>

On December 3, 2019, FERC ruled on a request for a determination under section 36 by South Carolina Public Service Authority with respect to investments in the Santee Cooper hydroelectric project.<sup>57</sup> The original project license, issued in 1979, expired in 2006.<sup>58</sup> The project has since operated under an annual license.<sup>59</sup> The licensee requested the Commission's determination with respect to eleven separate investments including replacements and upgrades to existing equipment, repair projects, and a cybersecurity upgrade, as well as studies regarding one of the dam's seismic stability.<sup>60</sup>

FERC determined with respect to each investment that: (1) the investment meets the criteria; (2) the investment "appear[s] to meet the criteria" but to assist the Commission in making a decision with respect to the term of a new license, the licensee may wish to provide additional information "to clarify aspects of the investment, if any, that enhanced the project beyond repairs [or replacements, as applicable] necessary to ensure continued operation of the project"; or (3) it is unable to determine whether the investment meets the criteria.<sup>61</sup> On the information presented, FERC was not able to determine that a \$1.5 million investment for seismic studies "warrants consideration."<sup>62</sup> FERC noted that another entity (The U.S. Army Corps of Engineers) funded and completed construction work to improve the seismic stability of the dam in question, and said that it was "not certain that Congress intended for [it] to consider investments solely in studies without an associated licensee investment in safety improvements to the project."<sup>63</sup> With respect to investments that it determines "appear to meet the criteria. . ." under Section 36(b)(2), FERC said that, the licensee will need to demonstrate during the relicensing process how the investment "enhanced" the

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53. *Id.* at P 14.

54. *Id.* at P 10.

55. *Id.*

56. 168 F.E.R.C. ¶ 61,083 at P 10.

57. *South Carolina Pub. Serv. Auth.*, 169 F.E.R.C. ¶ 61,181 (2019).

58. *Id.* at P 2.

59. *Id.*

60. *Id.* at P 7.

61. *Id.* at PP 24, 26, 28.

62. 169 F.E.R.C. ¶ 61,181 at P 30.

63. *Id.* at PP 29-30.

project beyond ensuring its continued operation in order to consider the investment in setting the term of a new license.<sup>64</sup>

Finally, FERC directed that in the future the Office of Energy Projects will issue orders on requests for determination under section 36.<sup>65</sup> “Any such decisions will be subject to review by the Commission where rehearing is sought.”<sup>66</sup>

#### IV. FERC ORDERS UTILITIES TO REVISE RATES TO ACCOUNT FOR ACCUMULATED DEFERRED INCOME TAXES PURSUANT TO TAX CUTS AND JOBS ACT OF 2017

On November 21, 2019, FERC issued Order No. 864<sup>67</sup> requiring that “public utility transmission providers with transmission formula rates under an Open Access Transmission Tariff (OATT), a transmission owner tariff, or a rate schedule to revise those transmission formula rates to account for changes” in accumulated deferred income taxes (ADIT) resulting from the 2017 Tax Cuts and Jobs Act (Tax Cuts Act).<sup>68</sup> The requirements adopted by FERC in its final rule follow the proposals set forth in the notice of proposed rulemaking (NOPR) issued on November 15, 2018, with certain modifications as discussed below.<sup>69</sup>

President Trump signed into law the Tax Cuts Act on December 22, 2017, which, among other things, reduced the federal corporate income tax rate from 35% to 21% beginning January 1, 2018, resulting in less federal corporate income tax expense<sup>70</sup> and consequently a reduction in ADIT liabilities and ADIT assets on the books of public utilities.<sup>71</sup> ADIT balances are accumulated on the regulated books of public utilities and arise from timing differences between the method of computing taxable income for IRS purposes and computing income for regulatory accounting and ratemaking purposes.<sup>72</sup> Because public utilities collected ADIT liability from customers based upon the higher 35% federal corporate income tax rate which will no longer be due to the IRS and is considered excess ADIT, the over-collected amount must be returned to customers.<sup>73</sup>

For public utilities with transmission formula rates, the Commission will require them to include a Rate Base Adjustment Mechanism in their formula rates to preserve rate base neutrality by removing any excess ADIT from or adding any deficient ADIT to their rate base, and an Income Tax Allowance Ad-

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64. *Id.* at P 28.

65. *Id.* at P 31.

66. *Id.*

67. Final Rule, *Pub. Util. Transmission Rate Changes to Address Accumulated Deferred Income Taxes*, 169 F.E.R.C. ¶ 61,139 (2019).

68. *Id.*

69. *Id.* at P 2.

70. Final Rule, *Public Utility Transmission Rate Changes to Address Accumulated Deferred Income Taxes*, 84 Fed. Reg. 65,281, at 65,282 (2019).

71. *Id.*

72. *Id.*

73. *Id.* at 65,283.



justment Mechanism to return excess ADIT to or recover deficient ADIT from ratepayers.<sup>74</sup> Public utilities with transmission formula rates must also include a new permanent worksheet into their transmission formula rates designed to annually track information related to excess or deficient ADIT and provide transparency around the adjustment of rate bases and income tax allowances.<sup>75</sup> The worksheet submitted to FERC must be populated, assisting the Commission in analyzing the worksheet's function and helping the Commission to assess whether the worksheet provides adequate transparency.<sup>76</sup> FERC determined that a public utility's next rate proceeding is the most appropriate place to address excess or deficient ADIT resulting from the Tax Cuts Act.<sup>77</sup> All public utilities with these transmission formula rates are required to submit a filing to demonstrate compliance with the final rule, including any revisions to its transmission formula rates, if necessary, within the later of thirty days of the effective date of this rule or the public utility's next annual informational filing following the issuance of this final rule.<sup>78</sup>

V. FERC ISSUES OPINION NO. 569 ADOPTING REVISED  
METHODOLOGY TO DETERMINE ROE  
UNDER SECTION 206 OF FPA

On November 21, 2019, FERC issued Opinion No. 569, establishing a revised methodology to determine whether an established rate of return on equity (ROE) that electric utilities are entitled to earn on electric transmission investment is just and reasonable under section 206 of the FPA.<sup>79</sup> The Commission in its order also applied the new methodology to resolve two proceedings before it involving the base ROEs of Midcontinent Independent System Operator, Inc. (MISO) transmission owners (TOs)<sup>80</sup> for which the Commission had previously issued an Order Directing Briefs.<sup>81</sup>

FERC issued on November 15, 2018, an Order Directing Briefs requiring the participants to submit briefs addressing FERC's proposed ROE methodology, specifically the proposed framework for determining whether an existing base ROE is unjust and unreasonable under the first prong of FPA section 206, and a revised methodology for determining just and reasonable base ROEs under the second prong of FPA section 206.<sup>82</sup> The *MISO* Briefing Order was the cul-

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74. *Id.* at 65,283-84.

75. 84 Fed. Reg. 65,281, at 65,282.

76. *Id.* at 65,290.

77. *Id.* at 65,292.

78. *Id.* at 65,294.

79. Opinion No. 569, *Order on Briefs, Rehearing and Initial Decision*, 169 F.E.R.C. ¶ 61,129 (2019).

80. *Id.* at P 459.

81. *Coakley v. Bangor Hydro-Elec. Co.*, 165 F.E.R.C. ¶ 61,030 (2018). This Finance and Transactions Committee previously discussed the *Coakley* Briefing Order in its last Committee Report. *Report of the Finance and Transactions Committee*, 40 ENERGY L.J. 1 Online (2019), [https://www.ebanet.org/assets/1/6/\[Finance\\_and\\_Transactions\]\[Final\].pdf](https://www.ebanet.org/assets/1/6/[Finance_and_Transactions][Final].pdf).

82. *Association of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, 165 F.E.R.C. ¶ 61,118 at PP 17-18 (2018).

mination of several proceedings addressing just and reasonable rates.<sup>83</sup> In its earlier Opinion No. 531, the Commission made certain changes to its application of the discounted cash flow (DCF) methodology to determine ROE for the New England transmission owners, abandoning the one-step DCF model in favor of the two-step constant growth model that it typically applies to the natural gas and oil pipeline industries<sup>84</sup> and departing from its usual practice of setting the just and reasonable ROE of a group of utilities at the midpoint of the zone of reasonableness.<sup>85</sup> In *Emera Maine*, the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) vacated and remanded Opinion No. 531.<sup>86</sup> The D.C. Circuit held that FERC had failed to take the first step required under FPA section 206 of a finding that an existing ROE is unjust and unreasonable before setting a new rate at a level that FERC determined is just and reasonable.<sup>87</sup> The D.C. Circuit reasoned that FERC never actually explained how the existing ROE was unjust and unreasonable, and “because FERC’s single ROE analysis failed to include an actual finding” of the existing base ROE being unjust and unreasonable but rather only relied on that conclusion as a result of a determination that a new base ROE was just and reasonable, “FERC acted . . . outside its statutory authority in setting a new base ROE.”<sup>88</sup> “On October 16, 2018, the Commission issued an order proposing a methodology for addressing” the deficiencies in *Emera Maine* “and establishing a paper hearing on” whether and how to apply this methodology to the four complaint proceedings concerning the New England TOs’ ROE.<sup>89</sup> The *MISO* Briefing Order sought comments on whether and how the *Coakley* Briefing Order should apply to the two MISO TO’s ROE proceedings before the Commission.<sup>90</sup>

Opinion No. 569 satisfies the standard set out in *Emera Maine* by establishing a new framework for determining whether an existing base ROE is unjust and unreasonable and a new methodology for determining a new base ROE that is just and reasonable.<sup>91</sup> The Commission rejected using the Expected Earnings and Risk Premium models and determined that the DCF and capital-asset pricing model given equal weight “will better reflect how investors make their investment decisions.”<sup>92</sup> The Commission had proposed in the *Coakley* Briefing Order

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83. *Id.* at P 1.

84. Opinion No. 531, *Coakley v. Bangor Hydro-Elec. Co.*, 147 F.E.R.C. ¶ 61,234 at PP 8, 32-41 (2014), order on paper hearing, Opinion No. 531-A, 149 F.E.R.C. ¶ 61,032 (2014), order on reh’g, Opinion No. 531-B, 150 F.E.R.C. ¶ 61,165 (2015), *rev’d*, *Emera Maine v. FERC*, 854 F.3d 9 (D.C. Cir. 2017). This Finance and Transactions Committee previously discussed the D.C. Circuit’s findings in a prior Committee Report. *Report of the Finance and Transactions Committee*, 39 ENERGY L.J. 1 Online (2018), [http://www.ebanet.org/assets/1/6/Finance\\_and\\_Transactions\\_Committee\\_FINALv2.pdf](http://www.ebanet.org/assets/1/6/Finance_and_Transactions_Committee_FINALv2.pdf).

85. 147 F.E.R.C. ¶ 61,234 at PP 144-45.

86. *Emera Maine*, 845 F. 3d. at 30.

87. *Id.* at 27.

88. *Id.* at 26-27.

89. 165 F.E.R.C. ¶ 61,118 at P 1.

90. *Id.*

91. 169 F.E.R.C. ¶ 61,129 at P 1.

92. *Id.* at P 31.

to give equal weight to the four financial models in determining base ROE instead of primarily relying on the DCF model as it traditionally had done.<sup>93</sup> FERC also adopted high-end and low-end outlier tests that would eliminate those companies whose ROEs are unreasonably high or low from the proxy groups used to determine the zone of reasonableness in the ROE proxy calculations.<sup>94</sup>

Finally, FERC applied its revised base ROE methodology to the two complaints involving MISO TOs.<sup>95</sup> Regarding the first complaint, FERC found that the MISO TOs' 12.38% ROE was unjust and unreasonable and that instead a base ROE of 9.88% would be just and reasonable, granting a rehearing in order to require the MISO TOs to adopt the 9.88% ROE and requiring the MISO TOs to provide refunds with interest for the refund period.<sup>96</sup> Regarding the second complaint, FERC found that the first complaint retroactively reduced the effective ROE during the refund period of the second complaint, and since the relevant ROE for the second complaint was 9.88% which was established to be not unjust and unreasonable, dismissed the complaint with no requirement for refunds.<sup>97</sup>

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93. *Id.* at P 11.

94. *Id.* at PP 375, 387.

95. *Id.* at P 2.

96. 169 F.E.R.C. ¶ 61,129 at P 574.

97. *Id.* at P 575.

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