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 time period between July 1, 2015, and June 30, 2016.*

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I. NOTED PROCEDURAL HOLDINGS FROM THE FEDERAL COURT

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 that proceeding 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."[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 notable procedural issues (e.g., standing, failure to raise issue on rehearing) which resulted in the court dispensing with one or more issues without reaching the merits.

* The FERC Practice Committee thanks Jeffrey Bayne, Dennis Hough, Michael Keegan, Thomas Kirby, Melissa Legge, and Anjali Patel for their contributions to this report.

1. 16 U.S.C. § 825*l*(b) (2011); Natural Gas Act, 15 U.S.C. § 717r(b) (2011).
2. 16 U.S.C. § 825*l*(b); 15 U.S.C. § 717r(b).
3. 16 U.S.C. § 825*l*(b); 15 U.S.C. § 717r(b).

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

1. American Transmission Systems, Inc. v. FERC, No. 14-1085 (D.C. Cir. July 1, 2016)

In an unpublished opinion, the D.C. Circuit dismissed petitions for review of two FERC orders, finding that it lacked jurisdiction because the parties had not preserved their arguments below.[4] The petitioners argued that Order No. 1000's directive that transmission providers remove tariff provisions granting a "federal right of first refusal to construct transmission facilities" violated the *Mobile-Sierra* doctrine.[5] The court found that "[t]he problem for petitioners . . . is that Order No. 1000 applies only to the removal of rights of first refusal, and petitioners have preserved no argument that either one of their agreements actually contained a right of first refusal for the *Mobile-Sierra* doctrine to protect," leaving the court without jurisdiction to hear the challenge.[6]

The Court explained that in their Order No. 1000 compliance filing at the FERC, petitioners had identified four provisions in PJM's Consolidated Transmission Owners Agreement and the PJM Operating Agreement that purportedly contained federal rights of first refusal,[7] but that the FERC had rejected those arguments. The FERC found that two of the provisions did not contain rights of first refusal; it approved a revision to clarify that the third provision did not need to be removed because it did not create a right of first refusal, and it failed to address the fourth provision. The court found that the petitioners failed to challenge the FERC's determinations in a petition for rehearing, and therefore their claims were jurisdictionally barred.[8] It held that because "petitioners failed to preserve any argument before the Commission that [their agreements] actually contained a right of first refusal that is even arguably subject to *Mobile-Sierra* protection," the court lacked "jurisdiction to entertain their challenges to the Commission's determination that *Mobile-Sierra* did not apply to their agreements."[9] The court also stated that it is jurisdictionally barred from considering points raised for the first time at oral argument.[10]

2. Sierra Club v. FERC (Freeport), No. 14-1275 (D.C. Cir. June 28, 2016)

Petitioners, Sierra Club and the Galveston Baykeeper (collectively, Associations) sought review of the FERC's decision authorizing Freeport LNG Develop-

4. American Transmission Sys. Inc. v. FERC, No. 14-1085, 2016 WL 3615443 (D.C. Cir. July 1, 2016) (per curiam); *dismissing petitions for review of PJM Interconnection, L.L.C.*, 142 F.E.R.C. ¶ 61,214 (2013) (Order No. 1000 Compliance Order); *and PJM Interconnection, L.L.C.*, 147 F.E.R.C. ¶ 61,128 (2014) (Rehearing Order).

5. *American Transmission Sys. Inc.*, 2016 WL 3615443 at *1(citing Order No. 1000, *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, F.E.R.C. Stats. & Regs. ¶ 31,323 at P 253, 76 Fed. Reg. 49,842, at 49,885 (2011) (to be codified at 18 C.F.R. pt. 35) (Order No. 1000) (subsequent history omitted).

6. *Id.*

7. *Id.* at *2.

8. *Id.*

9. *Id.* at *3.

10. *American Transmission Sys. Inc.*, 2016 WL 3615443 at *2.

ment, L.P. to redesign its liquefied natural gas (LNG) terminal in Texas with facility modifications to better support gas exports and the construction of additional gas liquefaction facilities to supplement its export operations.[11] The petitioners argued that the FERC's analysis of the proposal's impact on the environment ran afoul of the National Environmental Policy Act of 1969 (NEPA).[12]

With regard to the procedural issues, the court held that the Associations had standing and that the case is not moot. The court focused on the individual-member injury component of association standing. Although the FERC argued that the Associations must tie the injury to the specific aspects of the action authorized by the Commission orders, the court found that the FERC's argument "slice[d] the salami too thin."[13] The court held that the member had standing because the member's alleged "aesthetic injury" followed from an inadequate Environmental Impact Statement, regardless of whether the inadequacy concerned the same environmental issue that causes the injury.[14] The court further dismissed the FERC's claim that the case was moot because the U.S. Department of Energy (DOE) had issued informational reports evaluating specific environmental aspects of the LNG production and export chain. The court found petitioners were challenging the sufficiency of the Commission's NEPA review—not the DOE's analysis—and the additional DOE reports did not remedy the alleged deficiencies.

On the merits, the court rejected all of the Associations' challenges and upheld the Commission's environmental analysis under the deferential arbitrary and capricious standard of review. First, the court found that DOE's independent decision to allow exports—a decision over which the Commission has no regulatory authority—broke the "NEPA causal chain and absolv[ed] the Commission of responsibility to include in its NEPA analysis considerations that it 'could not act on' and for which it cannot be 'the legally relevant cause.'"[15] Second, the court rejected as outside the scope of the Commission's NEPA responsibilities the Associations' argument that the Commission acted arbitrarily and capriciously by failing to take sufficient account of a government report that predicted increased gas production and coal use. Finally, the court explained that a NEPA cumulative-impact analysis need only consider the "'effect of the current project along with any other past, present or likely future actions *in the same geographic area*' as the project under review," and that a nationwide analysis was not required.[16]

The court additionally found that it lacked jurisdiction to consider petitioner's argument regarding the Commission's quantification of emissions as the petitioner had failed to raise the argument before the FERC as required under the NGA. The court stated:

> That obligation to raise objections before the Commission first is redoubled under NEPA because '[p]ersons challenging an agency's compliance with NEPA must

11. Sierra Club v. FERC (Freeport), 827 F.3d 36, 40 (D.C. Cir. 2016).

12. 42 U.S.C. §§ 4321-4347 (2014).

13. *Sierra Club (Freeport)*, 827 F.3d at 44 (quoting WildEarth Guardians v. Jewell, 738 F.3d 298, 307 (D.C. Cir. 2013)).

14. *Id.* (quoting *WildEarth Guardians*, 738 F.3d at 307).

15. *Id*. at 48 (citing Department of Transp. v. Public Citizen, 541 U.S. 752, 769 (2004); distinguishing Mid States Coal. for Progress v. Surface Transp. Bd., 345 F.3d 520 (2003)).

16. *Sierra Club (Freeport),* 827 F.3d at 50 (quoting Taxpayers of Mich. Against Casinos v. Norton, 433 F.3d 852, 864 (D.C. Cir. 2006)).

> structure their participation so that it . . . alerts the agency to the [parties'] position and contentions,' and failure to do so 'forfeit[s] any objection' to the environmental analysis on that ground.[17]

3. Sierra Club v. FERC (Sabine Pass), No. 14-1429 (D.C. Cir. June 28, 2016)

In a sister case to *Sierra Club* (Freeport), the Sierra Club sought review of the FERC's decision authorizing an increase in production capacity at an LNG terminal in Louisiana alleging that the FERC had failed to comply with the NEPA.[18] Similar to Freeport, the court in this case also concentrated on individual injury aspect of the standing issue. The court held that the Sierra Club had standing because it had demonstrated that at least one of its members will "suffer cognizable aesthetic and recreational harm were the volume of tanker traffic to and from the terminal to grow" and that there is a "substantial probability" that an increase in the terminal's production capacity will cause tanker traffic to increase.[19]

On the merits, the court found that the Commission did not act arbitrarily and capriciously by failing to consider two indirect effects of its actions. Referencing its analysis in *Sierra Club* (Freeport), the court found that the alleged effects related to exports rather than the action authorized by the Commission. The court instructed the Sierra Club that it could raise these concerns in a challenge to the DOE's NEPA review of its export decision.

The court also dismissed in part and denied in part petitioner's argument that the Commission had failed to consider cumulative impacts in its NEPA analysis. To the extent Sierra Club's argument related to projects other than Sabine Pass, the court found that it lacked jurisdiction because Sierra Club had failed to raise them in a petition for rehearing before the FERC as required under the NGA. The court explained that the NGA's "jurisdictional provisions are stringent" and that "there are no reasonable grounds to excuse the party's failure" to exhaust its administrative remedies.[20] The court additionally found that the Commission had provided a reasonable explanation for its finding that the increase in production capacity at Sabine Pass did not generate environmental impacts of the sort that the NEPA requires it to consider cumulatively.

4. Xcel Energy Services v. FERC, 815 F.3d 947 (D.C. Cir. 2016)

On March 8, 2016, the D.C. Circuit granted in part the petition of Xcel Energy Services Inc. (Xcel) for review of three FERC orders denying retroactive refund of unlawful rates.[21] The court explained that in order to protect consumers from excessive rates and charges when reviewing a non-jurisdictional entity's rates as a component of a regional transmission organization's rates, the FERC's practice has been to either suspend the proposed rates during the review process or allow the rates to take effect only when the non-jurisdictional entity voluntarily

17. *Id.* at 50-51 (quoting *Public Citizen*, 541 U.S. at 764).
18. Sierra Club v. FERC (Sabine Pass), 827 F.3d 59 (D.C. Cir. 2016).
19. *Id.* at 66.
20. *Sierra Club (Sabine Pass)*, 827 F.3d at 69.
21. Xcel Energy Servs. v. FERC, 815 F.3d 947 (D.C. Cir. 2016).

agrees to make refunds if the Commission determines the rates are unjust.[22] However, the FERC failed to follow this established procedure in a filing by Southwest Power Pool, Inc. (SPP) to implement the formula rate of Tri-County Electric Cooperative, Inc. (Tri-County), a non-jurisdictional participating transmission owner.[23]

After Xcel sought rehearing, the FERC "acknowledged that it 'erred in allowing SPP's rate proposal for Tri-County's [Annual Transmission Revenue Requirement] to go into effect April 1, 2012, without a commitment from Tri-County to refund the difference between the as-filed rate and the rate ultimately found to be just and reasonable by the Commission.'"[24] Nevertheless, the Commission denied rehearing, stating that "it lacked jurisdiction to make Tri-County's collected rates subject to refund."[25]

The D.C. Circuit disagreed.[26] First, it noted that the lack of authority to order refunds from Tri-County, a non-jurisdictional entity, was irrelevant because SPP is ultimately the entity providing services.[27] Second, the court explained that although there is a general prohibition against suspending a rate schedule in effect under a final order,[28] this does not apply "where the Commission acknowledges that it acted contrary to section 205's mandate to protect consumers against unjust and unreasonable rates."[29]

B. Other Circuit Court Decisions

1. Idaho Power Co. v. FERC, 801 F.3d 1055 (9th Cir. 2015)

The Ninth Circuit remanded for further consideration two FERC orders that conditionally approved proposed settlement agreements as uncontested, finding that the FERC abused its discretion by not following its rules and precedent.[30] The case evolved from a protracted proceeding involving electricity sales in the Pacific Northwest in 2000-2001.[31] The petitioner, a wholesale energy supplier, filed two related settlement agreements seeking to end its involvement in the proceeding.[32] The first settlement was the subject of comments contesting the settlement's release of claims provision.[33] No objections were filed to the second settlement.[34] The FERC conditionally approved both settlements, treated them as uncontested,

22. *Id.* at 950 (citing *Lively Grove Energy Partners, LLC*, 140 F.E.R.C. ¶ 61,252 at P 47 & n.59 (2012); *City of Banning*, 136 F.E.R.C. ¶ 61,134 (2011); *City of Riverside*, 128 F.E.R.C. ¶ 61,207 at P 26 (2009); *Great River Energy*, 130 F.E.R.C. ¶ 61,001 (2010)).

23. *Id.*

24. *Id.* at 951 (quoting *Southwest Power Pool*, 142 F.E.R.C. ¶ 61,135 at P 13 (2013)).

25. *Id.* (citing *Southwest Power Pool*, 142 F.E.R.C. ¶ 61,135 at PP 14-15).

26. *Xcel Energy Servs.*, 815 F.3d at 953.

27. *Id.*

28. *Id.* at 954 (citing 18 C.F.R. § 2.4(a) (2016)).

29. *Id.* at 956.

30. Idaho Power Co. v. FERC, 801 F.3d 1055, 1056 (9th Cir. 2015).

31. *Id*.

32. *Id.* at 1057.

33. *Id.*

34. *Id.* at 1057-58.

and required modifications to the settlements' release provisions.[35] The court found that the FERC's treatment of the first settlement as uncontested was inconsistent with a number of statements in the record showing it had been in fact contested.[36] The court then found that the FERC abused its discretion by not applying its *Trailblazer*[37] analysis for contested settlements.[38] Due to the dependent relationship between the two settlements, the court remanded the order approving the second settlement for further consideration.[39] On remand, the FERC applied *Trailblazer* to the first settlement, treated the second as uncontested, and conditionally approved both settlements.[40]

2. Northwest Requirements Utilities v. FERC, 798 F.3d 796 (2015)

Northwest Requirements Utilities v. FERC[41] involved various consolidated petitions for review of FERC orders requiring the Bonneville Power Administration (Bonneville) to provide transmission services on nondiscriminatory terms pursuant to section 211A of the FPA.[42] In response to these orders, Bonneville filed, and the FERC accepted, protocols that would compensate wind generators when Bonneville curtailed wind generation in specific circumstances.[43] The petitioners in this case were wholesale customers of Bonneville and related trade organizations, whose costs would increase if Bonneville compensated wind generators in this manner.[44]

In its decision, the Ninth Circuit first held that the petitioners did satisfy the requirements for Article III standing: injury in fact, causation, and redressability.[45] However, the court went on to hold that the petitions failed to demonstrate statutory standing.[46] The Ninth Circuit stated that "[s]ection 211A was designed to foster an open and competitive energy market by promoting access to transmission services on equal terms."[47] However, according to the Ninth Circuit, the petitioners in this case, Bonneville's wholesale energy customers and their organizational allies, "do not align with these goals."[48] The petitioners wanted to reduce Bonneville's costs, which are passed on to them, and the court stated that this interest was "at best, 'orthogonal' to the purposes of a statutory provision intended to increase access to transmission markets."[49] As a result, the Ninth Circuit concluded

35. *Idaho Power Co.,* 801 F.3d at 1057-58.

36. *Id.* at 1058-59.

37. *Trailblazer Pipeline Co.*, 85 F.E.R.C. ¶ 61,345 (1998); *order on reh'g* 87 F.E.R.C. ¶ 61,110; *reh'g denied*, 88 F.E.R.C. ¶ 61,168 (1999).

38. *Idaho Power,* 801 F.3d at 1059.

39. *Id.*

40. *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity*, 53 F.E.R.C. ¶ 61,136 (2015), *reh'g denied*, 155 F.E.R.C. ¶ 61,307 (2016).

41. Northwestern Requirements Utils. v. FERC, 798 F.3d 796 (9th Cir. 2015).

42. 16 U.S.C. § 824j-1 (2014).

43. *Nw. Requirements Utils.*, 798 F.3d at 803-04.

44. *Id.* at 801. Bonneville was not a party to this proceeding. *Id.*

45. *Id.* at 804-07.

46. *Id.* at 809.

47. *Nw. Requirements Utils*., 798 F.3d at 808.

48. *Id.* at 809.

49. *Id.* (quoting Grand Council of Crees (of Quebec) v. FERC, 198 F.3d 950, 958 (D.C. Cir. 2000)).

that the petitioners were outside of the zone of interests to be protected or regulated by the statute and denied their petitions for review.[50]

3. People of the State of California v. FERC, 809 F.3d 491 (9th Cir. 2015)

On December 17, 2015, the Ninth Circuit denied in part and dismissed in part petitions for review of several FERC orders pertaining to the energy crisis in California and other western states in 2000 and 2001.[51] In a previous decision,[52] the Ninth Circuit held that "FERC's failure to consider evidence of market manipulation [in the Pacific Northwest during the energy crisis] was arbitrary and capricious"[53] and remanded with instructions to examine such evidence.[54] On remand, the FERC for the first time stated that it would apply the *Mobile-Sierra* doctrine to the short-term bilateral power sales contracts at issue.[55] The FERC also limited the scope of evidence in the proceeding.[56]

The Ninth Circuit analyzed its jurisdiction over the two issues raised by petitioners: (1) FERC's application of the *Mobile-Sierra* presumption;[57] and (2) the scope of the evidentiary proceeding.[58] While the FPA does not on its face limit review to final orders, under *Steamboaters* the Ninth Circuit has "joined other circuits in the view that 'review . . . is limited to orders of definitive substantive impact, where judicial abstention would result in irreparable injury to a party.'"[59] Here, the court found that it had jurisdiction to review the FERC's invocation of the *Mobile-Sierra* doctrine because it was a final action.[60] But the court denied the petitioners challenge of the facial applicability of the *Mobile-Sierra* doctrine, noting that the "mere short-term nature of these spot sale contracts does not render FERC's application of the *Mobile-Sierra* doctrine unreasonable."[61]

In contrast, the court held that the changes to the scope of the evidentiary proceeding were preliminary and lacked definitive substantive impact.[62] The Ninth Circuit explained that even though "some harm might flow from proceeding under a flawed evidentiary framework . . . [t]he individual evidentiary restrictions challenged here are classic interim rulings whose consequence cannot be determined with any finality at this juncture," and as a result the court dismissed the evidentiary challenges for lack of jurisdiction.[63]

II. FEDERAL ENERGY REGULATORY COMMISSION HEADLINES AND NOTABLE

50. *Id.*
51. California ex rel. Harris v. FERC, 809 F.3d 491 (9th Cir. 2015).
52. Port of Seattle v. FERC, 499 F.3d 1016 (9th Cir. 2007).
53. *Cal. ex rel. Harris*, 809 F.3d at 496 (citing *Port of Seattle*, 499 F.3d at 1034-36).
54. *Id.* at 497 (quoting *Port of Seattle*, 499 F.3d at 1035-36).
55. *Id.*
56. *Id*.
57. *Id.* at 498.
58. *Cal. ex rel. Harris*, 809 F.3d at 499-500.
59. *Id*. at 498 (citing Steamboaters v. FERC, 759 F.2d 1382, 1387 (9th Cir. 1985)).
60. *Id.* at 499.
61. *Id.* at 500-503.
62. *Id.* at 499-500.
63. *Cal. ex rel. Harris*, 809 F.3d at 500.

ADMINISTRATIVE ACTIONS

A. Appointments

On September 1, 2015, the FERC announced that Chairman Bay named Max Minzner as general counsel to the Commission.[64] Immediately prior to his appointment, Mr. Minzner served as an advisor to Chairman Bay. Mr. Minzner also previously taught at the University of New Mexico School of Law and the Benjamin N. Cardozo School of Law, and from 2009 to 2010 served as special counsel to the FERC Office of Enforcement.

B. Rulemakings and Policy Statements

1. Commencement of Assessment of Annual Charges, Order No. 815, Docket No. RM15-18-000

In Order No. 815, the FERC revised its part 11 regulations to modify when it would begin assessing annual charges to hydropower licensees and exemptees, other than state or municipal entities, with respect to licenses and exemptions authorizing unconstructed projects and new capacity.[65] Assessments are charged against licensees and exemptees of projects with more than 1.5 megawatts of installed capacity.[66]

Under the revised regulations, the FERC will begin assessing annual charges on the date by which the licensee or exemptee is required to commence construction of an unconstructed project or new capacity, rather than on the date that project construction actually begins.[67] Any license or exemption for an unconstructed project that receives an extension of the start-of-construction deadline will be assessed annual charges beginning at the expiration of the extended deadline (but in no case longer than four years after the issuance date of the license or exemption).[68]

The revised regulations apply to any license, exemption, or amendment that is issued after the revised regulation's effective date—that is, December 21, 2015.[69] Any projects pending before the Commission when the rule became effective will be subject to its effects.

2. Delegation of Authority for FERC Form No. 552, Order No. 820, Docket No. RM16-4-000

With Order No. 820, the FERC revised 18 C.F.R. section 375.311 (2015), which governs the delegation of authority to the Director of the Office of Enforcement, to create consistency among the delegations for forms administered by the

64. Press Release, Fed. Energy Reg. Comm'n, Chairman Bay Names Max Minzner as General Counsel (Sept. 1, 2015), https://www.ferc.gov/media/news-releases/2015/2015-3/09-01-15.asp#.V56arqt0q20.

65. Order No. 815, *Commencement of Assessment of Annual Charges*, F.E.R.C. STATS. & REGS. ¶ 31,372 (2015), 80 Fed. Reg. 63,667 (2015) (to be codified at 18 C.F.R. pt. 11) [hereinafter Order No. 815].

66. 18 C.F.R. § 11.1(b) (2016).

67. Order No. 815, *supra* note 65,. at P 19.

68. *Id.* at P 18.

69. *Id.* at PP 20, 31.

Office of Enforcement.[70] The amendment expressly delegates authority over FERC Form No. 552, Annual Report of Natural Gas Transactions, to the Office of Enforcement.[71] Form No. 552 collects transactional information from natural gas market participants.

3. Instant Final Rule Transferring Certain Dispute Resolution Service Matters to the Commission's Landowner Helpline, Order No. 821, Docket No. RM15-26-000

In Order No. 821, the FERC revised its regulations to reflect an internal reorganization.[72] Specifically, the newly created Landowner Helpline (designated in January 2015) replaces the FERC's Dispute Resolution Service as the contact for handling dispute-related calls, emails, and letters pertaining to the construction and operation of jurisdictional infrastructure projects, including natural gas and hydroelectric facilities.[73]

4. Civil Monetary Penalty Inflation Adjustments, Order No. 826, Docket No. RM16-16-000

FERC Order No. 826 adjusted the maximum civil monetary penalty amounts that may be imposed under the FPA, the NGA, the Natural Gas Policy Act (NGPA), and the Interstate Commerce Act (ICA).[74] The action was taken pursuant to the Federal Civil Penalties Inflation Adjustment Improvements Act of 2015, which directed agencies to issue an interim final rule making such adjustments.[75] Among the penalty amounts that were adjusted, the maximum penalties of $1 million 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 $1,193,970 per violation per day.[76] The interim final rule became effective July 6, 2016.

5. Policy Statement on Hold Harmless Commitments, Docket No. PL15-3-000

On May 19, 2016, the FERC issued a final policy statement on the hold harmless commitments that applicants seeking authorization for mergers, acquisitions, and dispositions subject to Commission approval under section 203 of the Federal Power Act offer as forms of ratepayer protections.[77] The final rule "adopt[ed],

70. Order No. 820, *Delegation of Authority for FERC Form No. 552*, F.E.R.C. STATS. & REGS. ¶ 31,376 (2015), 80 Fed. Reg. 81,178 (2015) (to be codified at 18 C.F.R. pt. 375) [hereinafter Order No. 820].

71. *Id.* at PP 1, 5.

72. Order No. 821, *Transferring Certain Dispute Resolution Service Matters to the Commission's Landowner Helpline*, F.E.R.C. STATS. & REGS. ¶ 31,337 (2016), 81 Fed. Reg. 5,378 (2016) (to be codified at 18 C.F.R. pts. 1b, 2, 157, and 380) [hereinafter Order No. 821].

73. *Id.* at PP 1, 6.

74. Order No. 826, *Civil Monetary Penalty Inflation Adjustments*, F.E.R.C. STATS. & REGS. ¶ 31,386 (2016), 81 Fed. Reg. 43,937 (2016) (to be codified at 18 C.F.R. pts. 250 and 385) [hereinafter Order No. 826].

75. *Id.* at PP 1, 2 (citing § 701, Pub. Law 114–74, 129 Stat. 584, 599), 3.

76. Order No. 826*, supra* note 74, at PP 8, 11, 12, 17.

77. *Policy Statement on Hold Harmless Commitments*, 81 Fed. Reg. 33,502, 155 F.E.R.C. ¶ 61,189 (2016) [hereinafter *Policy Statement*].

clarif[ied], and withdr[e]w, in part, the proposals in the Proposed Policy Statement" issued on January 22, 2015.[78]

In the Policy Statement, the Commission did four things. First, it set forth, "as general guidance, the lists of transaction-related costs and transition costs that should be subject to any hold harmless commitment, as proposed in the Proposed Policy Statement, and provide[d] additional clarifications regarding transmission costs, capital costs, labor costs, and the costs of transactions that are not consummated."[79] Even with these lists as guidance, the Commission will "continue to consider hold harmless commitments on a case-by-case basis[,]" and "[t]he burden remains on applicants to show that any offered hold harmless commitment will meet the Commission's standard that the proposed transaction does not have an adverse effect on rates."[80]

Second, the FERC established controls and procedures to track the transaction-related costs subject to any hold harmless commitment, regardless of the projected amount of costs of the transaction.[81] Applicants offering hold harmless commitments must include in their FPA section 203 applications: a description of how they "define, designate, accrue, and allocate transaction-related costs," and an explanation of the criteria used to determine which costs are transaction-related.[82] The FERC, however, withdrew its proposal to require applicants to "describe their accounting procedures and practices."[83]

Third, the Commission clarified that it was withdrawing its proposal to stop accepting time limited hold harmless commitments, finding that "[a]t this time . . . there is [in]sufficient evidence to conclude that applicants are . . . incurring substantial transaction-related costs after five years."[84]

Finally, the Commission clarified that a hold harmless commitment, or other form of ratepayer protection, may be unnecessary for some categories of transactions "if an applicant can otherwise demonstrate that a proposed transaction will have no adverse effect on rates."[85]

The Policy Statement became effective on August 24, 2016.[86]

C. Creation of New Rehearing Group in FERC Office of General Counsel

At the FERC's February 2016 open meeting, the Commission announced the creation of a new group dedicated to rehearing requests.[87] The rehearing group is housed in the Solicitor's Office, within the Commission's Office of General Counsel (OGC). At the meeting, a representative from OGC explained that one of the

78. *Id.* at P 2 (citing Proposed Policy Statement, *Policy Statement on Hold Harmless Commitments*, 80 Fed. Reg. 4,231 (2015), 150 F.E.R.C. ¶ 61,031 (2015)).

79. *Policy Statement, supra* note 77, at P 3; *see, id.* at PP 43, 44 for an updated list of costs.

80. *Id.* at P 45.

81. *Id.* at P 68.

82. *Id.*

83. *Id.* at P 68.

84. *Policy Statement, supra* note 77, at P 82.

85. *Id.* at P 3.

86. *Id.* [Regs. Preamble].

87. Transcript of Open Session at 16, 1,024th Fed. Energy Reg. Comm'n Meeting (Feb. 18, 2016), http://www.ferc.gov/CalendarFiles/20160308073513-transcript.pdf.

group's tasks is to "bring a fresh set of eyes" to dockets on rehearing, but that the group will work with the team that prepared the underlying order "to leverage the[ir] case-specific expertise" and the expertise of the senior staff and other professionals throughout the Commission.[88] The representative also explained that a new attorney who was not involved in the underlying proceeding "will provide an additional check on the initial legal decision."[89] It is hoped that this new group will lead to increased efficiencies, as members of the group are exclusively responsible for rehearing requests, rather than the competing responsibilities present under the previous framework. The representative also explained that the new group "will attempt to implement a more streamlined process."[90] Specifically, in future rehearing orders, the Commission will not reiterate comprehensive factual background and procedural history. Instead, rehearing orders will focus strictly on those issues that require further discussion, either because the Commission wants to change or clarify its prior determination, or because it is responding to arguments raised on rehearing that were not addressed in the initial order.

D. Administrative Litigation and Settlements

1. Judge Carmen Cintron named Acting Chief Administrative Law Judge

On December 7, 2015, Judge Carmen A. Cintron was named the Commission's Acting Chief Judge. Judge Cintron has been at the FERC since December 1999, and was named Deputy Chief Judge by then-Chief Judge Curtis Wagner on September 6, 2015.[91]

2. Judge Lawrence Brenner

On April 11, 2016, Chairman Norman Bay appointed Lawrence Brenner as a Senior Administrative Law Judge.[92] Judge Brenner, who previously served as the FERC's Deputy Chief Administrative Law Judge, returns to the FERC after serving as a commissioner on the Maryland Public Service Commission (PSC) from 2007-2015. During his time at the PSC, Judge Brenner was the Chairman of the Washington Metropolitan Area Transit Commission, and he served terms as the PSC's representative and President of the Organization of PJM States, the PSC's representative and President of the Mid-Atlantic Conference of Regulatory Utility Commissioners, and as chair of the Mid-Atlantic Distributed Resources Initiative.

88. *Id.*

89. *Id.*

90. *Id.* at 17.

91. *Directory of Judges: Acting Chief Judge Carmen A. Cintron*, FED. ENERGY REGULATORY COMM'N, http://www.ferc.gov/about/offices/oaljdr/dj/cintron.asp (last updated Dec. 7, 2015).

92. News Release, Fed. Energy Reg. Comm'n, Chairman Appoints Lawrence Brenner as Administrative Law Judge (April 11, 2016), https://www.ferc.gov/media/news-releases/2016/2016-2/04-11-16.asp#.V50WMP-krLIV.

3. Judge Patricia Hurt

On May 16, 2016, Chairman Bay announced the appointment of Judge Patricia E. Hurt as a FERC Administrative Law Judge.[93] Prior to her appointment at the FERC, Judge Hurt served as an administrative law judge with the Office of Disability Adjudication and Review at the Social Security Administration. Judge Hurt also served as an attorney advisor in the FERC's Office of Administrative Law Judges and as a trial attorney in FERC's Office of Administrative Litigation, which time included a detail as Special Assistant U.S. Attorney for the District of Columbia.

E. Reports and Technical Conferences

1. White Paper on Guidance Principles for Clean Power Plan Modeling

On January 19, 2016, FERC staff issued a white paper entitled "Guidance Principles for Clean Power Plan Modeling."[94] While the Clean Power Plan (CPP) "assigns no direct role to the Commission," FERC staff notes that the FERC "may be called upon . . . to address concerns about reliability as the CPP is implemented."[95] Accordingly, this white paper provides four "guiding principles" to assist transmission planning entities in conducting analysis of the CPP and associated state, federal, or multistate compliance plans.[96] First, entities conducting CPP modeling should be transparent and engage stakeholders in developing models, model inputs, and study designs.[97] Second, studies should use multiple modeling tools, incorporate the results from previous studies, and continue to refine methodologies in order to more effectively assess the impact of the CPP and associated compliance plans.[98] Third, study inputs should account for uncertainty and studies should include a base case that "accurately reflect[s] the current and future state of the electric grid under business as usual conditions."[99] Finally, transmission planning entities are encouraged to develop and adopt new modeling tools and techniques.[100]

2. EPA, DOE, and FERC Coordination on Implementation of the Clean Power Plan

On August 3, 2015, the U.S. Environmental Protection Agency (EPA), the DOE, and the FERC issued a document describing how the three agencies plan to "coordinate efforts to help ensure continued reliable electricity generation and

93. News Release, Fed. Energy Regulatory Comm'n, Chairman Appoints Patricia Hurt as New Administrative Law Judge (May 16, 2016), https://www.ferc.gov/media/news-releases/2016/2016-2/05-16-16.asp.

94. FED. ENERGY REG. COMM'N, STAFF WHITE PAPER ON GUIDANCE PRINCIPLES FOR CLEAN POWER PLAN MODELING, Docket No. AD16-14-000, (Jan. 20, 2016), (eLibrary No. 20160120-4005) [hereinafter GUIDANCE PRINCIPLES].

95. *Id.* at 1.

96. *Id.* at 1-2.

97. *Id.* at 6-8.

98. *Id.* at 8-10.

99. GUIDANCE PRINCIPLES, *supra* note 94, at 10.

100. *Id.* at 11-12.

transmission during the implementation of the Clean Power Plan."[101] The agencies state that they will "make reasonable efforts" to monitor the progress of state plan developments; monitor the implementation of state (or as applicable federal) plans "to maintain awareness of any potential electric reliability effects;" and "ensure coordination, as appropriate, to address any issues concerning reliability that may arise."[102] During the plan development stage, the agencies will meet quarterly, at a minimum, to discuss any potential reliability concerns. During the plan implementation stage, the agencies "anticipate continuing their coordinate effort" to address electric reliability issues.[103]

The document further describes the individual roles of the agencies. "EPA will engage with states as they develop their plans" and assess their options to meet the guidelines, and the EPA's implementation team will "share any information related to reliability with FERC and DOE."[104] After the plans are in effect, the EPA implementation team will maintain contact with the states in case plan revisions are needed. The DOE will provide, as requested, technical expertise to the states to inform compliance development and to the EPA "to inform any questions or decisions EPA has regarding the reliability implications of compliance plans."[105] The FERC will focus on CPP-related issues "involving the reliability of the power grid, the efficient operation of wholesale electricity markets and the potential need for additional energy infrastructure."[106]

3. Energy Primer

On July 27, 2015, the FERC posted its *Energy Primer: A Handbook of Energy Market Basics*.[107] The primer—which was developed by staff from the FERC Division of Energy Market Oversight (DEMO) and updates the FERC's 2012 Energy Primer[108]—provides a broad overview of the gas and electric wholesale markets, the domestic crude oil and petroleum products markets, and energy-related financial markets. The latest edition reflects developments in the energy markets from the last three years, including changes to the footprints of some of the organized markets and the growth in natural gas supplies. It also includes an expanded discussion on the anti-manipulation provisions of the FPA and the NGA.

The primer has been cited by both the Supreme Court in *FERC v. Electric Power Supply Association*, 136 S. Ct. 760, 768 (2016), and the 7th Circuit in *MISO Transmission Owners v. FERC*, 819 F.3d 329, 332 (7th Cir. 2016).

101. FED. ENERGY REG. COMM'N, EPA-DOE-FERC COORDINATION ON IMPLEMENTATION OF THE CLEAN POWER PLAN 1 (August 3, 2015), http://www.ferc.gov/media/headlines/2015/CPP-EPA-DOE-FERC.pdf [hereinafter COORDINATION PLAN].

102. *Id.*

103. *Id.* at 5.

104. *Id.* at 3.

105. *Id.* at 4.

106. COORDINATION PLAN, *supra* note 101, at 4.

107. FED. ENERGY REG. COMM'N, ENERGY PRIMER: A HANDBOOK ON ENERGY MARKET BASICS (Nov. 2015), http://www.ferc.gov/market-oversight/guide/energy-primer.pdf.

108. News Release, Fed. Energy Reg. Comm'n, FERC's 2015 Energy Primer Reflects Changes in Energy Markets (July 27, 2015), https://www.ferc.gov/media/news-releases/2015/2015-3/07-27-15.asp.

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