ENERGY REGULATION QUARTERLY

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MISSION STATEMENT

The mission of the Energy Regulation Quarterly is to provide a forum for debate and discussion on issues surrounding the regulated energy industries in Canada including decisions of regulatory tribunals, related legislative and policy actions and initiatives and actions by regulated companies and stakeholders. The Quarterly is intended to be balanced in its treatment of the issues. Authors are drawn principally from a roster of individuals with diverse backgrounds who are acknowledged leaders in the field of the regulated energy industries and whose contributions to the Quarterly will express their independent views on the issues.

EDITORIAL POLICY

The Quarterly is published by the Canadian Gas Association to create a better understanding of energy regulatory issues and trends in Canada.

The managing editors will work with CGA in the identification of themes and topics for each issue, they will author editorial opinions, select contributors, and edit contributions to ensure consistency of style and quality.

The Quarterly will maintain a "roster" of contributors who have been invited by the managing editors to lend their names and their contributions to the publication. Individuals on the roster may be invited by the managing editors to author articles on particular topics or they may propose contributions at their own initiative. From time to time other individuals may also be invited to author articles. Some contributors may have been representing or otherwise associated with parties to a case on which they are providing comment. Where that is the case, notification to that effect will be provided by the editors in a footnote to the comment. The managing editors reserve to themselves responsibility for selecting items for publication.

The substantive content of individual articles is the sole responsibility of the contributors.

In the spirit of the intention to provide a forum for debate and discussion the Quarterly invites readers to offer commentary on published articles and invites contributors to offer rebuttals where appropriate. Commentaries and rebuttals will be posted on the Energy Regulation Quarterly website.

ENERGY REGULATION QUARTERLY

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2017: The Canadian Energy Year in Review

Rowland J. Harrison, Q.C. and Gordon E. Kaiser
Managing Editors

Each year when we write this Annual Review we marvel at how complex the industry has become only to find out that the following year makes the year before look tame. This year we had some assistance from south of the border when the new president turned many things on their head. That included energy policy but it turned out that the Americans have an amazing system of checks and balances. None of the threats have turned into reality but then the year is young.

As it turned out things at home are not that tame. Ontario took the bull by the horns and cut the price of electricity by 25 per cent loading the debt incurred on a regulated utility the Province owned to keep it off provincial books. That created some controversy which may not be over.

The first heading in last year's Annual Review was "The Pipeline Delays Are Over." It turns out we were wrong. Another heading was "Renewables Continue to Grow." We were right about that.

In fact, the Province of Alberta this past year demonstrated how to buy renewables in an intelligent and cost-effective way. Those in Ontario shake their heads knowing that their cost of wind is likely four times the Alberta cost. So much for being a leader.

But as we said these are complex markets. This year's Annual Review describes how three Provinces in this country can simultaneously rack up unbelievable debt building dams to deliver cheap hydroelectricity for their citizens.

"Storage and Embedded Generation" was another heading in last year's Annual Review. That topic remains important. In fact integrating new technology into Canadian energy markets now represents the largest challenge for Canadian energy regulators. It is an important efficiency in a world with high prices and few tools left in the toolbox.

In this world it is not surprising that regulatory reform is being shouted from every corner by both energy regulators and the governments that appoint them. How that plays out in 2018 will be interesting to see. First to be reviewed was the National Energy Board. That led to two new agencies. One is a political agency, the other is an independent agency changed with conducting hearings. Next up to bat was the Ontario Energy Board. The Modernization Panel reviewing the OEB has yet to start work. It reports back at the end of 2018.

Before we turn to the Annual Review we should take a moment to reflect on the Energy Regulation Quarterly's journey to its five year anniversary and thank some very important people.

The first five years have been interesting. This Journal was started by the Canadian Gas Association at no small cost. Some thought that it would simply become a form of lobbying for the gas industry. That turned out not to be the case. It proved to be remarkably independent.

Some thought that nobody would be interested in writing articles. That also turned out not to be the case. Over the five years, we have grown to depend on a very reliable group of contributors. Two of them are always featured in this annual year-end edition. They are David Mullan, an Emeritus Professor at Queen's University, and Robert Fleishman, Senior Counsel at Morrison Foerster in Washington. Mullan's annual article goes to the bread-and-butter

of energy regulators - the new developments in administrative law. When that comes from the country's leading administrative lawyer we should be particularly grateful. And we are.

Robert Fleishman's annual Washington Report offers an important insight into energy law as it develops in the United States. Bob's long service as the Editor of the Energy Law Journal in Washington led to many helpful tips for the Canadian startup.

We thank every one of our contributors and hope you keep up the good work. We also thank Tim Egan, the President of the Canadian Gas Association, and Mike Cleland, the former President of the Association that came up with this idea in the first place. We also thank the Canadian Electricity Association and their president, Anthony Haines, who later joined this effort and threw some money into the pot. We will report back when we hit 10 years.

Finally a special thank you to all of our interns from the Faculty of Law at the University of Ottawa. The ERQ is unique. This is the only energy journal that is published in both French and English. This means some heavy lifting for our interns. Thank you for all your help over the past five years. We learned a lot more from you than you learned from us.

Pipeline Delays are Back

Every year in this Annual Review, we start by reviewing the status of pipeline construction. There is no question that this is the dominant regulatory issue in Canadian energy markets. It is always useful to see where they all stand at year-end. Last year we reported that the pipeline delays were over. It turns out we were wrong.

The pipeline delays are back in full force. In fact, we could argue that the problem has never been greater. It now borders on a constitutional crisis.

The cost of these delays remains real. In 2014 we quoted the late Alberta Premier Jim Prentice who said that the lack of pipeline access cost the federal and Alberta governments $ 6 billion per year. This year the CD Howe Institute has weighed in and estimates that pipeline bottlenecks cut five dollars off the profits of every barrel of oil produced in Western Canada. Frank McKenna, the deputy chair of the Toronto Dominion Bank recently weighed in on the debate noting that the differential between benchmark U.S. prices and Western Canadian select heavy crude is now $11 a barrel. That is down from $40 a barrel in December 2013 but the cost remains significant. According to McKenna, this price differential cost Canada $117 billion in the past seven years.

In the end, it is all a very sad commentary on the Canadian regulatory process. And some would argue the lack of federal government initiative in establishing clear directions for national projects crossing provincial borders.

We can start with the saddest story of all -the TransCanada Energy East pipeline. If ever there was a case of regulatory mismanagement, this is it. TransCanada first announced the $15.7 billion project to build a 4500 km pipeline from Alberta to the East Coast in April 2013. The concept was based on the fact that Canada's East Coast refineries rely on imports for 80 per cent of their requirements. Alberta crude could replace the foreign crude – an interesting idea.

The first major setback occurred in August 2016 when the NEB suspended hearings until the Board ruled on motions demanding that three panel members resign on the grounds they were biased because they had met with the ex-Premier of Québec. In September, the NEB replaced all three panel members with a new panel which threw out all of the decisions of the previous panel including all hearing steps and related deadlines.

Then in August 2017, the NEB released a decision indicating that it would allow a wider discussion of greenhouse gas emissions in the new hearings including a ruling that for the first time it would consider the public interest impact of upstream and downstream carbon emissions from the increased production and consumption of oil resulting from the project. That was enough for TransCanada. In October 2017, the company announced it was no longer going ahead.

Before moving ahead with more bad news we turn to one piece of good news for TransCanada. As reported last year President Trump had approved Keystone XL after President Obama had turned it down. That had led to all kinds of NAFTA claims and constitutional challenges. But those were dropped when President Trump

arrived on the scene.

As the year 2017 came to a close, good news came from Calgary. TransCanada had secured a 500,000 barrels a day 20-year commitment after conducting an open season locking up about 60 per cent of the 830,000 barrel a day capacity. TransCanada Chief Executive, Russ Girling, thanked President Donald Trump for his continued support of project as well as the efforts of other U.S. backers and the Alberta government. The Alberta government had stepped in to commit 50,000 barrels a day for the project from some of the royalties it receives as barrels of oil. The premier's spokeswoman noted: "it's good for the project, it's good for the industry and it's good for our differential."

Last year it looked like the Kinder Morgan Trans Mountain pipeline was moving forward. Kinder Morgan had filed the application for approval of the $5.4 billion project twinning the existing pipeline from Edmonton, Alberta to Burnaby, British Columbia on December 16, 2013. The project was designed to increase capacity from 300,000 barrels per day to 890,000 per day. The West Ridge Marine terminal would be expanded to allow Burrard Inlet tanker traffic to increase from 5 to 34 vessels per month not a small increase in capacity.

For some period of time Kinder Morgan had faced fierce opposition from the mayor of Burnaby and his allies but generally received support from both the NEB and the courts. However, the year 2017 produced a change in events. A new government was elected in B.C. and the new Minister of Environment announced that the Province was considering new regulations that would likely stop pipeline companies from shipping bitumen. The province said that the new regulations were necessary to give the province time to undertake studies and implement appropriate standards for spill response plans.

That has led to an al-out war between Alberta and British Columbia with Alberta stating it will no longer import B.C. wine or purchase electricity from B.C.'s Site C dam. B.C. responded by saying they will ship their wine to Asia which is where Alberta wants to send its crude.

The Prime Minister of Canada has weighed in saying that this pipeline is going to get built. The Prime Minister has attempted to assure the B.C. residents that the Kinder Morgan pipeline is not a danger to the B.C. coast given the billions of dollars the federal government has invested in its Oceans Protection Plan. The war of words will continue but this time the federal government does seem to be committed to its jurisdiction to regulate national projects. Stay tuned.

Shifting Markets

Last year we reported that Canada would soon lose its most important customer for natural gas and crude oil exports. That customer, the United States, is about to become energy self-sufficient given the substantial increase in production of gas and oil from shale formations. Between 2010 and 2015 crude oil production from U.S. shale regions increased 72 per cent while gas production increased 28 per cent.

This year a forecast by the International Energy Agency (IEA) predicts that the United States crude imports will fall to near negligible levels by 2040. The U.S. currently consumes 99 per cent of Canada's crude exports amounting to about 3.76 million barrels per day according to the IEA. This is the reason Kinder Morgan is so important. Without access to Tidewater and Asian markets the Canadian petroleum production industry is finished.

There is another major shift that is affecting Canadian energy markets in a big way. That is the expectation that renewable production will significantly replace traditional crude oil and gas production. That is the reason that Royal Dutch Shell announced in March 2017 that it was selling most of its Canadian oil sands assets for about $7.25 billion. The company concluded that the energy industry is changing in a fundamental way that could turn oil sands operations into liability. Shell concluded that global oil demand could peak within a decade driven by increasingly competitive fossil fuel alternatives such as solar and wind and electric cars.

Lower prices for solar and wind power and batteries are one thing. But even more important, argues Shell, are tougher government restrictions on greenhouse gas emissions. As noted later in this Annual Review these renewable targets are increasing in virtually every jurisdiction in the world. The one exception is the United States. But even there it is really just at the federal level

under agencies controlled by President Trump. Elsewhere, particularly in large states such as California, American jurisdictions are leading the worldwide charge.

The Drive to Renewables Continues

Renewables continue to grow across North America. For the first time, the United States got 10 per cent of its power from renewable energy. In Ontario, the IESO estimates that at the wholesale level wind and solar combined provide about 7 per cent of Ontario supply needs. Renewable resources now account for 35 per cent of systems energy capacity in Ontario with about 14,000 MW.

These trends will continue for two reasons. First all forecasts indicated that the prices will continue to decline between 2015 and 2025. According to the International Renewable Energy Agency generation cost for onshore wind will fall another 26 per cent but offshore wind generation cost will fall 35 per cent and utilities scale solar PV costs will drop 57 per cent.

At the same time it is expected that renewable energy targets will increase. Some are already very aggressive. In both California and New York, clean their energy standards mandate that 50 per cent of the state's electricity must come from renewable energy by 2030. In Alberta, that percentage is 30 per cent by 2030. In Québec, it is 61 per cent by 2030.

At the end of 2017, Ontario quietly pulled the plug on its FIT program. That program began in 2006. More than 4200 MW of wind and solar was purchased under 20 year contracts during the first round of the program at what proved to be very high prices. Prices were subsequently reduced and in later versions of the FIT Program only 750 MW of contracts were awarded.

Contracted supply from the Ontario FIT program grew from 13 MW in March 2010 to 4661 MW by the end of 2017. Of the total 4661 MW just over 3000 MW was wind and 1659 MW was solar. The cost of the contracts is not available.

Today, there is relatively little need for additional generation. Ontario's energy consumption has declined every year but one since 2008. Today, it stands at 1997 levels.

Just as Ontario was exiting the market Alberta came in with a big splash. As the year came to a close, the returns came in from Alberta's first competitive bid. This bid is part of the Alberta New Democratic party's initiative following their election in May 2015 under the Climate Leadership Plan. That plan included an economy wide carbon levy, a phase out of coal-fired generation, increased renewables, increased energy efficiency and increased use of distributed energy resources.

The results of the bid were a pleasant surprise for everyone involved. Four wind projects were selected totaling 596 MW with prices ranging from $30.90 to $43.30 MWh with the weighted average of $37.00 MWh. These record prices were so attractive that the AESO decided to purchase an additional 196 MW over and above its 400 MW target. The winning bidders included Capital Power for 201 MW, EDP Renewables Canada for 248 MW and Enel Green Power Canada for 146 MW.

The realized prices of $31 MWh were well below the last Ontario procurement in March 2016 which resulted in a realized price of $ 85 MWh for 300 MW of wind power. It turns out that competitive bidding works.

Construction Cost Overruns

It is no secret that building energy infrastructure in Canada can be difficult. Recently TransCanada threw in the towel in the Energy East project after years of delay and opposition. The final straw as mentioned above was the National Energy Board decision to consider the cost of carbon emissions in determining whether to allow the project to proceed. A new unexpected criteria was too much for TransCanada.

The TransCanada decision came only a few days after the decision of the Federal Court of Appeal ordering the federal government to renegotiate the terms under which the Trans Mountain pipeline crosses a First Nations reserve in British Columbia, raising new questions about the fate of Kinder Morgan Inc.'s federally approved plan to expand the pipeline. It turns out that regulatory challenges are not over once a construction permit is granted. Across the country major hydro-electric projects now face serious delays and cost overruns.

On the Atlantic, the Nova Scotia Utility and

Review Board is dealing with the problems at the Muskrat Falls generating station and the implications for the Maritime Link transmission line. On the Pacific, the British Columbia Utilities Commission is grappling with the site C dam being built by BC Hydro. In the middle of the country, the Manitoba Public Utilities Commission is facing a similar problem authorizing billions of dollars necessary to complete the Keeyask generating station

We can start in the west and move east.

Site C is a multibillion-dollar project to construct a hydro dam and generating station on the Peace River, near Nelson, B.C. The project received provincial and federal environmental approvals in October 2014 and construction began in the summer of 2015. When completed the estimated $8.3 billion facility will provide peak capacity of about 1145 MW, enough power to a service 450,000 homes a year.

The Site C political fortunes changed during the provincial election campaign in May 2017 when the NDP promised, if elected, to have the Site C project reviewed by the B.C. Utilities Commission. After taking the reins of the provincial government in, the new Premier made good on the NDP promise and issued an Order in Council requesting the B.C. Utilities Commission to undertake an inquiry into certain aspects of the Site C project.

On November 1, 2017, the B.C. Utilities Commission issued its Final Report on the B.C. Hydro Site C project following a three month investigation. While the Final Report made no recommendation on whether the project should proceed it did warn that the cost of the project will be higher than expected. The Final Report also indicated the benefits of the Site C project could be obtained through other renewable generation projects at lower cost but noted that there would be substantial costs associated with terminating. The Final Report concluded that suspending the construction process would present substantial costs to rate payers along with additional uncertainty.

In the end, the British Columbia government decided to proceed with the construction of the Site C dam with full knowledge that completing the project would cost nearly $1.7 billion more than originally proposed. It was also highly unlikely that the project would meet its 2024 in-service date. The B.C. government is now anticipating a total cost of $10 billion and the setting aside of a further $700 million to address cost overruns. The Report concluded that cancelling the project would mean an unavoidable $4 million hit on the books of BC Hydro or the books of the Minister of Finance. That, the Report indicated, would lead to a 12 per cent rate increase immediately.

That takes us to Manitoba where the Manitoba Public Utilities Board is grappling with the Keeyask project, a 695 MW generating station 725 km north of Winnipeg on the Nelson River. The project was originally estimated to cost $6.5 billion and was to be in service by November 2019. It is now estimated to cost $8.7 billion. The project is a joint venture between Manitoba Hydro and four Manitoba First Nations.

The cost overruns were identified through an independent review by the Manitoba Board which followed a Manitoba Hydro application for a 7.9 per cent rate increase. At this point the project is continuing as planned.

That brings us to Newfoundland and Labrador and the Muskrat Falls 824 MW generating facility scheduled to begin operation in 2020. It is the first phase of the Lower Churchill project in Labrador which will ultimately have a capacity of 3000 MW capable of providing 16.7 TWh of electricity a year.

To date there is a projected cost overrun of 50 per cent. Costs have increased from $7.4 billion to $12.7 billion. There are also serious delays in the completion of the project. Construction of the Muskrat Falls generating facility began in 2013 and was expected to take 4 to 5 years. First power from the dam and Hydro station is now expected to be delayed until 2020.

The project, first announced in November 2010, is based on a $6.2 billion deal between Newfoundland and Labrador's Nalcor Energy and Halifax based Emera. Under that agreement Nalcor will design and build the hydroelectric power station at Muskrat Falls and a transmission line called the Labrador Link running from Muskrat Falls to the Avalon Peninsula.

Emera will build an electrical interconnection called the Maritime Link between

Newfoundland and Cape Breton and invest in the Labrador Island Link. Emera will construct and own a 500 MW $1.2 billion underwater power connection from Newfoundland to Nova Scotia known as Maritime Link which will permit future electricity exports to the Maritime provinces and the United States

As 2017 came to a close, Newfoundland's Premier, Dwight Ball, established an inquiry into Muskrat Falls to be led by Supreme Court Justice Richard Leblanc. He will examine issues around the sanctioning of the project including whether Nalcor's forecasts and assumptions were reasonable. He will also examine Nalcor's execution of the project and why the Public Utilities Board was exempted from a full review. The Inquiry will begin its work in January 2018 with a final report due on December 31, 2019.

Muskrat Falls is scheduled to deliver full power in 2020. Currently various parties are criticizing the Commission's terms of reference which they say are too narrow. Submissions on that issue are due on February 15.

There is little in common in these three hydroelectric projects with one exception – they are all too big to fail.

Regulating Carbon

Starting this year every Canadian province will be required to implement carbon pricing – either with the carbon tax or a cap and trade system. If they don't they will face a federal government backstop carbon tax. With the exception of the province of Saskatchewan all Canadian jurisdictions have indicated they will bring in some form of carbon pricing. British Columbia and Alberta have instituted carbon taxes, while Ontario and Québec have opted for cap and trade systems linking them to California's Western Climate Initiative.

As the year ended, the liberal government in Ottawa introduced a draft carbon tax legislation outlining the carbon price backstop that will apply to Provinces that do not have their own levy in place or have one that does not meet federal standards. Ottawa will set the levy at $10 a ton this year and increase it annually in $10 increments until it reaches $50 a ton in 2022. At that point, the tax will drive up the cost of gasoline prices by roughly 11 cents per liter.

The federal initiatives arrive at a time when the governments in power in both Ontario and Alberta will soon face elections. That is causing controversy in both provinces as the sitting governments face opponents that take a different view on carbon pricing.

Ontario's first year of carbon pricing brought in nearly $2 billion from quarterly auctions. The Ontario system which was launched in 2017 is designed to lower greenhouse gas by putting caps on the amount of pollution companies in certain industries can emit. If they exceed those limits they must buy allowances at quarterly auctions or from other companies that have come in under their limits. The cap declines 4 per cent each year to 2020. As it decreases, the Government hopes companies will have more incentive to cut their emissions.

At the beginning of 2018, Ontario joined the Québec and California Carbon Market known as the WCI. That has raised another concern. It is argued that the proceeds from the auction will be lower because it will be cheaper for Ontario companies to buy allowances in those jurisdictions. This means that the greenhouse gas emissions will not be cut in Ontario according to Ontario's Environment Commissioner and Auditor General.

One of the issues in this debate is what happens to the money the Program brings in. Currently the Ontario Government says it is directing that revenue towards green projects such as energy efficient improvements in hospitals, smart thermostats for homeowners, and bike lanes to further reduce greenhouse gas emissions. Both Opposition parties in Ontario question this, arguing that the money is not going to that purpose.

The price of carbon in Ontario 2017 auctions was roughly $18 per ton. By 2022, the Government expects that to rise to over $20 although some believe it may be higher. Under the Federal Government's carbon tax, the price would be $50 a ton by 2022.

Alberta launched carbon regulation in 2007, setting limits on greenhouse gas for industrial facilities charging $15 per ton of carbon dioxide for emissions above that level. In November 2015, the new NDP government in Alberta introduced a more aggressive target tax at the level of $20 per ton in 2017 rising to $30 per ton in 2018.

British Columbia ushered in North America's first broad-based carbon tax in 2008. That tax was initially set at $10 per ton and rose to $30 where it has remained since 2012. The money raised by the provincial government was used to reduce other taxes and as a result the taxes are said to be revenue neutral. British Columbia's recently sworn in a New Democratic government presented its first provincial budget in September 2017 and announced new changes to the B.C. carbon tax. As of April 1, 2018, the carbon tax will increase by $5 per ton until it reaches the federal target carbon price of $50 on April 1, 2021, one year before the Ottawa 2022 deadline. B.C.'s carbon taxes are currently set at $30 per ton.

Québec launched a cap and trade program in 2013 and joined California in a carbon market that allows industry in either jurisdiction to buy and sell emission allowances that were issued by either the province or the state. The minimum price for those allowances in 2017 was $13.56 per ton and it rises each year. The Ontario government joined the Québec-California Carbon market at the beginning of 2018

Local Generation and Storage

This was a topic we reported on in last year's Annual Review. An update may be helpful.

Setting the stage may also be helpful. Embedded generation can mean customer owned generation, utility owned generation, or third-party generation. The important criteria is that it is local generation. It is generation located near the customer. That means cost savings. Not only the customer but also for distributors and transmitters. That is why local generation is promoted in many jurisdictions.

Local generation can use different technologies. The ground was first broken by solar. Next came CHP. And now most of the attention is directed at storage. Many believe storage is the silver bullet. It has low carbon, increasingly attractive prices, amazing flexibility, and can be installed almost anywhere. And it has low off-peak energy costs.

One thing that all energy regulators understand is that the cost of electricity systems are driven by peaking costs. We build systems that are only used 10 per cent of the time or less. Storage is the solution to that. That is why the concern across North America is how to get more storage. What are the barriers to entry? Who should be supplying it and how should we set the price?

Local generation has been growing at a rapid clip. The Ontario IESO recently reported that at the end of 2017 there was more than 3800 MW of embedded generation in local distribution systems in Ontario. This was a 25 per cent increase over the previous year. That is a big number.

To some extent this rapid growth was driven by the IESO subsidies, particularly the Save on Energy and Industrial Accelerator programs which offered significant grants for those installing local generation. Often this was CHP. According to the IESO there are currently 69 CHP facilities installed in Ontario with a total capacity of 131 MW. The total incentive the IESO paid out was $121 million. There are an additional 36 systems contracted for with an estimated capacity of 46 MW. The incentive pay out will be approximately $42 million.

In Ontario, industrial customers have another incentive to install CHP facilities. It can reduce their exposure to global adjustment (GA) charges. That can reduce an industrial electricity bill by over 50 per cent. Ontario utilities also have an incentive to install CHP facilities. These CHP installations help Ontario utilities to meet their OEB CDM commitments, but CHP will no longer be eligible for incentives after July 1, 2018. Local generation can reduce a utility's costs largely in terms of deferred capital investment. Energy regulators like local generation for the same reason. Deferred capital expenditure can reduce rates.

Last year, we reported that the FERC in Washington was taking the lead when it issued a Notice of Proposed Rulemaking to reduce barriers to energy storage and distributed energy resources. The FERC directed six U.S. Regional System Operators to draft reports on their progress with respect to storage development. Virtually all U.S. states now have program supporting the development of energy storage. Without a doubt the most aggressive is California.

In Canada, the Ontario IESO is taking the lead by supporting over 10 projects. The leading Ontario utility is Toronto Hydro with 7 projects in late construction or in-service. Toronto Hydro is currently building a 10MW

battery storage to provide backup power for Metrolink's Eglinton Light Rail Transit which enters service in 2021. Toronto Hydro is also working with Hydrostor to test the world's first underwater compressed air energy storage project in Lake Ontario near Toronto Island.

Toronto Hydro is working with Ryerson University and the IESO to develop standardized pole mount energy storage systems for neighborhood applications. This energy storage system is unique because it doesn't have a footprint. It is attached to existing power poles. If successful it could become a solution to address EV charger loads or power quality issues on over 175,000 poles across the city.

A much smaller utility, Festival Hydro in Stratford Ontario, has just installed Canada's largest battery storage facility which will provide a storage capacity of 8.8 MW. This translates to 40.8 MWh energy capacity - enough to supply more than 10,000 homes for an hour. This project is also supported by the IESO. Festival Hydro hopes it will significantly reduce its infrastructure investment costs over the next few years.

We can expect regulators to challenge barriers to entry to storage. The U.S. energy storage market alone is expected to increase tenfold to U.S. $3.2 billion between 2016 and 2022. The cost of storage is also starting to fall. According to a recent McKinsey report the average battery pack costs are down from U.S. $1000 per kilowatt hour in 2010 to less than U.S. $230 per kilowatt hour in 2016.

As the year 2017 came to a close, Ontario's system operator, IESO and Ontario's energy regulator, OEB were highlighting the importance of distributed energy resources, particularly energy storage. In December, the new President the Ontario IESO stated in one of his first speeches:

- DER's need to be fully integrated into electricity system operations, planning, markets, regulations and policy driven incentives. This is something we've heard from LDCs in communities across the province desire to choose distributed resources as an alternative to traditional "wires" solutions.

- Another area of focus is creating a level playing field in which DER's can efficiently, fairly and on a technology neutral basis compete with both transmission and distribution infrastructure and centralized power plants to provide electricity services.

Within a week this was echoed by the Ontario Energy Board when it issued its Strategic Blueprint 2017-2022. In identifying future regulatory challenges the Board stated:

- Does sector transformation create new utility services that need to be assessed and remunerated appropriately?

- What role should incumbent utilities play in the emerging market for distributed energy resources and related services?

Before the ink was dry on the OEB's Strategic Blueprint, the Minister of Energy in Ontario appointed a Chair for a new Modernization Panel. The panel has a broad mandate including how the OEB can continue to protect consumers while supporting innovation and new technology, and how it should be structured and resourced. The panel will report back to the government by the end of 2018.

Local generation regardless of the technology will change the industry. It has great potential for cost saving in an industry that is politically challenged because of high prices.

One of the issues that will surface in Canada next year, as it has in the United States, is the role of net metering. Local generation means that there is a lot of generation capacity spread around the province. At any given point in time much of it may be idle. It is in everyone's interest to make sure that excess capacity does not go to waste. Excess energy should be moved to somewhere where it has positive value. Net metering may be a step in that direction. In July 2017, the OEB made some revisions to its net metering regulations. More revisions are expected and draft rules are out for comment.

Natural Gas Developments

The year 2017 saw some important developments in the natural gas industry.

In November 2017, Enbridge Gas Distribution Inc. and Union Gas Limited, now under one owner with the acquisition of Spectra by

Enbridge in late 2016, applied to the Ontario Energy Board to amalgamate and form a single natural gas distribution company effective January 1, 2019. The amalgamated utility would serve over 3.5 million natural gas customers in Ontario – and the combined revenue of the two utilities is approximately $31 billion. In the application, Enbridge and Union stated that their customers would not bear any of the costs related to the amalgamation. They also argued that if the Ontario Energy Board approves the amalgamation, customers will receive a total benefit of $410 million over a ten-year period.

The rates that Enbridge and Union currently charge customers are set using two separate frameworks that expire at the end of 2018. The Ontario Energy Board would normally review the costs of each of the gas utilities and set new rates starting in 2019. In a separate application, Enbridge and Union asked the Ontario Energy Board to defer its full review of their costs for 10 years and proposed a new methodology for setting rates between 2019 and 2028.

For a while it looked like Ontario might have one single monopoly providing natural gas service throughout the province. However, EPCOR, a public utility owned by the City of Edmonton entered the Ontario market in 2017 by buying all of the assets of Natural Resource Gas or NRG in Aylmer for $21 million.

NRG has 8000 customers. The OEB approved the acquisition in August 2017 applying the no harm test that the Board has used in the consolidations in the electricity industry. The Board also adopted the practice in the electricity industry of not allowing the applicant to recover any of the premium in the acquisition price from rate payers. EPCOR paid $21 million for assets which had a net book value of just over $14 million.

2017 also saw a continuation of the battle between EPCOR and Union regarding three natural gas franchises in South Bruce County. In March 2015 three municipalities had requested proposals from parties interested in providing gas in the municipalities. A number of companies applied and the municipalities chose EPCOR. EPCOR then applied to the Ontario Energy Board for approval of the franchise agreements granted by municipalities in November 2016.

Objections from Union regarding the nature of the bidding process resulted in the Board putting those applications on hold and holding a generic hearing to determine how competitive applications for natural gas franchises in Ontario should be best handled. The Board issued its Decision in the generic hearing in November 2016 and since that time has been reviewing various proposals from both EPCOR and Union. The first Procedural Order in that process was issued in January 2017 and what appears to be the last Procedural Order was issued in February 2018 with answers to be filed on March 2, 2018. A final decision is expected sometime in the spring.

Another important decision in the natural gas industry during 2017 occurred on the West Coast. That decision was one of the first regulatory decisions to deal with renewable natural gas which in a world of carbon costs is attracting a great deal of attention.

In August of 2015, FortisBC, which provides natural gas service in different areas of British Columbia, applied to the B.C. Utilities Commission for approval to modify the pricing regime for renewable natural gas (RNG) in the province. RNG is pipeline quality natural gas produced from decomposed organic waste from farms, sewage, landfill gas and municipal organic waste.

The regulatory proceeding began in September 2015 and continued until May 2017. In August 2017, the B.C. Utilities Commission approved a revised pricing structure whereby a portion of the incremental RNG cost is absorbed by the ratepayer and a portion is absorbed by the voluntary RNG market. The Commission agreed that the only way to sustain and develop renewable natural gas is to allocate the cost of the incremental RNG premium between the general rate base and the voluntary markets. The Commission noted that the RNG program fosters B.C. energy objectives including reducing GHG emissions, developing innovative technologies, encouraging switching to lower carbon energy, and reducing waste biomass. ■

2017 DEVELOPMENTS IN ADMINISTRATIVE LAW RELEVANT TO ENERGY LAW AND REGULATION

*David J. Mullan**

Introduction

For this year's survey of administrative law developments of significance for energy law and regulation, there were many candidates for inclusion, several of which arose out of the energy regulatory process itself. Faced with this embarrassment of riches, I have selected four topics that I trust will be of interest for those involved in energy law and regulation: participatory rights in regulatory proceedings on the basis of public interest standing; the role of regulators in the duty to consult and, where appropriate, accommodate when the rights and claims of indigenous peoples are at stake; a revisiting of a matter discussed last year, the principles respecting the granting of leave on questions on law and jurisdiction including this time the scope of the concept of "jurisdiction" in this setting; and the relevance of standard of review analysis to judicial review applications respecting the Crown's fiduciary duties to indigenous peoples and the implementation of treaties between Canadian governments and indigenous peoples. Omitted from this survey, not in any sense because of its lack of importance but rather reasons of space and the primarily constitutional nature of the questions raised, is the extent to which provincial and municipal governments have regulatory authority over aspects of matters coming within federal constitutional jurisdiction and, in particular though not exclusively, interprovincial pipelines.

Participatory Rights

Contemporary energy regulatory law frequently raises issues as to participatory entitlements and standing. Who should be allowed to take part in regulatory hearings? Who is entitled to appeal the outcome of those proceedings? Who has standing to seek judicial review of regulatory decisions and rulings? Who should be accorded intervenor status before the courts on statutory appeals and applications for judicial review?[1] In many contexts, the answer to these questions will depend on the interpretation of a relevant statutory standard or formula such as "directly affected". Participation may also be conditioned on the exercise of a specific discretion by a regulatory body or a court and the legal constraints on the exercise of that discretion. On other occasions, especially in the context of statutory appeals to the courts or applications for judicial review, the relevant standard will be that established by the common law and depend on that law's conception of both personal and public interest standing and the factors relevant to each. Some of these issues have been discussed in my 2014 survey.[2]

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1 In this regard, the "last minute" application by the newly elected government of British Columbia for intervenor status in the applications for judicial review of various elements of the Trans Mountain Pipeline decision gave rise to the most interesting judgment on intervention rendered in an energy regulatory setting in 2017. See *Tsleil-Waututh Nation v Canada*, 2017 FCA 174.

2 David Mullan, "2014 Developments in Administrative Law Relevant to Energy Law and Regulation" (2015) 3:1 ERQ 17, at 17-24.

On January 19, 2018, the Supreme Court of Canada rendered a split judgment on another participatory issue: the entitlement of a citizen to make a complaint to a regulatory body alleging failure on the part of a market participant to adhere to its legal obligations. While this case did not involve an energy regulator but the Canadian Transportation Agency, the outcome and the terms of the majority judgment will have ramifications for those energy regulators which exercise a complaint jurisdiction such as the Alberta Utilities Commission under section 26 of the *Electric Utilities Act*.[3] This provides the Commission with authority to entertain complaints by "any person" about the conduct of the Alberta Electric System Operator.

Delta Air Lines v. Lukács[4] arose out of a complaint by a prominent airline passengers' rights activist, Gábor Lukács that Delta's policies and practices on the carriage of obese persons was "discriminatory" in terms of a provision in the *Air Transportation Regulations*.[5] In bringing this complaint, he relied upon sections 37 and 67.1(2) of the *Canada Transportation Act*.[6] The first conferred authority on the Agency to hear and determine complaints relating to a failure to observe provisions of Acts administered by the Agency while the second was more specific and provided "on complaint … **by any person** [emphasis added]" for Agency suspension or disallowance of terms and conditions of carriage that were "unreasonable or unduly discriminatory". For these purposes, Lukács relied upon a statement of Delta policy contained in an email responding to a person who had complained to Delta about having to sit next to an allegedly obese passenger.

The Agency[7] was concerned as to whether Lukács had standing to complain and dealt with this issue as a preliminary matter. In doing so, it first rejected the argument that, as a self-described "large" man, Lukács had a sufficient personal interest under the principles of standing.[8] It then proceeded to consider whether there was a basis for public interest standing by reference to the three criteria adopted by the Supreme Court for the purposes of court challenges to the constitutional validity of legislation. As stated initially by the Agency,[9] this required an evaluation of three factors:

1. Is there a serious issue as to the validity of the legislation?

2. Is the party seeking public interest standing affected by the legislation or does the party have a genuine interest as a citizen in the validity of the legislation?

3. Is there another reasonable and effective manner in which the issue may be brought to the court?

The Agency's response is encapsulated in the following summary:

> 74. Even looking at the three factors cumulatively and in light of their purposes, the fact remains that, in regard to the second factor, the challenge made by Mr. Lukács is not related to the constitutionality of legislation or to the non-constitutionality of administrative action.[10] Considering that the second part of the test for granting public interest standing does not expand beyond cases in which constitutionality of legislation or the **non-constitutionality** of administrative action is contested, this is a fatal flaw in Mr. Lukács's submissions [emphasis added].

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3 *Electric Utilities Act,* SA 2003, c E-51, s 26.
4 *Delta Air Lines Inc v Lukács*, 2018 SCC 2.
5 *Air Transportation Regulations*, SOR/88-58, s 111.
6 *Canada Transportation Act*, SC 1996, c 10, s 37, 67.1(2), providing for appeals on a question of law or jurisdiction with leave of a judge of the Federal Court of Appeal. (I return to the scope of this provision in the section of this survey on applications for leave to appeal.)
7 *Gábor Lukács v Delta Air Lines* (25 November 2014), 425-C-A-2014, at para 2.
8 *Ibid* at para 64.
9 *Ibid* at para 68.
10 Note that this was an expansion of the test as set out initially in the Agency's ruling. The initial characterization of the second criterion did not include the constitutional invalidity of administrative action or decisions. Indeed, even as restated, the terms of the second category fail to reflect the 1986 extension of public interest standing to challenges to the validity of administrative action on administrative law as well as constitutional grounds: *Finlay v Canada (Minister of Finance)*, [1986] 2 SCR 607. However, at paras 70-71, the Agency did indicate that it was aware of this extension.

Lukács appealed this ruling to the Federal Court of Appeal under section 41 of the *Canada Transportation Act.*[11] While he conceded on the issue of personal standing, he argued that the Agency had erred in applying the principles respecting public interest standing in court proceedings to the complaint provisions of that Act. In any event, he also argued against the restriction of public interest standing to situations in which the constitutionality of legislation or administrative action was in issue. His appeal was successful on the first ground. The Federal Court of Appeal[12] held that, even though the Agency did have a screening jurisdiction with respect to complaints, the Agency erred in the application of the general law of standing in this context. Therefore, the appeal was allowed, and the matter remitted to the Agency to redetermine "otherwise than on the basis of standing"[13] whether it would allow the complaint to proceed. While not formally ruling on the second ground, de Montigny JA, delivering the judgment of the Court, did express the view that the public interest standing standards developed in a judicial setting with respect to constitutional validity challenges to either legislation or decisions "ha[ve] no bearing on a complaint scheme designed to complement a regulatory regime."[14]

Delta obtained leave to appeal to the Supreme Court which by a majority of 6-3,[15] in a judgment delivered by McLachlin CJ, disallowed the appeal on the merits though modifying the remission order so as not to restrict the Agency from reasonable adaptation of "the standing tests of civil courts in light of its statutory scheme."[16]

The majority provided two bases for rejecting the appeal on the merits. First, even though the standard of review was deferential reasonableness, the Agency could not reasonably accept that a complainant could assert public interest standing but then adopt a test for public interest standing that could never be met given the Agency's reliance on the requirement that it was restricted to situations where the "constitutionality of legislation or the illegality of administrative action" was an issue. Under such a regime, only those who were personally affected by the policy or behaviour could launch a complaint. Such a position was not "justifiable, transparent and intelligible".[17] It did not fall "within a range of possible, acceptable outcomes".[18] This meant that the Agency had "unreasonably fettered its discretion."[19] Secondly, the Agency's ruling was an unreasonable interpretation of the relevant legislation as revealed by a consideration of the objectives of the statutory regime. Notwithstanding the breadth of the Agency's implicit discretion as to the acceptance of complaints, it was unreasonable to effectively eliminate the possibility of any form of public interest standing, once again restricting use of the statutory mechanism to those targeted by the legislation.

It is difficult to take issue with these aspects of the majority judgment. Indeed, it is bizarre that the Agency would recognize the possibility of public interest standing but then apply a test that is confined to the recognition of public interest standing in the context of regular court proceedings where the constitutionality of legislation or administrative action is at stake. Nonetheless, the majority was also correct to modify the remission order to allow scope for the Agency to develop its own standing rules respecting those who could make complaints. Of course, it might be argued (as Lukács apparently did[20]) that the statutory use of the term "any person" in section 67.2(1) should be taken literally and require the Agency to accept complaints from every source. However, it is an equally, if not far more plausible reading of the statutory scheme to read the more

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11 *Supra* note 6, s 41.
12 *Lukács v Canada (Transportation Agency),* 2016 FCA 220, 408 DLR (4th) 760.
13 *Ibid* at para 32.
14 *Ibid* at para 31.
15 The three Ontario judges on the Court all dissented: Abella J delivered a judgment in which Moldaver and Karakatsanis JJ concurred.
16 *Supra* note 4 at para 30.
17 *Ibid* at para 12.
18 *Ibid.*
19 *Ibid* at para 13. I have some problem seeing this as a fettering of discretion though, as a practical matter, it is probably of no moment in this context. The Agency appeared to be determining what legal test it thought it was bound to observe. It did not see itself as having a discretion as to the test to be applied and making a choice as to how to formulate that test, this being the traditional domain of fettering of discretion.
20 See *e.g.* the Agency's decision, *supra* note 8 at para 49.

generic or umbrella provision, section 37 and its conferral of a discretion with respect to complaints ("may") as allowing the Agency the scope to develop its own standing rules. As to whether the Agency adopts standing rules or other gatekeeping restrictions is for the most part a matter for the Agency's discretion and, as McLachlin CJ states in the penultimate paragraph of the majority judgment:

> It is not for this Court to tell the Agency which of these methods is preferable. Deference requires that we let the Agency determine for itself how to use its discretion, provided it does so reasonably.[21]

How then did the minority reach a contrary position? Abella J, delivering the judgment of the minority, provides a more extensive justification of deference to the Agency's choice of gatekeeping rules and policies. However, at no point does she go so far as to say that this allows for the adoption of a standing threshold that public interest litigants cannot pass. Rather, her focus is on rejecting the contention that "any person" in section 67.2(1) should be read literally and underscoring the entitlement of the Agency to adopt and apply "its own standing rules [which] can be **similar** to those applied by the courts [emphasis added]".[22] However, this does not contradict or undercut the majority's position. Indeed, she goes on to apparently acknowledge that, even under recognized principles of deference and reasonableness, the Agency could not adopt a standing regime that effectively precluded all public interest complainants:

> [63] The test applied by the Agency effectively foreclosed Mr Lukács' ability to make out a case for public interest standing in this case. But, in my respectful view, that does not end the matter.

It is at this point that the real difference between the majority and the minority emerges. Abella J identifies a range of other bases (some standing related[23]) on which the Agency could have rejected or refused to entertain this complaint. Consequently, irrespective of the reasons actually relied upon by the Agency for denying standing, the outcome was reasonable. This raises the very thorny question of the extent to which a reviewing court can refuse judicial review or reject an appeal on the basis of an outcome that is reasonable even if the reasons of the decision-maker are not. Such a possibility finds its genesis in a statement by David Dyzenhaus in a book chapter[24] endorsed in the seminal authority of *Dunsmuir v. New Brunswick*.[25] In particular, there is the admonition that, in conducting reasonableness review, the court is to be attentive to the reasons actually provided **and** the outcome,[26] as well as the reasons that "could be offered in support of a decision".[27] In her judgment, McLachlin CJ recognizes the Court's prior endorsement of at least sometimes moving beyond the reasons contained in the tribunal or agency's decision.[28] However, she was concerned with when, if ever that would justify a court excusing palpably unreasonable reasons and allowing the decision to stand.

McLachlin CJ's response to Abella J was that such supplementation is not permissible where it amounts to a supplanting of the reasons of the decision-maker.[29] It was not for the Court to replace the reasons provided by the decision-maker with its own reasons. Ignoring the specific reasons given in favour of review based on the Court's own construct of the reasonableness of the outcome would ignore *Dunsmuir*'s directive to have regard to both the reasons **and** the outcome. More generally, it would amount to the Court taking over the role of the decision-maker in a manner that ignores the decision-maker's primary responsibility for the development of the bases on which its discretionary powers are exercised. Even where

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21 *Supra* note 4 at para 31.
22 *Ibid* at para 43.
23 *Ibid* at paras 63-64.
24 David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart, ed, *The Province of Administrative Law* (Oxford: Hart Publishing, 1997) 279 at p 286.
25 *Dunsmuir v New Brunswick,* 2008 SCC 9, [2008] 1 SCR 190.
26 *Ibid* at para 47.
27 *Ibid*.
28 *Supra* note 4 at paras 22-28, with particular reference to *Alberta (Information and Privacy Commissioner) v Alberta Teachers Association*, 2011 SCC 61, [2011] 3 SCR 654, and *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708.
29 *Ibid* at para 24.

the decision-maker makes an unreasonable determination, there is still a role for that decision-maker, not the Court as surrogate, to exercise its mandate and decide whether the same result can be justified by different reasons. Indeed, to justify the outcome in a case such as this on court-developed standards of what should be the relevant criteria for standing would be to deprive the Agency of its discretion to formulate an appropriate and reasonable standing test. Therefore, remission was the appropriate disposition.

In so ruling, McLachlin CJ was careful to note that it did not amount to a blanket condemnation of the practice of reviewing courts supplementing the reasons provided by the agency for the purposes of conducting more informed judicial review or even endorsing a decision on the basis that it was reasonable notwithstanding the complete absence of reasons. However, it can perhaps be taken from the judgment that, even where there would be no supplanting of the agency's actual reasons, the occasions for such supplementation should be rare and depend on exceptional circumstances. More particularly, Paul Daly, in his blog on *Lukács,*[30] argues that courts should be very cautious in straining to construct or supplement reasons and thereby justify denying judicial review or refusing to remit in the name of "efficiency and cost-effective administration".[31] Such exercises always court the risk of undercutting the principles of judicial deference at their root, a root that has as its core premise that the agency, not the court is the statutorily assigned decision-maker.

What then can be taken from *Lukács* by other regulatory agencies and energy regulators in particular?

1. Where an administrative agency has a discretion with respect to not only accepting complaints but also defining participatory rights more generally, the exercise of such discretionary power is entitled to deference in the form of reasonableness as opposed to intrusive correctness judicial review.

2. Unless precluded by the terms of the relevant statutory provision (such as one that restricts access to persons "directly affected"), regulators are generally empowered to develop gatekeeping, standing and participatory opportunity rules by reference to their own requirements and statutory objectives and structures.

3. In developing standing rules and participatory principles, agencies can look to the court-developed rules respecting both private and public interest standing and adopt and adapt them as best seems appropriate to their individual mandates.

4. Only where the rules and principles adopted fail to meet a somewhat forgiving reasonableness test will there be exposure to judicial review or reversal on appeal.

5. However, unless authorized legislatively, a regulatory body is likely to be exposed to judicial review where, in the exercise of a discretionary gatekeeping power, it adopts a rule that, on its face or in effect, excludes **any** possibility of a complaint or other forms of participation on the basis of public interest standing.

6. It remains important where an agency's access decisions are based on already existing rules, prior agency precedents, or principles developed in the context of the particular case for the agency to provide reasons for outcomes that meet the *Dunsmuir* justification, transparency and intelligibility standards.

7. Even though Courts are sometimes forgiving of a failure to provide reasons or the inadequacy of reasons and will construct their own justification of the agency's "outcome", to rely on this form

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30 Paul Daly, "Reasons and Reasonableness: Delta Air Lines Inc. v. Lukács, 2018 SCC 2" (22 January 2018), *Administrative Law Matters* (blog), online: <www.administrativelawmatters.com/blog/2018/01/22/reasons-and-reasonableness-in-administrative-law-delta-air-lines-inc-v-lukacs-2018-scc--2/>.

31 *Ibid*. Daly is particularly concerned with the prospect that McLachlin CJ's judgment might encourage tribunals and agencies to offer no more than scant reasons and then argue for supplementation (as opposed to supplanting) in response to an application for judicial review or a statutory appeal. For further judicial exploration of this troubled area of judicial review law, see the dissenting judgment of Stratas JA in *Shakov v Canada (Attorney General)*, 2017 FCA 250 at paras 103-06.

> of judicial sympathy as a way resisting a remission of the matter for reconsideration is a highly risky strategy. It is also one that will almost certainly not work where the reconstruction exercise is one that runs counter to or amounts to a supplanting of the reasons actually provided.

I would, however, enter one note of caution to the extent that the decision has been hailed as a precedent that will lead to expanded public interest standing in regulatory matters.[32] It is certainly true that the majority judgment takes issue with the Agency's treatment of the second limb of the public interest standing test in court proceedings. It did so not only because, if applied literally, this second limb could never be met in the particular setting of *Lukács* but also because the Agency treated this second limb as a game-stopper. As the majority stated, this was out of line with the current conception at least in the context of court proceedings of public interest standing as involving a "flexible, discretionary approach"[33] in which all three elements of the standard test had to be evaluated and balanced not only against one another but also with reference to other competing values. However, it should be recognized that this emphasis on a "flexible, discretionary approach" was part of the majority's rationale for rejecting the Agency's conclusions on public interest standing on the basis that the Agency had purported to apply a standard that involved a legally erroneous view of the law respecting public interest standing. When it came to the second limb of the majority's rejection of the Agency's approach, McLachlin CJ simply said that it would be wrong for an agency such as this to have a rule that prevented a public interest group from **ever** having standing to bring a complaint.[34] That is somewhat short of saying that the agency must adopt a regime that is generous or liberal in its rules respecting public interest standing. In other words, this leaves open the possibility that an agency may adopt public interest standing rules that are less generous than a "flexible, discretionary approach" might require in the case of a court in the context of judicial review or statutory appeal proceedings.

The Duty to Consult and, Where Appropriate, Accommodate Indigenous Peoples[35]

a. Introduction

In the three previous survey articles for the *Energy Regulation Quarterly*, I discussed at some length the involvement of energy regulators in the constitutionally guaranteed process of consulting and, where appropriate, accommodating indigenous peoples when their rights and claims are implicated in governmental decision-making.[36] In that discussion, I paid

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32 See Gabrielle Giroday, "SCC decision helps those who want public interest standing at tribunals" (22 January 2018) *Canadian Legal Newswire*, online: <www.canadianlawyermag.com/legalfeeds/>.

33 *Supra* note 4 at para 18, citing *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 SCR 525, at para 1.

34 *Ibid* at paras 19-20.

35 While the two judgments that I discuss in this survey do a lot to clarify the role of regulatory agencies in the process of consultation and accommodation, it would be folly to believe that, as a result, litigation over issues of consultation will necessarily lessen in quantity. The Federal Court of Appeal has under reserve the judicial review applications arising out of the Trans Mountain Pipeline decision in which there are significant issues as to the content of the duty to consult and accommodate. On January 15, 2018, the Supreme Court heard an appeal from the Federal Court of Appeal in *Mikisew Cree First Nation v Canada (Minister of Aboriginal Affairs and Northern Development)*, 2016 FCA 311, 405 DLR (4th) 721, in which the issue is the extent to which the duty to consult extends to legislative action including the introduction and passage of primary legislation: see [2017] SCCA No 50 (QL). Indeed, the two judgments under review in this survey were not the only encounters that the Supreme Court had with the duty to consult in 2017. In *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resources Operations)*, 2017 SCC 54, the Court's primary focus was on whether the First Nation could make a claim under section 2(a) of the *Charter* and it guarantee of freedom of religion in relation to governmental approval of the construction of a ski resort in an area that was of significance to the religious beliefs of the Nation's members. The Court rejected that claim and a further claim that the Minister's decision breached the Crown's duty of consultation and accommodation. During its consideration of the duty to consult and accommodate, the Court framed the issue in terms of judicial review of the Minister's decision that there had been ample consultation and accommodation and that approval of the project could therefore proceed. In so doing, the Court (at para 77) adopted a deferential standard with respect to the Minister's decision on the adequacy of consultation. The test is "whether the decision of the Minister, on the whole, was reasonable." Litigation also continues apace in the lower courts as exemplified by the judgment of the Ontario Divisional Court in *Saugeen First Nation v Ontario (Minister of Natural Resources and Forestry)*, 2017 ONSC 3456, sustaining a challenge based on a lack of consultation and accommodation to the granting of a licence to develop a quarry on the First Nation's traditional lands.

36 *Supra* note 2 at 27-30; David Mullan, "2015 Developments in Administrative Law Relevant to Energy Law and Regulation" (2016) 4:1 ERQ 19 at 30-34; David Mullan, "2016 Developments in Administrative Law Relevant to Energy Law and Regulation" (2017) 5:1 ERQ 15 at 16-21.

attention to two cases which at the beginning of the current survey period were under reserve in the Supreme Court of Canada. On July 26, 2017, the Supreme Court of Canada rendered judgment in both matters: *Clyde River (Hamlet) v. Petroleum Geo-Services*[37] and *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*[38] In combination, they provide welcome clarity and closure to various contested aspects of the role of energy regulators as both active participants in the actual processes of consultation and accommodation and assessors of the consultation and accommodation efforts of others. For that reason, these are almost certainly for energy regulators the most important administrative law decisions rendered by the Supreme Court, or any other court for that matter, during the period under review.

Both have already been the subject of extensive analysis, including an important article[39] in this journal by Dwight Newman as well as an equally insightful blog posting by Nigel Bankes,[40] a frequent contributor to the ERQ. Considering the coverage provided by these and other commentary, I will not attempt to deal with every significant dimension of these two judgments. Rather, I will set out what, in my view, are the major holdings of the two decisions and then comment briefly on some of the important questions respecting the engagement of regulatory agencies in this domain that remain to be dealt with authoritatively or with sufficient clarity.

b. Crown Downloading of Responsibility for Conducting Consultation

In *Clyde River (Hamlet)*, the initial point of departure in the Court's recital of the relevant legal principles was to affirm the capacity of the Crown to act through a regulatory agency or tribunal in fulfilling any duty to consult indigenous peoples. However, downloading this initial responsibility to a regulator did not absolve the Crown from its overall obligation. Either of its own initiative or in response to complaints, the Crown has an obligation to act in the face of inadequate consultation in the regulatory forum. Moreover, there is an obligation on the Crown to make it clear to affected indigenous groups that it is relying initially on the regulatory body to "fulfill its duty in whole or in part."[41] (What precisely this obligation requires is an issue to which I will return.)

c. The Requirement of "Contemplated Crown Conduct"

One of the threshold requirements for the assertion of a right to consultation is that there be "contemplated Crown conduct."[42] This raised the question of where, if anywhere to locate "contemplated Crown conduct" in the context of a private sector application to a regulator with the potential to affect detrimentally the rights or claims of indigenous peoples. How is the Crown engaged in such a process? The dilemma is encapsulated very well in the assertion that, for these purposes, an independent regulatory body exercising statutory authority in a judicial or *quasi-judicial* capacity could not be equated with the Crown albeit that the outcome of its proceedings might result in an adverse impact on indigenous rights and claims.[43] However, the Supreme Court was not seduced by this "Crown conduct" argument. While the National Energy Board was, in one sense, neither the Crown nor an agent of the Crown, Karakatsanis and Brown JJ (delivering the judgment of the Court in *Clyde River (Hamlet)*) held that:

> … as a statutory body holding responsibility under [an Act of

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37 *Clyde River (Hamlet) v Petroleum Geo-Services,* 2017 SCC 40.
38 *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 41.
39 Dwight Newman, "Changing Duty to Consult Expectations for Energy Regulators: Broader Implications from the Supreme Court of Canada's Decisions in *Chippewas of the Thames* and *Clyde River*" (2017) 5:4 ERQ 21 at 21.
40 Nigel Bankes, "*Clyde River* and *Chippewas of the Thames*: Some Clarifications Provided but Some Challenges Remain" (4 August 2017), *ABlawg* (blog), online: <http://ablawg.ca/wp-content/uploads/2017/08/Blog_NB_Clyde_River_CTFN.pdf>.
41 *Supra* note 37 at para 23.
42 As accepted in the foundational judgments in *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 at para 35, and *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 SCR 560 at para 41.
43 In this context, the authority customarily relied upon was the judgment of Iacobucci J for the Court in *Quebec (Attorney General) v Canada (National Energy Board)*, [1994] 1 SCR 159. For a variant on this argument, see Chris W. Sanderson, Q.C. and Michelle S. Jones, "The Intersection of Aboriginal and Administrative Law: When does a Regulatory Decision Constitute "Contemplated Crown Conduct?" (2017) 5:1 ERQ 37.

> Parliament], the NEB acts on behalf of the Crown when making a final decision on a project application. Put plainly, once it is accepted that a regulatory agency exists to exercise executive power as authorized by legislatures, any distinction between its actions and Crown action quickly falls away. In this context, the NEB is the vehicle through which the Crown acts.[44]

In *Chippewas of the Thames*, Karakatsanis and Brown JJ elaborated further and, in so doing, dealt specifically with the argument that to treat the NEB as the locus of "contemplated Crown conduct" would compromise its independence:

> A tribunal is not compromised when it carries out functions Parliament has assigned to it under its Act and issues decisions that conform to the law and the Constitution. Regulatory agencies frequently carry out different, overlapping functions without giving rise to a reasonable apprehension of bias.[45]

In this context, it is worth noting that the Court relies on a rather different conception of the Crown than it did in spelling out the extent to which the Crown can rely on a regulatory agency to meet the Crown's obligations. For those purposes the Crown and the regulator are to be treated as separate entities with the Crown having continuing responsibilities over the adequacy for the regulator's consultation and, presumably, accommodation efforts.

d. What Justifies Crown Reliance on the Processes of a Regulator?

Thereafter, the Court returns to the question of the circumstances under which the Crown can rely on the processes of a regulatory agency as fulfilling its duty to consult. Here, the primary emphasis of the judgment is on the extent of the NEB's procedural and remedial powers under the applicable statutory regime, powers that give it ample capacity to both engage in consultation and effectuate any entitlements arising out of indigenous rights and claims. The Court also referred to the NEB's "institutional expertise"[46] in both conducting consultations and assessing the environmental impacts of proposals. To the extent that the emphasis here is rather different from the kind of inquiry that the Court required in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council,*[47] questions arise as to whether that earlier precedent now carries any weight on this issue and I will discuss that question later in this survey.

e. Regulator Assessment of Adequacy of Consultation and Accommodation

In *Clyde River (Hamlet)*, the final element in the Court's assessment of the role of regulatory agencies in the consultation/accommodation process focussed on the circumstances under which regulators were entitled and, indeed, had the obligation to assess the Crown's own efforts at consultation. In 2010 in *Carrier Sekani*, the Court had held that this capacity arose out of the conferring on agencies and tribunals of the authority to deal with questions of law arising during their proceedings. However, the Federal Court of Appeal had earlier ruled in 2009 in *Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.,*[48] that this applied only when, as in a situation such as obtained in *Carrier Sekani*, the Crown (in the form there of BC Hydro) was before the regulatory body as a proponent or a party. Moreover, as Dwight Newman points out,[49] after the release of the judgment in *Carrier Sekani*, the Supreme Court of Canada denied an application for leave to appeal from that Federal Court of Appeal judgment,[50] this perhaps suggesting that *Standing Buffalo* and *Carrier Sekani* could be read as not being inconsistent. Subsequently, in *Chippewas of the Thames,*[51] the Federal Court of Appeal by a majority in a judgment delivered by the same judge[52] reaffirmed

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44 *Supra* note 37 at para 29.
45 *Supra* note 38 at para 34.
46 *Supra* note 37 at para 33.
47 *Supra* note 42.
48 *Standing Buffalo Dakota First Nation v Enbridge Pipelines Inc,* 2009 FCA 308, [2010] 4 FCR 500.
49 *Supra* note 39 at 23-24.
50 [2009] SCCA No 499 (QL).
51 *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2015 FCA 222, [2016] 3 FCR 96.
52 Ryer JA.

that position, and, subsequently, the Alberta Utilities Commission,[53] following the Federal Court of Appeal, held that it was similarly incapacitated from evaluating the Crown's efforts at consultation in a matter in which the Crown was not before it as a party.

In what is one of the most significant parts of the judgment for regulatory agencies, the Supreme Court held that in *Chippewas of the Thames*, the majority[54] of the Federal Court of Appeal had erred in distinguishing *Carrier Sekani* on this ground. *Carrier Sekani* had overtaken the earlier Federal Court of Appeal judgment in *Standing Buffalo.*[55] Given that the final decision-making role of the NEB in this matter was itself "Crown conduct", the NEB could not ignore assertions that the Crown had not met its duty to consult presumably through external processes, the proceedings before the NEB, or a combination of both. As a matter of jurisdiction or authority, when the duty to consult remained unfulfilled, the NEB was obliged to "withhold project approval".[56]

The judgment went on to prescribe how the NEB should respond when there was a challenge for lack of consultation. At least, where "deep consultation" was required, the NEB had to address the concerns of indigenous peoples in written reasons which demonstrated that the complaints of inadequate consultation were taken seriously and evaluated. In such instances, it was for the NEB to "explain how it considered and addressed these concerns."[57]

f. The Content of Consultation and Accommodation

Beyond setting the threshold terms for engagement in the consultation and accommodation process by regulatory agencies or at least those engaged in final decision-making, the two judgments are of significance on the question of what is involved in consultation. While in *Clyde River (Hamlet)*, the Supreme Court of Canada affirmed the judgment of the Federal Court of Appeal[58] in its recognition that the NEB was an appropriate vehicle for performing in whole or in part the Crown's consultation responsibilities, the Court went on to hold that the NEB had not engaged in adequate consultation. Conversely, in *Chippewas of the Thames*, the Supreme Court of Canada reversed the Federal Court of Appeal's rejection of the NEB's capacity to engage in consultation and to assess the adequacy of consultation but nonetheless held that the NEB had consulted adequately. What led to the difference in terms of final outcome?

In *Clyde River (Hamlet)*, the Court focussed initially on the Crown's failure to make it explicit to the participants that it was relying on the NEB to meet its consultation responsibilities. As for the proceedings before the NEB in a matter where it was conceded that there was an obligation of "deep consultation", the Court held that there were many respects in which there was a failure to do what the duty to consult required. There was no oral hearing, no participant funding, an inaccessible response to the indigenous concerns about the impact of seismic testing on their rights (in the form of an only partially translated document of almost 4000 pages), and reasons for the approval of the application that failed to focus specifically on the impact of the proposal on the precise indigenous treaty rights that were alleged to be under threat.

In contrast, in *Chippewas of the Thames*, the Court held that there was sufficient notice of the Crown's intention to rely on the NEB's processes as meeting its obligation to consult with affected indigenous groups. In response to the claim that the Crown (in the person of the Minister of Natural Resources) had given explicit notice of such an intention only after the NEB hearing had concluded, the Court retorted that it should have been clear to the affected indigenous groups that this was the Crown's chosen venue for consultation and, where appropriate, accommodation. The bases for this assumed awareness were prior correspondence with government officials, the fact that no other consultation was taking place or contemplated, their participation in the NEB's processes, and their awareness that the NEB was the final decision-maker. This places

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53 *Fort McMurray West 500-kV Transmission Project, Ruling on jurisdiction to determine the Notices of Questions of Constitutional Law*, AUC Proceeding 21030.
54 In so doing, it preferred the position of Rennie JA, who dissented on this point.
55 *Supra* note 38 at paras 35-37.
56 *Supra* note 37 at para 39.
57 *Supra* note 38 at para 63, citing *Clyde River (Hamlet), supra* note 37 at para 41.
58 *Hamlet of Clyde River v TGS-NOPEC Geophysical Company ASA (TGS)*, 2015 FCA 179, [2016] 3 FCR 167.

a significant gloss on what, in terms of *Clyde River (Hamlet)*, constitutes "mak[ing] clear" to indigenous groups that the Crown is relying on the processes of a regulatory agency to fulfill its consultation obligations. It does not necessarily require specific notice but rather is a conclusion that can arise out of a consideration of all the relevant facts; it is something that indigenous groups should at least on occasion infer from those facts.

On the question as to whether the NEB's processes satisfied the Crown's obligations of consultation and accommodation, Karakatsanis and Brown JJ found, even assuming an obligation of "deep consultation", that there were sufficient differences between the level of engagement here and that in *Clyde River (Hamlet)*. Among those differences were the scope of the NEB's hearing processes[59] and the according to indigenous groups of expansive participatory rights within those processes, the provision of participant funding, and the detailed reasons that the NEB provided, reasons that were attentive to the relevance of the indigenous rights affected potentially by the reversal of Line 9 and that also included discussion of whether there had been sufficient consultation. As for accommodation, the Court pointed to "a number of accommodation measures that were designed to minimize risks and respond directly to the concerns expressed by Indigenous groups"[60] as was as the decision's directive for ongoing consultation as the project moved forward.

g. Residual Questions

(i) The Role of Legislative Intent in Determining the Capacity of a Regulator to Engage in Consultation

As discussed earlier, McLachlin CJ, delivering the judgment of the Court in *Carrier Sekani*, took the position that whether an administrative tribunal had the capacity to engage in consultation depended on legislative intent. It was an authority that must be conferred expressly or implicitly but was not to be inferred from a provision giving power to determine all questions of fact and law relevant to the decision-maker's exercise of jurisdiction. That left open the question of what would be sufficient indicators of an implicit grant of this authority.

In the Federal Court of Appeal in *Clyde River (Hamlet)*, Dawson JA relied upon a range of considerations pointing to the existence of a "mandate"[61] to engage in consultation. Included in those factors were legislative provisions requiring or authorizing the NEB to take account of the interests of indigenous peoples in the exercise of the particular power that was in issue. Basing a conclusion as to an implicit conferral of power on such provisions is not problematic. Indeed, it is also acceptable to link these considerations with the provisions respecting the procedural powers and remedial capacities of the regulator. What is, however, problematic in terms of establishing an implicit legislative conferral of a power to consult is the actual consultation practices of that regulator.

Indeed, it is significant that, in *Clyde River (Hamlet)*, the Court, in recognizing the capacity of the NEB to act on behalf of the Crown in fulfilling the duty to consult, does not express its conclusion in terms of an implicit legislative intention. Rather, the Court asks whether, given its statutory powers and discretions and remedial authority, the NEB has the capacity to engage in consultation in compliance with the requirements and within the expectations of this court-developed, constitutionally-based duty. In other words, the inquiry has ceased to be one that focusses on whether the legislature addressed its collective mind to the question of the capacity of the regulator to engage in consultation but instead becomes an inquiry into whether engagement in consultation is an appropriate match given the procedural and remedial environment within which the regulator operates. To the extent that this is about legislative intention, it is in the much more generalized sense of the legislature intending to provide a regulator with whatever powers are necessary for the effectuation of its mandate as it evolves and is affected by constitutional imperatives.

From my perspective, I have no problem with

59 According to the Court in *Clyde River (Hamlet)*, *supra* note 37 at para 47, and *Chippewas of the Thames* itself, *supra* note 38 at para 52, there was an oral hearing in *Chippewas of the Thames*, though see the Bankes blog on the case (*supra* note 40) in which a correspondent (Response dated September 7, 2017) contests this characterization of the process.
60 *Supra* note 38 at para 57.
61 *Supra* note 37 at para 65.

this mode of analysis. Where the effectuation of constitutional rights is at stake, establishing a specific if implied legislative intention that a tribunal have the power to be part of that effectuation process is an artificial inquiry. Rather, the inquiry should proceed on the basis of a judicial disposition to provide the best possible ways of upholding the rights in question and an inquiry into whether, given the normal incidents of its statutory powers, the relevant regulator can legitimately fulfill that role. Indeed, this may well have been a necessary transformation given, as the Court recognized,[62] that "the NEB and [the *Canada Oil and Gas Operations Act*[63]] each predate judicial recognition of the duty to consult." Thus, while a mere power to consider all questions of fact and law that arise during the regulator's proceedings may not be enough, a setting in which the regulator has the necessary procedural and remedial capacities to adapt the exercise of its mandate to include consultation and, where appropriate, accommodation will be.

(ii) What is Involved in Giving Notice of an Intent to Rely on the Regulator's Processes?

There is, however, a question about the relationship between the criteria for assessing a regulator's capacity to engage in consultation and the requirement that, where the Crown wishes to rely on a regulator's processes to fulfill in whole or in part its duty to consult, "it should be made clear to affected Indigenous groups that the Crown is so relying."[64] We have seen already that, while *Clyde River (Hamlet)* read alone might suggest that this requires that the Crown make that intention clear in every case, in *Chippewas of the Thames,*[65] the Court accepted that intention could be established from all the relevant circumstances. In particular, such an intention was inferred in that case from a combination of the prior interactions between the Crown and affected indigenous groups in relation to the approval process and the way in which the regulator went about exercising its powers in the particular matter and especially in the extent of its engagement with affected indigenous groups. For me, this raises questions as to how much further this willingness to infer awareness on the part of indigenous groups will extend. Are there circumstances in which it will be appropriate simply on a reading of the procedural and remedial powers of the regulator? What about appropriate procedural and remedial powers and a past practice of the Crown of accepting consultation and accommodation efforts in the exercise of those powers as adequate for the Crown's purposes? In other words, if the entitlement and obligation of a regulator to engage in consultation is something that can be inferred from the regulator's powers, capacities and practices, might those same considerations also justify an inference that the Crown is "consenting" to the regulator's fulfilment of its duty to consult and, where appropriate, accommodate?

In a somewhat different vein, can the Crown meet the notice obligation by a general statement to the effect that, henceforth, it will be relying on the regulator either in whole or in part to meet the Crown's consultation obligations whenever the context triggers such an obligation? Or, should the Crown out of an abundance of caution give notice every time that the issue arises? Another possibility is a statement from the regulator itself on notice to the Crown (in the form of the responsible Minister) and the parties to the effect that the regulator will be acting under the assumption that, given its procedural and remedial powers, it has initial responsibility for consultation and, where appropriate, accommodation. This notice might either be general or issued for every relevant proceeding.

(iii) To What Extent Do a Regulator's Capacities with Respect to Consultation Depend on it being the Final Decision-Maker?

In both *Clyde River (Hamlet)* and *Chippewas* of the Thames, the NEB was the final decision-maker. This was emphasised in both decisions. In *Clyde River (Hamlet)*, Karakatsanis and Brown JJ did so in reference to both the question of whether the NEB's functions amounted to Crown conduct and the role of the NEB in fulfilling in whole or in part the duty to consult and, where appropriate, accommodate.[66] In *Chippewas of the Thames*, the finality of the

62 *Supra* note 37 at para 31.
63 *Canada Oil and Gas Operations Act*, RSC 1985, c O-7.
64 *Supra* note 37 at para 23.
65 *Supra* note 38 at paras 45-46.
66 *Supra* note 37 at para 39.

NEB's decision also featured prominently in the Court's holding that the NEB had both the capacity and the obligation to consider whether there was adequate Crown consultation. This reliance on the finality of the NEB's decision-making processes obviously begs the question: And, what about when it is the Governor in Council or Cabinet that is the final decision-maker? How does this play out for the role of the regulator in itself consulting and assessing the extent of any independent consultation by the Crown?

In his ERQ article on the two judgments,[67] Dwight Newman argues convincingly that there is no reason why the Crown, in the form of the Governor in Council, should not be able to rely on the processes of the NEB as fulfilling in whole or in part its consultation responsibilities even where the NEB does not decide but merely reports or makes recommendations. Indeed, in practical terms, there are various reasons why all or the bulk of the required consultation should take place in a setting which increasingly is otherwise the venue for the Crown's consultation responsibilities in the federal energy regulatory arena.

Indeed, Newman goes on to argue[68] that, in the light of *Clyde River (Hamlet)* and *Chippewas of the Thames*, the majority judgment of the Federal Court of Appeal in *Gitxaala Nation v Canada*[69] should no longer be regarded as good law. In short, he asserts that the majority, in finding that the Governor in Council had failed in its duty to consult with respect to the Northern Gateway proposal, had not sufficiently recognized the high level of consultation that had taken place at the NEB level in the context of preparing a report for the Governor in Council on the proposal. He then concludes that the two more recent Supreme Court judgments:

> … might well imply that the Gitxaala case was wrongly decided in fundamental ways when it resulted in the quashing of a massive energy infrastructure project by two judges focussing on certain imperfections in consultation at a stage that may not have been necessary anyway. The present decisions may well imply that there was actually a legal entitlement to build Northern Gateway that was effectively snatched away in acts of what was effectively lawlessness.[70]

In the face of what is very harsh criticism of the Federal Court of Appeal majority judgment in *Gitxaala Nation* and the legal and factual bases on which it proceeded, it is important to keep in mind that, among the premises behind the majority's reasoning, were:

1. That the Joint Review Panel's Report dealt with only some of the subjects on which consultation was required; its mandate or range of relevant considerations was narrower than that of the Governor in Council[71];

2. That both recent judgments recognized the entitlement of the indigenous peoples to contest the adequacy of consultation and accommodation provided by regulatory bodies on which the Crown was relying in fulfilling its constitutional obligations. While that contestation may in many instances have to take place in the context of an application for judicial review or other court proceedings, where the Crown, in the form of the Governor in Council, must decide whether to accept a regulator's report or recommendation, the Governor in Council must surely respond to any such concerns or complaints coming from indigenous peoples; and

3. More generally, where, under the relevant legislation, the Crown (through the Governor in Council)

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67 *Supra* note 39 at 27.
68 *Ibid* at 28.
69 *Gitxaala Nation v Canada*, 2016 FCA 187, [2016] 4 FCR 418.
70 *Supra* note 39 at 28.
71 *Supra* note 69 at para 240.

> specifically reserves an entitlement to make up its own mind on a particular project albeit against the background of a regulator's report, there is room for a claim that indigenous peoples have a right to adequate consultation at that level[72] particularly where the Governor in Council reaches out to others in determining whether to approve such a report.[73]

In summary, I accept the argument that, even when the regulator is not a final decision-maker, the regulator will commonly be an appropriate vehicle for fulfilling at least some of the Crown's responsibility for consultation and, where appropriate, accommodation. However, in many instances, the regulator's processes may not exhaust the requirements of the duty to consult particularly where the final decision-maker has a broader mandate or range of evaluative tasks than that of the regulator. Irrespective of the extent of consultation by the regulator, further engagement with indigenous groups at the approval stage will be necessary in such a situation. The final decision-maker will also provide an appropriate forum for the initial determination of any challenges to the adequacy of consultation and accommodation undertaken by the regulator as well as an appropriate venue for remedying any deficiencies.

(iv) The Role of Proponents

In the foundation judgment of *Haida Nation v. British Columbia (Minister of Forests),*[74] McLachlin CJ, delivering the judgment of the Supreme Court of Canada, held that, while the Crown "may delegate to industry proponents"[75] at least some of its consultation and accommodation responsibilities, proponents do not owe a duty to indigenous peoples to consult and accommodate.[76] Since then, regulators have routinely imposed on proponents extensive consultation requirements. Indeed, one can see this exemplified in the recitation of the facts in *Gitxaala Nation*[77] as well as *Clyde River (Hamlet)*.[78] In the latter, the NEB evaluated the proponent's consultation activities as involving "sufficient efforts to consult with potentially-impacted Aboriginal groups and to address concerns raised."[79] Nonetheless, the Supreme Court of Canada held that some of the responsibility for the failure to consult rested with the proponent:

> To put it mildly, furnishing answers to questions that went to the heart of the treaty rights at stake in the form of a practically inaccessible document dump months after the questions were initially asked in person is not true consultation.[80]

While there are still many outstanding questions as to nature of proponents' engagement in the consultation process, at the very least this aspect of *Clyde River (Hamlet)* recognizes implicitly that, when a regulator is fulfilling in whole or in part the Crown's obligation to consult, that capacity includes an entitlement to deploy proponents as part of the consultation process; it is not confined to situations where the Crown itself is directly engaged in consultation. What flows from this however is that, where indigenous groups raise issues with regulator-directed proponent-conducted consultation as a component of the Crown's obligations, the regulator and ultimately the court on review have responsibilities to deal with complaints about both the adequacy and accuracy of those consultations. Accepting at face value proponent assertions of both adequate and accurate consultation and reportage would open the door to an excess of reliance on the good faith of self-interested participants.

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72 Though, for a rather different view of the institutional capacities of the Governor in Council albeit operating in a different context, see *Prophet River First Nation v Canada (Attorney General)*, 2017 FCA 17, and, in relation to a ministerial review process, the parallel proceeding in *Prophet River First Nation v British Columbia (Minister of the Environment)*, 2017 BCCA 58, 94 BCLR *(5th)* 232, the former of which I discussed in last year's survey: *supra* note 36 at 20-21.

73 In *Gitxaala Nation*, the Crown claimed executive privilege under section 39 of the *Canada Evidence Act,* RSC 1985, c C-5, with respect to certain information as to the process that the Governor in Council followed and, in particular, any exchanges with others during review of the Joint Review Panel's report. See para 319.

74 *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73, [2004] 3 SCR 511.

75 *Ibid* at para 53.

76 Though they may be subject to civil liability on some other basis: *ibid* at paras 52-56.

77 *Supra* note 69 at paras 57-58.

78 *Supra* note 37 at para 15

79 *Ibid*.

80 *Ibid* at para 49.

Applications for Leave to Appeal – the Relevance of Standard of Review

On applications for leave to appeal to the Federal Court of Appeal and the Supreme Court of Canada, those courts seldom provide reasons for the ruling on the application. In contrast, in British Columbia and Alberta, reasons are frequently provided, and there is a body of jurisprudence around the issue of what are the appropriate criteria to be taken into account in the disposition of applications for leave. In last year's survey,[81] I spent some time discussing in this context the extent, if any of the relevance of the standard of review by reference to which the appellate court will determine the merits of the appeal. This discussion was prompted by an apparent divergence among judges of the Alberta Court of Appeal, and, in particular, a statement by McDonald JA in *FortisAlberta v. Alberta (Utilities Commission)* to the effect that any decision on the standard of review was for the Court of Appeal in the context of hearing an appeal in which leave had been granted and not for the leave judge.[82]

Subsequently, the matter has moved much closer to resolution at least in the Alberta context with respect to appeals on law and jurisdiction from the Alberta Utilities Commission. First, In *Morin v. Alberta (Utilities Commission),*[83] Rowbotham JA seemed to clearly reaffirm earlier authority to the effect that the relevant standard of review was a factor to be considered in the leave judge's application of the overall test of whether the application for leave to appeal raised a "serious, arguable case". In a case in which one of the grounds of appeal was a failure to give notice of an application for leave to extend time limits provided for in the relevant legislation, Rowbotham JA placed considerable store in the discretionary nature of this determination and the entitlement of the AUC to deference in relation to any such discretionary rulings. Indeed, she went on to hold that the ruling would clearly survive deferential review. Secondly, McDonald JA himself apparently clarified his own position when in *ATCO Electric Ltd. v. Alberta (Utilities Commission),*[84] he included in a list of five factors relevant to the determination of whether the application for leave to appeal raised "a serious, arguable point", the "standard of review that will be applied should leave to appeal be granted."[85]

Nonetheless, there is a possibility that the matter has still not been resolved definitively to the extent that, in *Bokenfohr v. Pembina Pipeline Corp.,*[86] decided in early 2017 before both *Morin* and *ATCO*, Slatter JA seemed to adopt a compromise test. The question to be asked for Slatter JA was: What standard of review "is likely to be applied"[87] by the Court of Appeal if leave is granted? However, it is questionable whether this in reality is for practical and pleading purposes all that different from the stance endorsed in the two subsequent judgments. This is underscored by Slatter JA's discussion later in his judgment of a procedural fairness challenge based on a failure to grant an adjournment. There, he appeared to pronounce definitively on the standard of review for such discretionary, procedural rulings:

> The standard of review for denial of an adjournment is very high.[88]

Of more general significance in this context is the question of what qualifies as a question of "law and jurisdiction" for these purposes. This raises several questions such as the amenability to an appeal of a question that looks like one of mixed law and fact.[89] There is also the question whether, given the marginalization, if not elimination of "jurisdiction"[90] as a controlling

81 *Supra* note 36 at 29-30.
82 *FortisAlberta Inc v Alberta (Utilities Commission),* 2014 ABCA 264, at para 26.
83 *Morin v Alberta Utilities Commission*, 2017 ABCA 20.
84 *ATCO Electric Ltd v Alberta (Utilities Commission*), 2017 ABCA 331, at para 11.
85 See also the citations in last year's survey to other judgments of McDonald JA seemingly accepting the standard approach: *supra* note 36 at 30, n 122.
86 *Bokenfohr v Pembina Pipeline Corporation,* 2017 ABCA 40.
87 *Ibid* at para 2.
88 *Ibid* at para 30.
89 In such instances, the standard response tends to be that the threshold is crossed if there is a readily extricable question of law. See the detailed discussion by Stratas JA in *Canadian National Railway v Emerson Milling Inc*, 2017 FCA 79, at paras 20-28.
90 See the discussion by Rothstein J in *Alberta Teachers*, *supra* note 28 at paras 33-43, though, considering C*arrier Sekani*, *supra* note 42, the statement, at para 33, that "[s]ince *Dunsmuir*, this Court has not identified a single true question of jurisdiction" is perhaps subject to qualification.

concept or category in the overall theory of Canadian judicial review law, it has ceased to be of any relevance as a threshold entry point into an appeal on a "question of law or jurisdiction."

For appellants, in both the seeking of leave to appeal on a question of law and jurisdiction and, indeed, ultimately, in the determination of any appeal, the concept of jurisdiction still presents a beguiling possibility. Under conventional wisdom, review for jurisdiction is conducted on a correctness, not a deferential, reasonableness basis. In the context of appeals limited to questions of law and jurisdiction, the classification of an issue as jurisdictional, as exemplified by the traditional but now seldom invoked "jurisdictional fact" category of review, opens the door to review of both questions of fact and inextricably mixed law and fact, generally excluded from review or appeal on questions of law.

I do not pretend to have a definitive answer as to how these issues may ultimately be resolved in an environment of disenchantment with the terminology of jurisdiction. However, before we throw the baby out with the bath water, it is worth keeping in mind that jurisdiction has not disappeared completely from the rubric of Canadian judicial review law since *Dunsmuir v. New Brunswick.*[91] One need to look no further than *Carrier Sekani* referenced in another context earlier in this survey.[92] There, McLachlin CJ, delivering the judgment of the Court, unequivocally held that the issue of the Commission's role in consultation was a question of jurisdiction subject to correctness review.[93] And, indeed, there is no sense in either *Carrier Sekani* or the more recent authorities discussed in this survey that the issues of the regulator's capacity to fulfill in whole or in part the Crown's consultation and accommodation responsibilities or to assess the Crown's own fulfilment of that role were dealt with on other than a correctness basis.

In early 2017, Stratas JA, delivering the judgment of the Federal Court of Appeal in *Canadian National Railway Co. v. Emerson Milling Inc.,*[94] confronted this dilemma within the very context of an appeal on a question of law and jurisdiction from decisions of the Canadian Transportation Agency. In that setting, he held that the legislative perpetuation of the concept of a question of jurisdiction must be read as involving a category of issue that was not otherwise subsumed within questions of law. It adds "something above and beyond the phrase 'question of law'."[95] However, what is the content of that "something"?

Stratas JA's response to this conundrum is found in the domain of procedural fairness and his sense that questions of procedural fairness had been characterized historically as questions of jurisdiction rather than questions of law. Therefore, he contends that, on an appeal on questions of jurisdiction, there is access to the courts for all manner of questions of procedural fairness even if they involve "a factually suffused"[96] ruling by a tribunal or agency.[97]

It remains to be seen whether this lifeline for the concept of jurisdiction will be adopted by other courts and, more generally, whether the Supreme Court will, despite *Carrier Sekani,* continue down the path of consigning the concept of "jurisdiction" to the garbage bin of history.

Standard of Review of Decisions Affecting the Rights and Claims of Indigenous Peoples

In the previous section, I noted that, in *Carrier Sekani*, the Supreme Court held that correctness was the applicable standard to questions respecting the role of tribunals in the consultation and accommodation process. However, even in the foundation judgment in *Haida Nation,*[98] McLachlin CJ had recognized that just because constitutional rights were under consideration, this did not mean that there was no room for deference to components of that decision-making. While the existence or scope of the duty to consult was a question of law normally reviewable on a correctness

91 *Supra* note 25.
92 *Supra* notes 42, 47.
93 *Ibid* at paras 30, 67.
94 *Supra* note 89.
95 *Ibid* at para 17.
96 *Ibid* at para 19, this being a category of procedural fairness review that might not come within the term "question of law".
97 *Ibid* at paras 18-19.
98 *Supra* note 42 at paras 61-63.

standard, to the extent that these inquiries were factually suffused, a reviewing court should apply a reasonableness standard of review except with respect to determinations of pure law or mixed questions of fact and law from which a pure legal question was readily extricable.[99]As for issues involving the process of consultation, perfection was not required; rather the question was whether the responsible state actor had made reasonable procedural choices.[100] Similarly, provided the state actor had properly identified the legal principles by which it should evaluate the seriousness of the claim on which a right to consultation was based or the seriousness of the impact on the rights asserted, the court should evaluate the application of those legal principles to the facts on a reasonableness standard.[101]

In the aftermath of *Dunsmuir* but even prior to *Doré v. Barreau du Québec*[102] and its recognition of the application of administrative law standard of review principles in a setting where a *Charter* right was implicated, the Court in *Carrier Sekani* reaffirmed[103] and applied[104] the standard of review analysis set out in *Haida Nation*. However, during 2017, there were two judgments in which questions arose concerning the universality of the principles of judicial review (and conventional standard of review analysis in particular) to government decision-making and action affecting indigenous rights, claims and interests. Chronologically, they are the Federal Court of Appeal judgment in *Coldwater Indian Band v. Canada (Aboriginal Affairs and Northern Development)*[105] and the Supreme Court of Canada judgment in *First Nation of Nacho Nyak Dun v. Yukon,*[106] both of which have been the subject of blogs by Nigel Bankes.

Coldwater Indian Band involved Ministerial approval of the assignment of a pipeline right of way easement over portions of ten First Nations reserves in British Columbia. The Federal Court of Appeal, in a majority decision reversing a judgment of the Federal Court,[107] held that the approval should be set aside and remitted for reconsideration by the Minister. The basis for that holding was a breach of fiduciary duty that the Crown owed to the affected First Nations Band which had brought the application for judicial review. In assessing whether there had been a breach of fiduciary duty, Dawson JA, delivering the judgment of the majority, outlined the framework within which the case had to be decided.[108] As no question of jurisdiction was raised on the facts and as the decision involved a largely fact dependent exercise of discretion which did not come within any of the *Dunsmuir* categories where correctness was required, the Minister's decision was entitled to deference in the form of reasonableness review. Dawson JA did, however, recognize that reasonableness review in this setting had to take into account that what was at stake was a situation in which the decision-maker had a fiduciary relationship with the affected Bands:

> [I]t is important to observe that Coldwater, as a beneficiary of a fiduciary duty, cannot be deprived of that benefit because the fiduciary is a decision-maker whose decisions are to be reviewed under the principles articulated in *Dunsmuir* …. Thus, the fiduciary obligations imposed on the Minister serve to constrain the Minister's discretion, narrowing the range of reasonable outcomes.[109]

This caused Nigel Bankes[110] to wonder why, in the context of an application for judicial review, the Minister's exercise of discretion should have the benefit of deferential, reasonableness scrutiny

99 *Ibid* at para 61.
100 *Ibid* at para 62.
101 *Ibid* at para 63.
102 *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395.
103 *Supra* note 42 at para 64. (And, now see also *Ktunaxa Nation*, *supra* note 35, applying a deferential standard of review to a Ministerial decision that there had been ample consultation to justify proceeding to approve the construction of a year-round ski resort in an area of religious significance to the members of a First Nation.)
104 *Ibid* at paras 88-90.
105 *Coldwater Indian Band v Canada (Indian and Northern Affairs)*, 2017 FCA 199.
106 *First Nation of Nacho Nyak Dun v Yukon*, 2017 SCC 58.
107 *Coldwater Indian Band v Canada (Indian and Northern Affairs)*, 2016 FC 595.
108 *Supra* note 105 at paras 42-47.
109 *Ibid* at para 47.
110 Nigel Bankes, "The Intersection of Discretionary Powers, Fiduciary Duties, the Public Interest and the Standard of Review" (3 October, 2017) at 3, *ABlawg* (blog), online: <http://ablawg.ca/wp-content/uploads/2017/10/Blog_NB_Coldwater.pdf>.

when, if the matter had been brought as an action, there would have been no such judicial deference but rather a correctness determination as to whether there had been a breach of fiduciary duty. Leaving aside the accuracy of the premise on which this concern is based, it does raise starkly the question of whether it is appropriate to stretch conventional judicial review analysis to fit all manner of statutory decision-making. Certainly, Dawson JA recognized the essential dilemma, but one might ask rhetorically whether the compromise or blending that she adopted goes far enough.

First Nation of Nacho Nyak Dun provides an apparent contrast in approach. The facts are complicated but for the purposes of the points that I want to make are concisely summarized by Nigel Bankes in his blog on the case:

> The Court concluded that the land use planning process established by the Yukon Final Agreements permitted the Yukon to modify a Recommended Final Plan (in this case the Peel Watershed Regional Land Use Plan), but that the power to modify did not include the power to change the Plan "so significantly as to effectively reject it" (at para. 39). More specifically, Yukon's power to modify was confined by the scope of the issues that it had raised during the planning process; it could not raise significant new issues although it could respond to changing circumstances. As a result, Yukon's purported approval of the Plan was invalid (at para. 35).[111]

This case started out as an action for declaratory relief. However, it was treated throughout as an application for judicial review. Thus, in the Yukon Court of Appeal,[112] *Dunsmuir* was invoked in support of the proposition that, as the allegations "concern[ed]"[113] the proper construction of a constitutional document (the Umbrella Final Agreement incorporated into the Final Agreement, a treaty to which the parties were Canada, the Yukon, and Yukon First Nations), the standard of review was that of correctness.

Delivering the judgment of the Supreme Court of Canada, Karakatsanis J accepted that the "proceeding was best characterized as a judicial review of Yukon's decision to approve its land use plan."[114] This again provoked critical comment from Bankes who then advanced several reasons why disputes over the implementation of treaties such as this should not be resolved on the basis of "an over emphasis on judicial review".[115] In particular, he states:

> I am not sure that a judicial review approach is consistent with the idea of building a consent-based relationship between Indigenous communities and the state. The purpose of judicial review is to ensure the proper exercise of statutory power rather than the good faith fulfilment of consent-based relationships.[116]

However, it is instructive that, within the framework of judicial review and in contrast to the Yukon Court of Appeal, the judgment abstains from any direct assessment by reference to *Dunsmuir* as to whether the standard of review should be that of correctness or that of unreasonableness. Rather, the Court adopted a prescription for judicial review in such contexts which was specifically located within the setting of the implementation of modern treaties between Canadian governments and indigenous peoples:

> In judicial review concerning the implementation of modern treaties, a court should simply assess whether the challenged decision is legal, rather than closely supervise the conduct of the parties at each stage of the treaty relationship.[117]

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111 Nigel Bankes, "Court Confirms that Good Faith Fulfilment of Modern Treaties is Essential to the Project of Reconciliation" (14 December, 2017), at 1, ABlawg (blog), online: <http://ca.wp-content/uploads/2017/12/Blog_NB_NachoNyak.pdf>.
112 *The First Nation of Nacho Nyak Dun v Yukon*, 2015 YKCA 18.
113 *Ibid* at para 112.
114 *Supra* note 106 at para 4. See also para 32.
115 *Supra* note 112 at 2.
116 *Ibid.*
117 *Supra* note 106 at para 4. See also para 32.

In one sense, of course, this might be seen as no more than another way of stating that the standard of review is correctness on pure questions of law and reasonableness with respect to observance of the procedural requirements of the treaty's implementation provisions. However, in the section on "The Appropriate Role of the Court in These Proceedings",[118] the Court works at developing a framework for the review role which is detailed and tailored specifically to the very specialized domain of dispute resolution relating to the implementation and ongoing life of modern treaties such as the one in this case. While this is not meant to dismiss Bankes' arguments that judicial review may warp what is truly required for the appropriate resolution of such disputes, it at least amounts to a movement away from a sense of the application to all government decision-making of the *Dunsmuir* framework for discerning and applying either reasonableness or correctness review. Moreover, in framing the role of the courts, the judgment seems acutely conscious of the considerations that Bankes believes might get overlooked in a judicial review conception of dispute resolution in this context:

> Modern treaties are intended to renew the relationship between Indigenous peoples and the Crown to one of equal partnership …. In resolving disputes under modern treaties, court should generally leave space for the parties to govern together and work out their differences. Indeed, reconciliation often demands judicial forbearance.[119]

All of this, however, leaves open for further consideration the question of the extent to which the normal principles of Canadian judicial review law can be adapted to the particular context out of which disputes emerge. I would, however, suggest that there is some reason for optimism to be found in the path followed by the Supreme Court in the domain of the duty to consult and, where appropriate, accommodate indigenous rights and claims. ■

118 *Ibid* at paras 32-37.
119 *Ibid* at para 33.

WHO DECIDES? BALANCING AND BRIDGING LOCAL, INDIGENOUS AND BROADER SOCIETAL INTERESTS IN CANADIAN ENERGY DECISION-MAKING*

*Dr. Stewart Fast***

1. Introduction

Traditionally most decisions relating to the energy system have been in the hands of provincial or federal authorities. However a number of trends point to a growing authority on the part of municipal governments and Indigenous governments. These trends include: widespread use of negotiated impact benefit agreements for energy infrastructure between local governments and proponents; implementation of co-management structures for land use planning and resource development; recent jurisprudence reinforcing inherent jurisdiction of First Nations on lands with Aboriginal title; and, a lack of public confidence in energy development leading some municipal and Indigenous authorities to assert an intent to regulate cross-border energy infrastructure within their borders. In the face of growing authority of municipal and Indigenous authority the question of "who decides" when it comes to energy policy-making, planning, regulation and assessments of individual projects is a major new stress point in the energy decision-making system.

This article outlines the dimensions of this "who decides?" question from a number of perspectives including the constitutional and legal landscape, public interest complexities and examples of distributed decision-making involving municipal and Indigenous authorities. Throughout the text some challenging issues are highlighted along with recommendations to meet these challenges formulated by the Positive Energy research team in consultation with senior leaders from government, industry, Indigenous interests and ENGOs. The article draws on a workshop "Who Decides? Balancing and Bridging Local and Higher-Order Interests in Canadian Energy Decision Making" held March 20 and 21, 2017 at the University of Ottawa.[1]

There are two key terms used throughout this article that deserve early comment. I refer to municipal and Indigenous ***authorities***. This is terminology used throughout the Positive Energy project to refer to policymakers (elected government officials and the public service implementing policy direction) and regulators. In the municipal and Indigenous context,

* Note – this article is the second in a series published in ERQ on findings from the University of Ottawa's Positive Energy project. The first overview article from Michael Cleland and Monica Gattinger was published in the December 2017 Volume 5 Issue 4 titled "System Under Stress: Energy Decision-Making in Canada and the Need for Informed Reform". An extended version of the current article is available at <http://www.uottawa.ca/positive-energy/>.

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1 An agenda including list of participants, speaker presentations and "what we heard" report from this workshop is available online: <http://www.uottawa.ca/positive-energy/who-decides-balancing-and-bridging-local-and-higher-order-interests-canadian-energy-decision-making>.

authorities essentially means municipal and Indigenous elected officials and staff. Thus, to be clear, community groups, NGOs, industry proponents and other actors – whilst very important - are not authorities. The second key term is the ***energy decision-making system***. This term refers to a system of multiple parts including energy policymakers, energy regulators and planning activities, all of which are influenced and bound by the physical and market realities of energy.[2]

2. Dimensions of the "Who Decides?" question

2.1 Constitutional and legal landscape

The legal divisions of government authority over energy matters in Canada are set in Canada's founding documents. The *Constitution Act, 1867*[3] and amendments in 1982[4] stipulate that provinces enact laws related to developing energy resources, but that the federal government has explicit jurisdiction over interprovincial works (i.e., pipelines and international power lines) and has significant "residual power" under its constitutional responsibility for "peace, order and good government" to enact policy relating to energy matters.[5] Local and municipal governments are created under provincial law and their legal authority is typically restricted to local land-use by-laws influencing proposed locations for energy infrastructure. Indigenous government authority is more flexible and varied across the country and depending on circumstance, Indigenous governments may operate with the same powers as municipal or provincial governments on reserve lands and other territory.[6] Table 1 provides a summary of some of the federal and provincial powers over energy matters. Municipal and Indigenous roles are taken up later in the document.

Table 1 – Examples of federal and provincial powers over energy matters

Federal	Provincial
Interprovincial works (pipelines) and international power lines (Section 92A. *Constitution Act)* Nuclear power regulation Energy development offshore and on frontier lands	Non-renewable natural resource exploration, development, management Electricity generation development, conservation and management (Section 92A. *Constitution Act)*
Powers related to energy markets from jurisdiction over interprovincial and international trade and commerce (including foreign investment), international treaty-making, taxation	Wide powers from environmental regulation to energy distribution to standards relating to buildings and energy using equipment (Section 92.13 *Constitution Act "Property and Civil Rights"*)
Regulation of environmental impacts of energy development on Canada's fisheries (*Fisheries Act*[7]); Species at Risk (*Species at Risk Act*[8]); and more generally *Canadian Environmental Assessment Act*[9], *Canadian Environmental Protection Act*[10]	

2 For more on the energy decision making system see the overview article in the last issue of ERQ: Michael Cleland & Monica Gattinger, "System under Stress: Energy Decision Making in Canada and the need for Informed reform" (2017) 5:4 ERQ 11, online : <http://www.energyregulationquarterly.ca/articles/system-under-stress-energy-decision-making-in-canada-and-the-need-for-informed-reform>.
3 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 92A, reprinted in RSC 1985, App II, No 5.
4 *Canada Act, 1982* (UK), 1982, c 11.
5 Brenda Heelan Powell, *Environmental Assessment & the Canadian Constitution: Substitution and Equivalency* (Edmonton: Alberta Law Foundation, 2014); James John Guy, *People, politics and government: a Canadian perspective*, 7th ed (Toronto: Pearson Canada, 2009).
6 Natural Resources Canada "Roles and Responsibilities of Governments in Natural Resources" (2016), online: <https://www.nrcan.gc.ca/mining-materials/taxation/8882 Accessed December 15, 2016>.
7 *Fisheries Act*, RSC 1985, c F-14.
8 *Species at Risk Act,* SC 2002, c 29.
9 *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52.
10 *Canadian Environmental Protection Act, 1999*, SC 1999, c 33.

The contours of overlapping jurisdictions between federal, provincial, Indigenous and municipal authorities are evolving. Jurisdiction over energy decision-making, particularly over the siting of energy infrastructure, is often tested and new influences, including international legal influences, are emerging. Several recent legal rulings and ongoing situations are worth highlighting:

- **Validity of social acceptability as reason to deny energy project approval :** In June 2017, following a challenge by Strateco Resources Inc, the Superior Court of Québec upheld the government's refusal to grant uranium exploration permits for reasons of lack of sufficient social acceptability. The province issued a uranium mining moratorium in 2013 and directed its Bureau d'audiences publiques sur l'environnement (BAPE) to conduct a "generic" environmental review on uranium industry issues in Québec. The BAPE recommended to continue with the moratorium. The BAPE recommendation was criticized by the federal nuclear regulator CNSC who regulate and license uranium mines. Strateco contends Québec's decision was made outside of a legal framework.[11]

- **Constitutional requirements to meaningfully consult Indigenous groups overturns federal approval of Northern Gateway pipeline:** The *Constitution Act, 1982* Section 35 recognizes and affirms Aboriginal rights. This places a high standard for consultation on the federal government. In June 2016, the Federal Court of Appeal ruled that Canada's efforts were insufficient during the assessment process for the Northern Gateway Pipeline. This overturned the federal decision to approve the project.[12]

- **Proper justification required before provincial and federal governments can infringe Aboriginal rights and title:** The 2014 Supreme Court ruling in *Tsilhqot'in v British Columbia*[13] concerned provincially regulated forestry activity in traditional territory of the Tsilhqot'in Nation. The court set new guidelines to account for culturally sensitive evidence of past occupation and found that BC breached its duty to consult. It reaffirmed earlier jurisprudence (e.g, *Delgamuukw 1997*) that any provincial and federal infringement of Aboriginal title should be avoided and must pass a three part "justification test": Did the government discharge its procedural duty to consult and accommodate?; Were the government's actions backed by a compelling and substantial objective?; and, Is the governmental action consistent with the Crown's fiduciary obligation to the group?[14]

- **Requirements for "deep" consultation:** Supreme Court rulings in the summer of 2017 *Clyde River (Hamlet) v. Petroleum Geo-Services*[15] and *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*[16] have clarified requirements of "deep" consultation with Indigenous peoples who have strong claim to rights (e.g., treaty rights). The Inuit of Clyde River and the Chippewas of the Thames First Nation both sought to overturn NEB decisions on the basis of inadequate consultation. The Court agreed with appellants in *Clyde River* but not the *Chippewas*, pointing out that the former lacked several features required for meaningful consultation including: participant funding for Indigenous groups to address the evidence of the impacts of the activity before the NEB; oral hearings; inquiry

11 Strateco Resources, Press Release, "Litigation Against the Quebec Government: Strateco Adds $10 Million in Punitive Damages to its Original $190 Million Claim" (24 February 2016); Damon van der Linde, "Petition blocks uranium plans in Quebec" *Montreal Gazette* (15 December 2016).
12 Mandell Pinder LLP, "Gitxaala Nation v Canada, 2016 FCA 187 – Case Summary" (5 July 2016), online: <http://www.mandellpinder.com/gitxaala-nation-v-canada-2016-fca-187-case-summary>.
13 *Tsilhqot'in Nation v British Columbia,* 2014 SCC 44, [2014] 2 SCR 257.
14 Robin M Junger et al,"Supreme Court declares Aboriginal title in Tsilhqot'in Nation v. British Columbia" (2014) *Aboriginal Law Bulletin*, online: <http://mcmillan.ca/Supreme-Court-declares-Aboriginal-title-in-Tsilhqotin-Nation-v-British-Columbia>.
15 *Clyde River (Hamlet) v Petroleum Geo-Services Inc,* 2017 SCC 40.
16 *Chippewas of the Thames First Nation v Enbridge Pipelines Inc,* 2017 SCC 41.

into the specific rights and impacts of the proposed activity on those rights. The decision in the *Clyde River* case also made clear that the Crown can rely on steps undertaken by a regulatory agency, such as the NEB, to fulfil its duty to consult. This has been a point of some contention for some as to whether or not a regulator like the NEB can fulfil that role. The Court ruled that the NEB has sufficient procedural powers to carry out meaningful consultation but this role must be made clear to the Indigenous group(s) involved.[17]

- **Québec review of proposed Energy East pipeline:** The proponent first refused then, in a politically charged context, later agreed to undergo an Environmental Impact Assessment and Review under the province's *Environmental Quality Act.*[18] This situation raises questions of the extent to which provincial legislation can and should apply to interprovincial pipelines which are regulated federally under the *NEB Act.*[19]

  In this context it is worth mentioning that approval of other non-pipeline energy projects may fall under both federal and provincial jurisdiction. For example both BC and Canada required environmental assessments for the Site C hydro-electric project in and established a Joint Review Panel in order to do this.

- **Ontario overrules King Township by-laws intended to stop gas plant:** In 2010, King township passed an interim control by-law and started a process to amend its official plan to ban a 393 MW gas power plant. The provincial government exempted the plant from the provincial *Planning Act*[20] thus removing the authority of the municipality to restrict the construction of the generation facility.[21]

- **Provincial green energy policy curtailed by World Trade Organization:** International legal institutions can also curtail the authority of Canadian government energy authorities. Ontario has taken major steps to develop a provincial wind and solar energy industrial sector. However the province's "local content" requirements which required a minimum made-in-Ontario content for wind and solar energy generation projects were disputed through the World Trade Organization mechanisms.[22] The province was forced to drop the domestic content requirement in 2014.

2.2 Challenges and opportunities raised by growing power of municipal and Indigenous authorities

(1) **The emergence of "social license" and "governments grant permits, communities grant permission" terminology in policy is a challenge from a strict legal and constitutional perspective.** There are no rules or guidelines on how to apply for, or to grant, the "licence" implied by "social licence" (with the potential exception of the BAPE process in Québec). Yet, this has not stopped governments from using the terminology in public policy. For example, the New Brunswick government, placed a moratorium on hydraulic fracturing until a social licence is in place.[23] The federal government came to power on a platform stating:

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17 Mandell Pinder LLP, "Clyde River (Hamlet) v Petroleum Geo-Services Inc., 2017 SCC 40 and Chippewas of the Thames First Nation v Enbridge Pipelines Inc., 2017 SCC 41 – Case Summaries" (10 August 2017), online: <http://www.mandellpinder.com/clyde-river-and-chippewas-of-the-thames/>; Nader R. Hasan & Justin Safayeni, "Supreme Court of Canada offers important guidance for Indigenous groups on the Crown's duty to consult" (2017), online: <https://www.linkedin.com/pulse/supreme-court-canada-offers-important-guidance-groups-justin-safayeni>.

18 *Environment Quality Act,* CQLR c Q-2.

19 Daniel Gralnick, "Constitutional Implications of Quebec's Review of Energy East" (2016) 4:3 Energy Regulation Quarterly, online: <http://www.energyregulationquarterly.ca/articles/repercussions-constitutionnelles-de-lexamen-du-projet-energie-est-par-le-quebec#sthash.9vGk5hLb.dpbs>.

20 *Planning Act*, RSO 1990, c P.13.

21 Stephen Bird, *Gas-fired Power Facilities Case Study Oakville and King Township Ontario* (Ottawa: Canada West Foundation and University of Ottawa, 2016).

22 *Canada – Certain Measures Affecting The Renewable Energy Generation Sector* (2014), WTO Docs WT/ DS412/19, WT/ DS426/19, online: <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds412_e.htm>.

23 Government of New Brunswick, Press Release, "Moratorium on hydraulic fracturing to continue indefinitely" (27 May 2016), online: < http://www2.gnb.ca/content/gnb/en/news/news_release.2016.05.0462.html>.

"while governments grant permits for resource development, only communities can grant permission."[24] While few would disagree with the democratic ideal of consent of the governed, this raises prickly questions: Who speaks for communities? What about the interests of the larger national community? What happens when interests of communities clash?

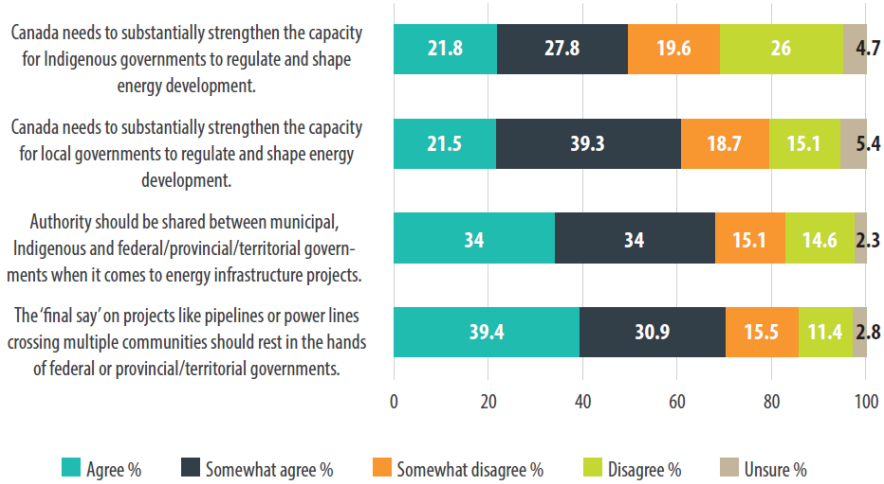
Nevertheless there are benefits to the distribution of some decision-making power, especially if we restrict the discussion to distribution of decision-making power to elected authorities and staff of municipal and Indigenous communities rather than the more amorphous notion of "communities". Participants in workshop pointed to benefits that can include: increased legitimacy of decisions at local levels; confidence-building among the parties involved; reduced "social risk" for project proponents; better projects and increased sustainability of energy infrastructure; and greater opportunities for comprehensive and integrated planning. Furthermore, Canadians appear to expect sharing of authority. Last fall our polling partner Nanos asked Canadians if they thought authority should be shared between municipal, Indigenous and federal or provincial governments when it comes to energy infrastructure projects and 68 per cent agreed (figure 1). Of course, there are also risks of confusion and delay with a system that has multiple decision-makers. Again Canadians appear to recognize and understand this. Fully 70 per cent thought the "final say" on linear infrastructure projects should rest in the hands of federal or provincial governments.

(2) **Indigenous peoples rights and consent and regulatory capacity –** constitutionally protected rights of Canada's aboriginal peoples means that Indigenous peoples and communities are rights holders and not only stakeholders in energy decisions. Canada's recent commitment[25] to the *UN Declaration on the Rights of Indigenous Peoples* by Canada introduces into the dialogue the concept of free, prior and informed consent

FIGURE 1

Views on recommendations among Canadians

Source: Nanos Research, RDD dual frame hybrid telephone and online random survey, September 23rd to 26th, 2017, n=1000, accurate 3.1 percentage points plus or minus, 19 times out of 20.



24 Liberal Party of Canada, "Environmental Assessments", online: <https://www.liberal.ca/realchange/environmental-assessments/>.

25 Government of Canada, News Release, "Canada Becomes a Full Supporter of the United Nations Declaration on the Rights of Indigenous Peoples" (10 May 2016), online: <https://www.canada.ca/en/indigenous-northern-affairs/news/2016/05/canada-becomes-a-full-supporter-of-the-united-nations-declaration-on-the-rights-of-indigenous-peoples.html>.

for resource development.[26] However, the federal government has indicated it will not directly adopt the *Declaration* into Canadian law[27] and it is uncertain how it will be applied. Jurisprudence from the *Tsilhqot'in* and *Delgamuukw* cases at the Supreme Court described above, suggest that consent is ideal but, in its absence, federal and provincial governments can infringe on Aboriginal title, provided they meet the established tests for "justification". Yet it is important to stress that the *Tsilhquot'in* decision affirmed that there is inherent jurisdiction on the part of First Nations to regulate lands to which they have a strong claim of Aboriginal title. Thus the decision should also be interpreted as an opportunity to bring regulatory capacity to First Nations. Some First Nations are pursuing this. For example, the Squamish Nation has developed and implemented an independent environmental review for major projects separate from the Crown environmental assessment process. The legal authority for the process derives from a contractual agreement with project proponents and the Crown and Squamish decision-making processes are coordinated.[28] This led in 2016 to the Squamish Nation issuing environmental approval for a LNG pipeline project.[29] Arrangements like this appear to be generally supported by the public as half of the Canadians polled by Nanos were in favour of efforts to increase the capacity for Indigenous governments to regulate and shape energy development (figure 1).

(3) **Identifying public interest(s) in the absence of national energy policy -** The energy decision making system is oriented towards making decisions that are in the public interest. However, the public interest is a difficult concept, it is continually evolving and is contested. Just as there are multiple "publics", there will be multiple public interests. Moreover, social scientists and planning theorists have criticized the notion of the public interest as a universalizing concept that denies differences in class, gender and race.[30] From this perspective, the interests of Indigenous Canadians, for example are arguably too easily obscured by the presumption of one public or national interest. Despite these problems, policy-makers and planners realize that doing away with the term "public interest" would not make matters simpler. The problems inherent in defining the public interest are also intrinsic to any planning activity with the aim of generating just outcomes for a plurality of interests.[31]

Approaches to determining the public interest rely on the existence of shared values and common interests. However, in the absence of a national energy policy there is no clear statement of these values and interests as they relate to the energy system. This could be interpreted as a fatal flaw that may make public interest determinations more susceptible to special interests. The federal governments' "Generation Energy"[32] initiative which aims to develop goals for what Canada's energy future should look like over the long term is a step in the direction of identifying shared values and common interests.

An additional complication is that notion of the public interest often requires an acceptance that costs and risks borne locally are for "the greater good". This can be achieved by legally enforced direction from higher-order governments, but that arrangement is increasingly complicated for the reasons of societal change outlined by Cleland and Gattinger[33] including reduced levels of trust in governments, decline in deference to expert authority and increased demands for citizen involvement in public decision-making. Workshop participants pointed to other ways in which local authorities give primacy to "the greater good"

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26 *United Nations Declaration on the Rights of Indigenous Peoples,* GA Res 61/295, UNAGOR, 2007, UN Doc A/61/L.67, s 32.2.

27 James Munson, "Ottawa won't adopt UNDRIP directly into Canadian law: Wilson-Raybould" *IPolitics* (12 July 2016), online: <https://ipolitics.ca/2016/07/12/ottawa-wont-adopt-undrip-directly-into-canadian-law-wilson-raybould/>.

28 Aaron Bruce & Emma Hume, "The Squamish Nation Assessment Process: Getting to Consent" *Ratcliff & Company LLP* (November 2015), online: <http://www.ratcliff.com/sites/default/files/publications/The%20Squamish%20Nation%20Process.%20Getting%20to%20Consent%20A%20Bruce%20and%20E%20Hume%20November%202015%20%2801150307%29.PDF>.

29 Fortis BC, News Release, "FortisBC receives Environmental Certificate from Squamish Nation for Eagle Mountain Woodfibre Gas Pipeline" (27 June 2016), online: <https://www.fortisbc.com/MediaCentre/NewsReleases/2016/Pages/Project-update-FortisBC-receives-Environmental-Certificate-from-Squamish-Nation-for-Eagle-Mountain-Woodfibre-Gas-Pipeline.aspx>.

30 Heather Campbell & Robert Marshall, "Utilitarianism's Bad Breath? A Re-Evaluation of the Public Interest Justification for Planning" (2002) 1:2 Planning Theory 163.

31 Mick Lennon, "On 'the subject' of planning's public interest" (2016) 16:2 Planning Theory 150.

32 Natural Resources Canada, "Generation Energy" (2018), online: <http://www.nrcan.gc.ca/20093>.

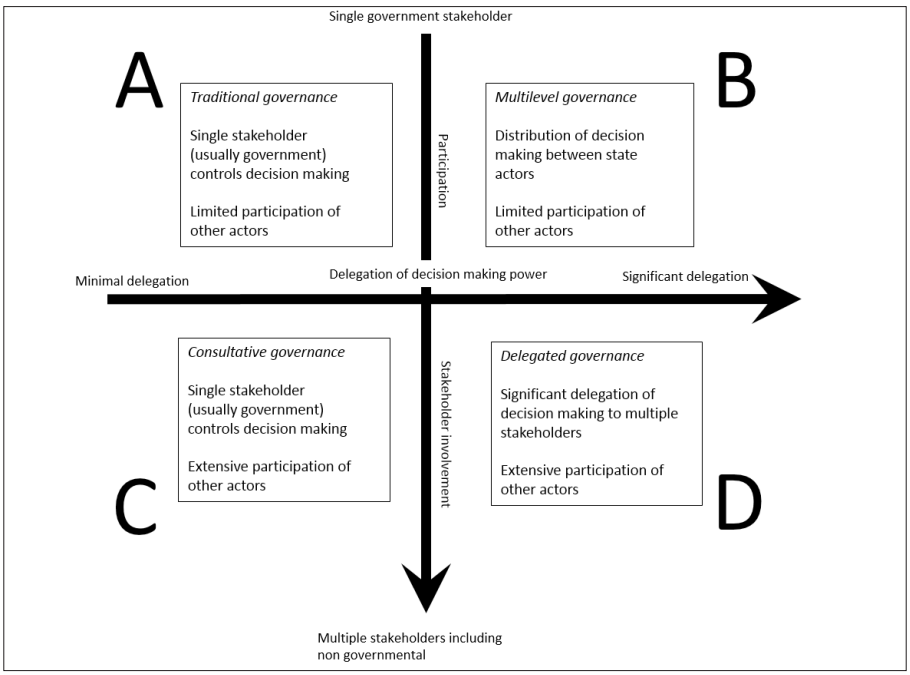
33 Michael Cleland & Monica Gattinger, *System under Stress: Energy Decision Making in Canada and the need for Informed reform* (Ottawa: Positive Energy, 2017).

and communicate to constituents. For the latter, the role of well-written and accessible decision documents by regulators is important. Other ways in which "the greater good" is enforced include compensation and other benefits negotiated via Impact Benefit Agreements with proponents.

2.3 What does distributed decision-making look like in practice?

The preceding section made mention of the distribution of decision-making power to municipal and Indigenous authorities. What does this mean in practice? To answer this, first it may be helpful to refer to scholarship in the field of governance. The term governance is used to refer to the process of collective decision-making and policy implementation.[34] It draws attention to the role of non-government actors and networks which is important given the shift away from solely state-centred political authority.[35] Furlong and Bakker[36] have described two simultaneous shifts in governance: one is a delegation of decision-making power, the second refers to increased participation in decision-making of multiple parties (figure 2). This classification of governance arrangement along two axis provides a potentially fruitful way to think about some of the ways in which decision-making power is distributed in Canada. A few examples of arrangements where decision-making power has been distributed or delegated to municipal or Indigenous governments (quadrant B and D) are provided below. More examples are available in the extended version of this paper.[37]

Figure 2 – Two-axes of governance change (Adapted from Furlong and Bakker)[38]



34 Iain McLean & Alistair McMilan, *The Concise Oxford Dictionary of Politics,* 3rd ed (Oxford University Press, 2009) *sub verbo* "governance".
35 Grace Skogstad, "Legitimacy and/or policy effectiveness?: network governance and GMO regulation in the European Union" (2003) 10:3 Journal of European Public Policy 321.
36 Kathryn Furlong & Karen Bakker, "The Contradictions in 'Alternative' Service Delivery: Governance, Business Models, and Sustainability in Municipal Water Supply" (2010) 28:2 Environment and Planning C: Politics and Space 349.
37 Stewart Fast, *Who Decides? Balancing and Bridging Local, Indigenous and Broader Societal Interests in Canadian Energy Decision-Making. System Under Stress – Interim Report #1* (Ottawa: Positive Energy, 2017), online: <http://www.uottawa.ca/positiveenergy/sites/www.uottawa.ca.positive-energy/files/positive_energy-who_decides_dec_2017.pdf>.

In the upper right hand quadrant, we have **multilevel governance**. Indigenous authorities may be engaged in multilevel governance arrangements through co-management of natural resources. The term co-management is described by natural resource scholars as an arrangement of shared management, decision-making, and responsibility between the state and non-state parties, the latter usually being local resource users.[39] There are a number of examples including the Comité d'examen des répercussions sur l'environnement (COMEX) which is a review body established under the James Bay and Northern Quebec Agreement, signed by the government of Quebec, Hydro-Québec and the Grand Council of the Cree of Quebec. The committee is composed of Québec government appointed members and Cree Nation appointed members, it is responsible for conducting environmental and social assessment of proposed infrastructure (e.g., mining, road, electricity) in the James Bay region.[40] The Mackenzie Valley Review Board (MVEIRB) is another example. It is a regulatory body in the Northwest Territories (NWT) that carries out environmental impact assessments and reviews in the Mackenzie Valley for non-renewable resource development. Half of the Board members are from Indigenous peoples, the remaining from federal and territorial governments.[41] A final example is community energy planning overseen by municipalities and including things like provision of retrofit programs; district energy investment; and energy labelling and conservation initiatives in municipally owned buildings. Often these initiatives access provincial or federal programs while the municipal government tends to be the final decision maker.

In the lower right quadrant, we have **delegated governance**. Examples here include the Nuclear Waste Management Organization. The federal government chose in 2002 to require Canada's nuclear energy corporations to fund, construct and operate a long term waste management facility. This mix of crown and private corporations established the Nuclear Waste Management Organization (NWMO). The NWMO is responsible for designing and implementing Canada's plan for the safe, long-term management of used nuclear fuel. The federal government has an oversight function but has delegated the selection process for a waste repository to the NWMO.[42] The selection process extensively involves elected authorities from potential host communities as well as other community members and requires that the host is both willing and informed. Thus there are multiple actors holding decision-making roles (federal government, NWMO, host communities) and extensive participation opportunities. Another potential example is the First Nations Land Management Regime which transfers authority for land administration on reserve land from the federal to First Nation governments.[43]

3. Recommendations to policy-makers

The question of "who decides?" and the role of municipal and Indigenous authorities in the Canadian energy decision making system is complex and dynamic. Legal and constitutional divisions of power are key considerations but evolving jurisprudence and governance trends mean that there are a diversity of roles for local and Indigenous governments. The following recommendations are targeted at federal and provincial policy-makers and regulators. They were formulated by the Positive Energy team in consultation with senior leaders from government, regulators, industry, Indigenous interests and ENGOs.

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38 *Supra* note 36.

39 Lars Carlsson & Fikret Berkes, "Co-management: concepts and methodological implications" (2005) 75:1 Journal of Environmental Management 65 at 66; Aaron T. Dale, "Inuit Qaujimajatuqangit and Adaptive Co-Management: A Case Study of Narwhal Co-Management in Arctic Bay, Nunavut" (2009) These and Dissertations (Comprehensive) 931 at x.

40 Comité d'examen des répercussions sur l'environnement et le milieu social, "About COMEX", online : <http://comexqc.ca/en/a-propos/>.

41 Energy and Mines Ministers' Conference, *Facilitating Responsible Mineral and Energy Development – Compendium of Case Studies on Building Public Confidence in the Mineral and Energy Resource Sectors* (Winnipeg: EMMC, 2016).

42 Natural Resources Canada, "Federal Oversight of the Nuclear Waste Management Organization's Plan for the Long-Term Management of Nuclear Fuel Waste", online: <http://www.nrcan.gc.ca/energy/uranium-nuclear/nuclear-fuel-waste-Bureau/7789>; Nuclear Waste Management Organization, "Regulatory Oversight", online: <https://www.nwmo.ca/en/Canadas-Plan/Canadas-Used-Nuclear-Fuel/Regulatory-Oversight>.

43 Indigenous and Northern Affairs Canada, "First Nations Land Management Regime", online: <https://www.aadnc-aandc.gc.ca/eng/1327090675492/ 1327090738973>; Sasha Boutilier, "An Unsung Success: The *First Nations Land Management Act"* (2016) Policy Options.

Energy development and investment requires reasonably efficient and timely decisions as well as a certain amount of predictability. The trend to have more actors involved in decision-making makes it more complicated to achieve this. Significant coordination and cooperation efforts are needed not only for the sake of efficiency, but also to ensure a balance between local and broader societal interests. The recommendations are oriented in this direction.

1. **Recognize and encourage distributed decision-making while reaffirming a prominent role for federal / provincial / territorial authorities**

    a. Recognize that whether intentionally through formal co-management arrangements, or through the more *ad hoc* Impact Benefit Agreements / host-community agreements, the power of Indigenous and municipal governments has been elevated in the energy decision making system.

    b. Encourage the benefits that can arise through this distribution and decentralization of decision-making authority. Benefits include: increased legitimacy of decisions at local levels; confidence- building among the parties involved; reduced "social risk" for project proponents; better projects and increased sustainability of energy infrastructure; and greater opportunities for comprehensive and integrated planning.

    c. Reaffirm and support the prominent role for federal / provincial / territorial authorities

        i. For linear energy infrastructure, provincial (within province) and federal (across provinces / international borders) authorities need to play prominent roles. This includes retaining ultimate authority to decide whether infrastructure is in the broad public interest. In other words, seek decision-making arrangements that are traditional, or consultative, or multi-level.

        ii. For non-linear energy infrastructure, provincial / federal / territorial authorities also need to play prominent roles and retain authority to decide whether infrastructure is in the public interest. However, there is potentially more opportunity for more distributed decision-making arrangements: i.e., traditional, consultative, multi-level or delegated.

        iii. For all types of energy infrastructure as well as for policy, planning and the development and implementation of regulation, explore greater use of formal co-management bodies that share authority among federal / provincial / territorial governments and collections of Indigenous or municipal governments. Draw on existing experiences.

        iv. Explicitly identify Indigenous governments that are proximate to linear infrastructure and need to be engaged. This will reduce burden on Indigenous governments and on proponents.

        v. Play a coordinating role by supporting capacity building (recommendation 2) and connecting planning efforts (recommendation 3).

2. **Support capacity building efforts for municipal and Indigenous governments**

    a. Promote coordination and cooperation to find economies of scale as Indigenous governments take on environmental assessment activities in their territories.

    b. Consider establishing an expert body to build technical capacity (planning, finance, safety, regulatory process principles) within Indigenous and municipal governments. Draw on existing experiences like QUEST's Community Energy Planning program, Catalyst 2020 program and others.

    c. Develop executive / personnel exchanges between industry, regulators, policy-makers, Indigenous governments and municipal governments. This will strengthen leadership competencies; increase awareness of historical context and cultures, organizational / technical / investment constraints and imperatives;

and, lead to better relationships.

d. Explore funding sources for capacity building. Potential sources include government, industry, and foundations (e.g., philanthropic foundations, community foundations).

3. Elevate prominence of energy in land use planning

a. Work towards better integration of energy issues in the land use planning system. Build regional, provincial and federal energy policy goals or energy plans into the existing medium and long term planning tools (e.g., planning acts, provincial policy statements, regional and strategic impact assessment processes).

b. Federal and provincial support for community energy planning through for example: provision of energy and GHG data, maintain federal gas tax agreement; mandated energy targets.

c. Review the First Nations Land Management Regime program with a focus on increasing opportunities for First Nations to control land use decisions within their territories

d. Track and monitor the content of IBAs to: avoid duplication in meeting regional priorities for infrastructure and development; identify best practices; and reduce transaction costs.

4. Aim for predictability, efficiency and a climate that fosters innovation, investment and competitiveness

a. Predictability and efficiency of the energy decision making system should be a goal of any reforms. The above recommendations to improve planning and build capacity within municipal and Indigenous governments can help in this direction. Decision systems must also foster innovation, investment and competitiveness. ■

ALBERTA ENERGY REGULATOR REVISES ELIGIBILITY REQUIREMENTS FOR ACQUIRING AND HOLDING ENERGY LICENCES AND APPROVALS

Katie Slipp and Ryan Zahara***

In early December 2017, the Alberta Energy Regulator (AER) released a new edition of *Directive 067: Eligibility Requirements for Acquiring and Holding Energy Licences and Approvals (New Directive)*.[1] The New Directive makes several significant changes to the previous version of Directive 067 (Original Directive), primarily in the form of increased responsibility for approval holders and increased scrutiny by the AER.

The New Directive was issued in apparent response to AER concerns about companies that are unable to fulfil abandonment and reclamation obligations. These concerns also arose as a result of the decisions[2] in *Redwater Energy Corporation (Redwater)* matter that is proceeding to a hearing at the Supreme Court of Canada in February of 2018. *Redwater* involved an insolvent energy company where the receiver sought to renounce the estates interest in certain wells, pipelines and facilities and the Court of Queen's Bench and Court of Appeal confirmed that receivers and trustees have this authority.

While this has only been an issue in a handful of cases to date, the New Directive will require all oil and gas operators to meet more stringent hurdles to participate in the oil and gas industry. The changes that current or prospective licence and approval holders should expect to see include, for example:

- The requirement for ongoing assessment of materiality in the context of changes to an approval holder's business and reporting to the AER regarding same. A failure to comply with reporting requirements could result in a change to the type of licence eligibility which could have significant impacts on a licensee's business or operations.

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1 Alberta Energy Regulator, *Directive 067: Eligibility Requirements for Acquiring and Holding Energy Licences and Approvals* (Calgary: AER, 2017).

2 *Redwater Energy Corporation*, 2016 ABCA 278; *Orphan Well Association v Grant Thornton Limited*, 2017 ABCA 124.

- A higher disclosure standard for directors and officers relative to other jurisdictions and related to past insolvency proceedings. A failure to provide this information or persuade the AER that there is no "unreasonable risk" might negatively impact a licensee's licence eligibility.

- Broad discretion on the part of the AER to assess and determine on a seemingly subjective basis what constitutes an "unreasonable risk". Little guidance has been provided that would assist current or prospective approval holders in determining how this standard might be applied, resulting in the potential for increased uncertainty relatively to the Original Directive about how the AER might make decisions regarding the issuance of licences or licencee eligibility of existing approval holders.

The New Directive

The New Directive increases the scrutiny the AER will apply to ensure that licences and approvals are only granted to, and retained by, "responsible parties". The increased scrutiny under the New Directive comes in the form of several significant changes to the Original Directive, which had been in force since July 11, 2005. These include the following:

1. License eligibility types

Under the New Directive, there are now three types of license eligibility, as compared to the eight types under the prior regime. The types of licence eligibility under the New Directive are:

1. No eligibility – Not eligible to acquire or hold licences to drill/construct wells, facilities, or pipelines.

2. General eligibility – Eligible to hold licences for all types of wells, facilities, and pipelines.

3. Limited eligibility – Eligibility to hold only certain types of licences and approvals or on certain terms and conditions.

The changes in the New Directive primarily relate to the limited eligibility category. That category replaces a number of eligibility types under the Original Directive which covered distinct types of operations and particularized assessments.

2. New requirements to become a licensee

In order to become a licens4ee under the Original Directive, parties had to meet relatively straightforward eligibility, residency, agency, insurance and declaration obligations, in addition to an applicant or existing license-holder paying the required fees. Additionally, the New Directive now gives the AER discretion to consider whether, in its opinion, a license applicant poses an "unreasonable risk".

This change in the New Directive was implemented, at least in part, by the AER in order to allow it to scrutinize former directors and officers of companies who have entered insolvency proceedings. If those insolvent companies were unable to fulfill abandonment and reclamation obligations and then those directors and officers went on to work for other licensees or form new companies, the New Directive allows the AER to potentially consider that company an "unreasonable risk".

The question of unreasonable risk appears to be a subjective determination to be made by the AER in respect of any given licensee or approval holder based on the following factors:

- Compliance history of the applicant. This includes its directors, officers and shareholders, in Alberta and elsewhere, including in relation to any current or former AER licensees that are directly or indirectly associated or affiliated with the applicant or its principals

- Compliance history of entities currently or previously associated or affiliated with the applicant or its directors, officers and shareholders

- Experience of the applicant, including its directors, officers and shareholders

- Corporate structure

- The applicant's financial health

- Outstanding debts owed by the applicant or current or former AER licensees that are directly or indirectly

associated or affiliated with the applicant or its directors, officers or shareholders

- Outstanding non-compliances of current or former AER licensees that are directly or indirectly associated or affiliated with the applicant or its directors, officers or shareholders

- Involvement of the applicant's directors, officers or shareholders in entities that have initiated or are subject to bankruptcy or receivership proceedings or in current or former AER licensees that have outstanding non-compliances

- Naming of directors, officers or shareholders of current or former AER licensees under section 106 of the *Oil and Gas Conservation Act*.[3]

Depending on its assessment, the AER may refuse to grant licence eligibility or may grant licence eligibility with or without restrictions, terms or conditions.

A key change is the requirement to report the involvement of directors, officers or shareholders in entities that are have initiated or are subject to bankruptcy or receivership proceedings or in current or former AER licencees that have outstanding non-compliances. Depending on the circumstances this could be an onerous requirement that is difficult to meet by being proactive.

3. On-going compliances obligations

All existing licence or approval holders will have on-going compliances obligations and must meet licence eligibility requirements on an ongoing basis and ensure that the information the AER has on file is kept accurate. A licensee must, for example, provide an updated Schedule 1 within 30 days of any "material change", the scope of which is described in the New Directive as including:

- changes to legal status and corporate structure;

- addition or removal of a related corporate entity;

- amalgamation, merger, or acquisition;

- changes to directors, officers, or control persons

- appointment of a monitor, receiver, or trustee over the licensee's property;

- plan of arrangement or any other transaction that results in a material change to the operations of the licensee;

- the sale of all or substantially all of the licensee's assets; or

- cancellation of insurance coverage.

When, in the AER's opinion, a material change results in an unreasonable risk, the AER may revoke or restrict eligibility by imposing terms and conditions.

In advance of making a material change, a licensee may request an advance ruling from the AER on the question of "unreasonable risk". At the date of writing, no process or guidelines had been established under the New Directive in this regard.

4. Restriction of licence eligibility.

Under the New Directive, there are three main circumstances in which the AER may revoke or restrict licence eligibility:

1. The licensee fails to provide complete and accurate information and ensure that information remains complete and accurate by advising the AER of material changes within 30 days;

2. The AER finds that, as a result of a material change or compliance history, the licensee possesses an unreasonable risk; or

3. The licensee fails to acquire or hold licences or approvals within one year after having been granted eligibility.

The repercussions for a party that is offside any of these requirements will depend on the circumstances. For a party that holds licences or approvals, licence eligibility will be restricted.

[3] *Oil and Gas Conservation Act*, RSA 2000, c O-6, s 106.

For example, general eligibility (if applicable) will be changed to limited eligibility with potential terms and conditions and the licensee will not be permitted to acquire additional licences or approvals unless general licence eligibility is reacquired or terms and conditions are lifted.

5. Information requirements relating to directors and officers

Schedule 1 of the New Directive now requires applicants to disclose whether any director or officer has been a director of officer of an energy company in any jurisdiction in the past five years, including of an energy company that has been subject to insolvency proceedings either while that person was a director or officer or during the 12 months prior to such insolvency proceeding.

Directors and officers must also now provide a current piece of government-issued identification that contains a photograph and affidavit of attestation of instrument and declaration. The AER specifically acknowledges in Schedule 1 that this information is being obtained to, among other things, conduct compliance and enforcement proceedings.

Current licensees and approval holders were required to provide an updated Schedule 1 by January 31, 2018.

Potential Implications for Prospective or Current Approval Holders

New Directive has been in effect since December 6, 2017. While it remains to be seen how exactly the requirements of the New Directive might affect prospective or current approval holders, it is apparent that there could be some challenges.

First, the powers of the AER under the New Directive are largely discretionary. This discretion is likely intentional to ensure that the AER has access to every tool that might be necessary to ensure responsible development in the province. This discretion, however, introduces some uncertainty for operators and their shareholders as to what the AER might consider in determining whether an approval should be issued or licence eligibility changed.

Also, while the New Directive allows the AER to make an advance determination of unreasonable risk, no direction has been provided about the information the AER might consider in this regard. Again, this gives the AER maximum flexibility to make decisions that it considers appropriate in the circumstances, but raises questions about consistency of decision making that were not as prominent under the Original Directive.

It is apparent that the New Directive paints all approval holders with the same brush. While the New Directive is likely aimed at ensuring responsible operation by new or smaller operators, it will have implications for larger and well-established licencees. As compared to smaller organizations, the task of identifying directors, officers, and shareholders that might have been involved in bankruptcy or receivership proceedings or in current or former AER licencees that have outstanding non-compliances is likely to be more onerous for larger operators.

Finally, it is not clear if the New Directive will be effective in addressing situations such as those that arose in the *Redwater* matter. There are a number of reasons companies enter insolvency proceedings and many of these are not within the control of directors and officers (*i.e.* price of oil and gas). Consequently, the insolvency of these entities cannot necessarily be linked to any specific improper conduct or poor management by the former directors and officers that the AER is seeking to prevent from recurring. However, there does appear to be a direct correlation between prior association with an insolvent licensee and potentially being deemed an "unreasonable risk" by the AER under the New Directive. It has been noted by the AER that this problem is not endemic and involves only a small number of former directors[4]. As noted, the AER does have discretion under the New Directive, but it is not yet clear how that discretion might be exercised in these circumstances. ■

4 Jeremy Sims, "Alta. gets tougher on abandoned oil wells", *The Western Producer* (21 December 2017), online : <https://www.producer.com/2017/12/alta-gets-tougher-abandoned-oil-wells/>.

WHAT'S NEXT FOR THE ONTARIO ENERGY BOARD?

*David Stevens**

The final months of 2017 have seen a flurry of activity around the future direction and focus of the Ontario Energy Board (OEB).

The Ontario Government has issued its 2017 Long-Term Energy Plan (2017 LTEP)[1] setting out plans and priorities for the coming years. The Ontario Government has also created an expert "Modernization Panel" to review the OEB and report back by the end of 2018. The OEB itself has issued a "Strategic Blueprint" setting out areas of focus for 2017 to 2022. A main focus in each of these initiatives is the need for the OEB to understand, accommodate and facilitate evolution of the regulated utility sector in the face of technological changes. An important backdrop to all of this is the upcoming Ontario election in June 2018. Depending on the outcome of the voting, there may be a shift in OEB focus and priorities. In the sections that follow, each of these items is briefly discussed.

2017 LTEP

On October 26, 2017, Ontario's Minister of Energy Glenn Thibeault released the 2017 LTEP. This long-awaited document is intended to set the course for Ontario's energy supply over the coming years.

The 2017 LTEP is organized into eight chapters, each of which focuses on a different topic. Examples are "Ensuring Affordable and Accessible Energy," "Ensuring a Flexible Energy System," "Innovating to Meet the Future" and "Responding to the Challenge of Climate Change." Each chapter sets out the Government's plans to address the challenges of that topic over the near and long-term future.

While many of the initiatives highlighted in the 2017 LTEP have previously been announced there are a number of new initiatives announced in the 2017 LTEP that will impact and expand the role of the OEB. Examples include the following:

- Expanding opportunities for electricity distributors (LDCs) to offer "non-wires" solutions to customers, such as customer-connected energy storage, electric vehicle infrastructure and encouraging joint service partnerships.

- Enhancing the net metering framework to allow different arrangements, such as third-party ownership of net-metered renewable generation facilities on a customer's premises and "virtual net metering," where a party could treat renewable generation in another location as offsets to the party's own consumption.

- Reducing market and regulatory barriers to deployment of energy storage to encourage the cost-effective deployment of energy storage, where it can provide value to customers and the electricity system.

In late October, Minister Thibeault directed the OEB to prepare an "implementation plan" setting out steps to implement the goals and

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1 Ministry of Energy, *Ontario's Long-Term Energy Plan 2017: Delivering Fairness and Choice,* (Toronto: Ministry of Energy, 2017), online: <https://files.ontario.ca/books/ltep2017_0.pdf>. The Ministry of Energy is the author of the 2017 LTEP, as contemplated by the *Energy Statute Law Amendment Act, 2015*. This stands in contrast to prior LTEPs which were more traditional "planning documents" prepared by the Independent Electricity System Operator (IESO). While the OEB will be called upon to implement aspects of the 2017 LTEP, there is no requirement for the 2017 LTEP to be reviewed or approved by the energy regulator.

objectives set out in the 2017 LTEP.[2] Key items that the OEB must address in its implementation plan include the following:

- Examining and identifying steps for pursuing opportunities to advance the cost-effective modernization of Ontario's electricity sector, including non-wires solutions, customer participation and energy efficiency.

- Identifying barriers to the development of distributed energy resources such as energy storage at scales and locations that provide value to transmission, distribution and customers.

- Identifying tools and steps that would mitigate costs for ratepayers (such as reduced regulatory review) and enhance consumer protection in relation to unit sub-meter providers and in the natural gas sector.

- Continuing to implement the Regulated Price Plan Roadmap, including consideration of new pricing structures that give stronger price signals.

The implementation plan must be completed by January 31, 2018.

OEB's Strategic Blueprint

In December 2017, the OEB released its "Strategic Blueprint" for 2017 to 2022 titled "Keeping Pace with an Evolving Energy Sector".[3] The Strategic Blueprint sets out the OEB's updated statement of "[its] Vision, Mission and Values and of the Goals and Objectives that will guide [its] work over the next five years." The Strategic Blueprint was promised in the OEB's most recent Business Plan[4] and is said to reflect "the OEB's recognition of the significant changes underway in the energy sector, not only in Ontario but around the globe."

At the outset of the Strategic Blueprint, the OEB identifies four "Strategic Challenges" to be met in a period of accelerating change and transformation: Sector Transformation & Consumer Value; Innovation & Consumer Choice; Consumer Confidence; and Regulation "Fit for Purpose." To meet these challenges, the OEB plans to maintain its current approach to consumer-centric regulation, but with a stronger emphasis on the new and different challenges posed by sector transformation.

The Strategic Blueprint document looks at trends and developments in the energy sector and comes to a number of interesting conclusions about how the OEB should proceed. Among these are the following:

- The OEB's approach must be grounded in an appreciation of the circumstances in Ontario and of its own mandate. It should focus on how the OEB can best address sector evolution through the use of existing regulatory powers and tools, including rate making, infrastructure approvals, licensing, codes and rules, and the issuance of policy guidance.

- It is premature to sanction or mandate, as some regulators have, a particular new business model for utilities or a specific new "platform" to accelerate the deployment of distributed resources – picking a particular model or platform at this point would impede innovation. However, a "wait-and-see" approach is not sufficient for Ontario. Instead, the OEB has the opportunity – and the responsibility – to support and guide the sector it regulates through the evolution underway.

Taking the foregoing into account, the OEB has created a set of "Strategic Goals and Objectives" to address the Strategic Challenges that it has identified. The Strategic Goals represent the specific outcomes the OEB aims to achieve with respect to each of the four Strategic Challenges and the Strategic Objectives describe the particular areas on which the OEB will focus in order to attain each of the Strategic Goals.

In relation to the "Innovation & Consumer Choice" Challenge, the OEB states that this will be met when "utilities and other market participants

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2 OC 2122/2017, online: <https://www.oeb.ca/sites/default/files/Directive_to_OEB_LTEP_Implementation_Plan_20171026.pdf>. The IESO is required to prepare a similar implementation plan.

3 Ontario Energy Board, *Strategic Blueprint: Keeping Pace With an Evolving Energy,* (Toronto: OEB, 2017), online: <https://www.oeb.ca/sites/default/files/OEB-Strategic-Blueprint-2017-2022-E.pdf>.

4 Ontario Energy Board, *Ontario Energy Board 2017 to 2020 Business Plan,* (Toronto: OEB, 2016), online: <https://www.oeb.ca/oeb/_Documents/Corporate/OEB_Business_Plan_2017-2020.pdf>.

are embracing innovation in their operations and the products they offer consumers". The OEB aims to achieve this Strategic Goal by (among other things): remunerating utilities in ways that encourage them to pursue cost-effective innovation in their operations and services; modernizing the OEB's rules to reflect the needs of an evolving sector; addressing any unwarranted regulatory barriers to innovation and new business models that benefit consumers; and working with market participants to identify and understand emerging new energy-related "value streams" and service models.

OEB Modernization Panel

On December 15, 2017, the Ontario Government announced that it appointed Richard Dicerni to head an expert panel to conduct a review of the OEB.[5] According to the announcement, "[t]he panel will have a broad mandate including reviewing how the OEB can continue to protect consumers amidst a rapidly changing sector, support innovation and new technologies, and how the OEB should be structured and resourced to deliver on its changing role." The panel will seek feedback from the public starting in spring 2018, examine best practices from other jurisdictions and report back to the Government by the end of 2018.

The creation of the OEB Modernization Panel appears to be a recognition that the electricity industry is changing rapidly and new approaches may be needed to manage this evolution. At this time, it is not clear whether the OEB review will be as wide-ranging as the recent expert panel on the modernization of the National Energy Board (NEB).[6]

2018 Ontario Provincial Election

Ontario's next provincial election will take place on June 7, 2018. The outcome of that election can be expected to shape future energy policy in the province.

Should the current Liberal Government be re-elected, then we may assume that current energy policy will continue in similar fashion. However, if another party wins the election (or perhaps holds the balance of power in a minority government), then there may be changes.

For example, the Progressive Conservative party platform includes plans to cancel the Climate Change Action Plan[7], the Cap and Trade Program and the *Green Energy Act*[8], and promises reductions to electricity bills.[9] Accomplishing these items would presumably include issuing new directions and priorities to the OEB. Interestingly, though, the Progressive Conservative platform recognizes that it will be "vital" to have an energy regulator "that can adapt to ever-changing technologies".

The NDP party has indicated its plan to return Hydro One Networks to public ownership, reduce electricity bills, cap "private profit margins" and bring "real oversight to electricity prices".[10] These items would require new direction to the OEB.

Conclusion

As can be seen, there are a number of initiatives underway that will shape and guide the OEB's focus and activities in the coming years. The recurrent theme is technological and other changes that are impacting the energy sector, and how the regulator will react and evolve traditional regulatory structures and approaches. The OEB's own plans will become clearer as it issues the 2017 LTEP implementation plan and considers requests from regulated utilities to expand and evolve their businesses and activities. It will be interesting to see how much the OEB will be able to set its own course, and how much the OEB's course will be impacted and directed by outside influences such as the Modernization Panel and any new Provincial Government. ■

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5 Ministry of Energy, *Ontario Establishing Panel to Modernize the Ontario Energy Board: Province Seeking Advice to Prepare for Innovation and Technological Change,* (Toronto: Ministry of Energy, 2017), online: <https://news.ontario.ca/mei/en/2017/12/ontario-establishing-panel-to-modernize-the-ontario-energy-board.html>.

6 Discussed in Nigel Bankes, "The Report of the Expert Panel on the Modernization of the National Energy Board and the Response of the Government of Canada" (2017) 5:3 Energy Regulation Quarterly, online: <http://www.energyregulationquarterly.ca/articles/the-report-of-the-expert-panel-on-the-modernization-of-the-national-energy-board-and-the-response-of-the-government-of-canada#sthash.IQPj8QOs.dpbs>.

7 Government of Ontario, *Ontario's Five Year Climate Change Action Plan 2016 – 2020,* (Toronto: Government of Ontario, 2016), online: <http://www.applications.ene.gov.on.ca/ccap/products/CCAP_ENGLISH.pdf>.

8 *Green Energy Act, 2009,* SO 2009, c 12, Schedule A.

9 Progressive Conservative Party of Ontario, "People's Guarantee", online: <https://www.ontariopc.ca/peoples_guarantee>.

10 Ontario NDP, "Hydro costs are sky high: Let's do something about it", online: <https://www.ontariondp.ca/hydro>.

ALBERTA'S FIRST CLEAN POWER CALL REALIZES RECORD PRICES

*Bob Heggie**

The election of the Alberta New Democratic Party with a majority government in May of 2015 heralded the introduction of wide-ranging reforms to the Alberta electricity market. Electricity in Alberta has responsibility, in a largely fossil fuel system, for a high percentage of provincial CO_2 emissions. As a result, the Alberta Government's *Climate Leadership Plan*[1] has, as arguably its most important objective, the reduction of GHG emissions from the sector.

Specific policy prescriptions to reduce emissions from the sector reflected in the Plan include:

- an economy-wide carbon levy
- phasing out coal-fired generation
- increasing renewables generation
- promoting energy efficiency
- increasing the role of distributed energy resources

All of these policy prescriptions, to one degree or another, are being put into action. With the introduction of these changes, the Alberta Electric System Operator (AESO) conducted an assessment of whether Alberta's energy only market design was expected to result in sufficient investment to ensure continued system reliability in light of the changes and their potential impact on electricity market dynamics.

The AESO concluded that the status quo was not expected to be sustainable and recommended the introduction of a capacity mechanism to improve reliability, particularly during the coal phase-out. The government accepted the AESO's recommendation and directed that a capacity mechanism be designed and introduced into Alberta's market framework.

For purposes of this summary, I will briefly touch on developments on the accelerated early retirement of coal plants initiative, with the balance of the document addressing the approach taken to facilitate development of renewable generation.

The *Climate Leadership Plan* requires the accelerated phase out of the entire coal-fired generation fleet by the end of 2030. Alberta's supply mix includes approximately 6000MW of coal-fired capacity. The fleet is of mixed vintage and, as a result, includes both legacy plants built prior to deregulation and merchant plants built after the Alberta market was restructured. Especially, for newer plants, the early retirement prescription would see some owners with stranded investments as these plants could have otherwise operated post 2030. Compensation has been agreed to by the government that will see unit owners paid $1.36B.

In addition to the accelerated, regulated phase-out of coal power, the government announced a "30 by 30" target for renewable energy. Rather than relying on market forces to determine replacement capacity for the retired coal generating plants, the government mandated that 30 per cent of electricity (energy) used in Alberta come from renewable sources by 2030.

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1 Government of Alberta, *Climate Leadership Plan* (Edmonton: Alberta Environment and Parks, 20 November 2015), online: <https://www.alberta.ca/climate-leadership-plan.aspx>.

The government has pegged this renewable energy objective at 5000MW, in terms of targeted installed capacity.

A market approach presented difficulties in meeting this objective. Low-carbon investments present special problems for markets, particularly in terms of making the investment in renewables-based generation attractive relative to investment in natural gas based generation, whose levelized costs and fixed costs are lower than low carbon alternatives.

In response to this challenge, the government announced a clean power call program. A clean power call is an open, competitive request for proposals from renewable generators to determine the long-term contract price required to build a specified amount of renewable generation.

The long-term contracting mechanism chosen was a contract for difference or "CfD". The CfD pays the difference between the market-clearing price and the long-term price needed to make the investment to build the power plant, as determined in the clean power call. The winning bid in the clean power call is typically referred to as the "strike price".

CfDs stabilize revenues for renewable developers at a fixed level over the 20 year contract term, thereby reducing commercial risk. If the market-clearing price is lower than the strike price, the CfD counterparty, in this case the AESO, pays a top-up. If the market clears above the strike price, the generator pays back the difference to the AESO.

The quality of the CfD, including its term, the enduring nature of private law contract certainty and counterparty credit quality, will all drive perceived risk and ultimate cost of investments.

The AESO was charged by the Alberta Government with procuring the renewable energy to meet the *Climate Leadership Plan* objectives. The AESO established the first procurement round and auction process. The process was called the *Renewable Electricity Program* or "REP" and called for bids on 400MW of capacity. The results of the bids from the first REP auction were released on December 13, 2017.

Four wind projects were selected totaling 596MW, with prices ranging from $30.90 to $43.30/MWh with a weighted average of $37.00/MWh. These prices are record setting and were so attractive that the AESO procured an additional 196 MW above its intended 400 MW target.

The winning bidders include Capital Power Corporation (201 MW), EDP Renewables Canada Ltd (248 MW) and Enel Green Power Canada Inc. (two projects: 115MW and 31 MW). Capital Power is Alberta-based whereas Enel and EDP are large, multi-national energy companies based in Italy and Portugal, respectively. All three winners are large balance sheet entities with likely access to capital at extremely competitive rates.

By all accounts, the REP results are a huge success. The realized prices are likely the result of one or a combination of: contract term length, counterparty credit rating, declining capital cost for wind installations, improving capacity utilization rates, capital structure and cost of capital. They do not include transmission costs beyond the direct interconnection. Certainly, a realized price of $31/MWh suggests extremely low capital costs, improving capacity factors, high leverage and extremely low financing costs. By way of comparison, Ontario's procurement program in March of 2016 resulted in a realized price of $85/MWh for 300 MW of wind power.

Alberta's wholesale electricity prices have been low as compared to historic levels. The average wholesale price in 2017 was $22/MWh. At those prices, Alberta consumers would be required to "top-up" generator revenues however, wholesale prices are predicted to rise in 2018 to the $60/MWh range due to announced coal retirements. As a result, in the short-term, generators may be paying back to Alberta consumers any revenues realized above the CfD strike price.

In terms of market impacts, increasing amounts of subsidized renewable generation with zero marginal costs can change market-pricing dynamics resulting in more price volatility, fewer middle priced hours in the merit order and lower priced hours, resulting in lower average prices. These are only potential impacts however. As the Province moves to its 5000MW target, there is a higher risk prices will be chronically low, resulting in the

renewable resource cannibalizing itself.

Directionally, the introduction of more renewables will impact the relative dispatch order and affect investment decisions, potentially displacing more efficient gas-fired generation in favour of more flexible but less efficient alternatives. Using incentives to force fit renewables into the supply mix will result in emission reductions that might otherwise not occur or take longer to occur if left to market forces.

The economic efficiency of these subsidized incremental reductions can be measured as an abatement cost – the incremental cost incurred by society divided by the CO_2 reduction achieved. The incremental cost can be determined by netting the estimated avoided thermal production costs from the contract price and the CO_2 reduction can be determined from the avoided thermal emissions.

Using a simplistic calculation, the estimated abatement cost of the renewable incentive at $37.00/MWh is roughly $50.00/ per tonne of CO_2. The carbon price in Alberta for 2018 is $30/ tonne CO_2. While the investment is relatively higher than the current social cost of carbon, prior estimates of abatement costs using historic levelized cost estimates for wind technology would have yielded abatement costs in excess of $100/ tonne CO_2. Additionally, this calculation used a natural gas price of $2/GJ and should gas prices increase, the abatement cost decreases, ultimately reaching zero at $5/GJ.

In conclusion, it remains to be seen whether subsequent auctions will realize prices at this historically low level or whether the winning bidders' investments in the first REP auction will be financially successful. It is safe to say however that the first REP auction, utilizing a market-based procurement approach, produced a first generation of renewable generation build out at the lowest possible cost. ■

THE GRID: THE FRAYING WIRES BETWEEN AMERICANS AND OUR ENERGY FUTURE

by Gretchen Bakke
New York: Bloomsbury USA, 2016

*Reviewed by Sean Conway**

Few innovations have been more transformative than the production and distribution of electricity in the latter years of the nineteenth century. Overnight, cities and towns in the United States and Canada were lifted out of the dirty and dark age of coal and kerosene and transported into the magical world of 'the hydro' and 'the electric light'. In the early days of this electricity revolution, one newspaper in Canada caught the spirit of the age with a headline that proclaimed, "Niagara Falls, Berlin Rises".[1]

Much has been written about the development of the electricity business since the days of Thomas Edison, George Westinghouse, Nikola Tesla and, in Canada, the remarkable Adam Beck. Typically, the hydro story attracts scholars writing from the perspective of the historian, the economist, or the engineer; many of these people have produced very cogent analyses of the hydro story. Refreshing it is then to read a new book on this topic, The Grid, written by a cultural anthropologist Professor Gretchen Bakke of McGill University in Montreal.

Bakke has produced a timely, stimulating and provocative look at the world of electricity production from its complicated beginnings over a century ago to our own time, when change of all kinds is stressing the business as never before. Bakke argues in these pages that while our electricity infrastructure is absolutely critical to the way we live our modern lives, the average citizen of 21st-century America knows little and appears to care less about this vital resource. Moreover, she writes "there is intense seething change in the very structure of the power machine that keeps us warm, lit and relatively well off". At the centre of this 'seething change' is a diverse group of change agents ranging from Silicon Valley smart guys to aging hippies to retired schoolteachers, all of whom seem determined to bring about a fundamental restructuring of the electricity business.

The Grid opens with a fascinating account on how we got 'the central station' model that has dominated the electricity sector for most of its existence in North America. Readers may be surprised to discover that, in the beginning, power plants were small, local, and usually intermittent in their operation. Edison developed a system built around the direct current (DC) which, in its early years, was quite limited in its range. Westinghouse and Tesla responded with their more versatile alternating current (AC) which had the great benefit that it could travel much longer distances than direct current at that time. In those early days, the producers of electricity sold and delivered their product directly to a variety of customers for such end uses as lighting, traction, and of

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1 Berlin Ontario changed its name to Kitchener in 1916.

course, the muscle to power a rapidly expanding industrial economy.

It was not long before the capital-intensive nature of the electricity business became clear. Large amounts of money would be required to build out the necessary infrastructure in sprawling and congested cities like New York and Chicago. More local power plants would be required to generate the electricity for an expanding market and a veritable jungle of wires would be required to get this power to market. And how would these dollars be recovered since most customers required only limited amounts of electricity for only part of the day? Well, as Bakke tells it, the genius who devised a solution for this challenge was an English-born assistant to Thomas Edison named Samuel Insull.

Insull began his life in America as Edison's personal secretary but he soon mastered the financial details of the business and moved to the Midwest. There, he took charge of Chicago Edison and soon made it the dominant player in that market. Insull realized that his costs were largely fixed but his customer base was simply too small and unreliable to provide the necessary revenue stream to support his large capital outlays. He soon noticed that if he lowered the price of his product and varied his rates for different categories of customers, he was able to drive demand and thereby increase his revenue. Like Adam Beck in Ontario, Insull set out to aggressively market electricity to middle class homeowners, commercial establishments, and industrial operations. In 1894, Chicago Edison built the largest power plant in the world at Harrison Street and discovered that with bigger and bigger 'central stations', electricity could be produced ever more cheaply and efficiently. As the twentieth century dawned, Chicago Edison was doing a booming business in the great metropolis of the American Midwest.

According to this Bakke thesis, Insull also figured out that government regulation and localized monopoly were a great boon to investor-owned utilities. A utility consensus developed during the trust-busting Progressive era of pre-World War I America. This consensus provided that "if utilities accepted to be heavily regulated, the government at the state and federal levels agreed to grant them a guaranteed service area, within which no other electric utility would be issued a charter to function." For Bakke, these Insull-led reforms established the parameters of our electricity system for much of the modern era. It was Insull who understood that electricity could be a product 'for the masses not the few', that electricity had such popular appeal it could move cautious politicians to support investments and financing they would not normally consider, and it was Samuel Insull who "made it seem natural that the electricity business could only work as a monopoly".

Insull's business model of large generating power plants and monopoly franchise service areas prospered for many years and not even the Great Depression changed the basic formula. Yes, writes Bakke, it is true that by the mid-1930s, Insull's electric empire and many other investor-owned utility companies were collapsing under the weight of too much debt and questionable accounting practices, but the question of the late 30s was not whether there would be competing providers within a single locality but "which sort of monopoly an electricity customer might find themselves a part of: a non-profit municipal network or a for-profit investor-owned utility". The post-World War II economic expansion in the United States represented a high-water mark for the electricity power brokers as prices remained low, revenues grew, and system expansion seemed to know no limits. Throughout it all, the customer remained quite passive, soothed by attractive pricing and the never-ending array of appliances and electrical applications.

The 1970s arrived with a disruptive jolt. Vietnam, OPEC, stagflation, Watergate, Three Mile Island, and an increasingly restless and skeptical consumer all converged to change the channel from complacency to concern and consternation. Jimmy Carter became President in January of 1977 and soon he was talking to Americans about a very different kind of energy future, what Bakke affectionately calls 'The Cardigan Path'. Carter told Americans that concepts like energy conservation and energy efficiency must become part of everyday life and business. Rather than turn up the thermostat when it gets cold, Carter advised Americans to put on a sweater! Congress followed suit with the *National Energy Act*[2] and the *Public Utilities Regulatory Policies Act (PURPA)*[3], "which effectively broke the utility's total control of

2 *National Energy Act of 1978 (NEA).*
3 *Public Utilities Regulatory Policies Act (PURPA)*, Pub L No 95–617, 92 Stat 3117 (enacted November 9, 1978).

everything that entered, moved through, and exited their power system".

Professor Bakke is not a neutral observer in these policy developments. Throughout this long and, at times, convoluted story, the reader is treated to some clear author preferences. For example, as we are led down the Cardigan Path, we are told at page 109 that "PURPA helped prove that bigger wasn't better and that monopoly-governed, vertically-integrated, government-regulated megacompanies were far and away not the best way to make and manage American power. Small was not only beautiful but efficient, and as it has turned out, cost-effective." While there is no question that there is abundant evidence to support the claim that bigger is not always better and that many of these energy megacompanies had serious faults and failures, I am not sure that in the intensifying urban world of 21st-century America, one can yet conclude that small is always better or more cost-effective. Nowhere in the Bakke account is there any good analysis of the resistance in non-urban communities to some of the new energy infrastructure like windmills beyond the axiomatic belief that wind energy is basically a good thing. Many who follow the energy debate have observed, for example, that there are many people who are very keen about windmills as long as they are nowhere to be seen in their neighbourhoods. In the current energy debate, windmills often find themselves 'in the penalty box' with hydro dams, oil pipelines and high-voltage transmission towers.

Bakke is on much stronger ground when dealing with the rising challenge of resilience to our existing electricity grid. Her analysis of the Great Blackout of August 2003 which left 50 million Americans and Canadians in the dark for days is truly a cautionary tale. She reminds the reader in vivid detail of the threats now posed to any version of a 'central station model', such threats as poorly managed foliage, of severe weather incidents, of the intersection and impact of sophisticated technology, and yes, the remarkably nasty effect on wires caused by overly aggressive squirrels. Add to this list of issues the fact that, because energy deregulation effectively reduced electricity to a commodity like many others, there are now many fewer players with an interest in strengthening the grid. Because public policy "has drastically changed the ways in which we now use the grid… the physics and the economics of the system today have no choice but to work at cross-purposes". And Bakke notes importantly "that the grid, like any complex mechanical system, is not just a machine but also the regulatory, business, cultural and natural environments within which this machine functions". Policy makers would do well to heed her advice when she stresses the point that the grid is not just governed by its engineering and its management but also by such factors as climate change, profit motives, and other socio-cultural factors that may change over time.

In the later chapters of this book, Bakke deals with one of these socio-cultural factors, the consumer of electricity and how the consumer has changed in recent years. Here again the perspective of the cultural anthropologist is both refreshing and helpful to the current energy debate. Bakke is at her best when describing "Mr. and Mrs. Front Porch" in communities like Houston, Texas, Bakersfield, California, Boulder, Colorado and rural Maine. Her description of encounters between these customers and 'the smart utility guys' out selling smart meters, for example, would be funny if not so startling and worrisome. The utility representatives are often out in their service areas trying to convince customers of the need to reduce consumption, of the benefit of time-of-use rates, and other generally recommended initiatives to lessen the stress on the system and to better manage both provider and consumer costs. But, in this telling, the utility people do not seem to appreciate or even understand that, for many of their customers, the real issue today is control. As Bakke describes the current situation, the modern customer wants more control in terms of how the electricity is generated, how and when it is delivered and, of course, how it is priced. She describes the American customer as someone who is inclined to believe that a smart meter is more likely 'a surveillance device' serving the interest of the utility rather than protecting the interest of the consumer. While Bakke glides over some very relevant issues like managing peak demand, she is very good on the credibility gap now facing many utilities. As one of her witnesses says rather colourfully, the sparks flew when the real utility policy seemed to be "Smart Meters/ Stupid Customers".

How does a modern society like Canada or the United States square this circle? In our digital and highly interconnected world today, we are even more dependent on reliable and quality electricity than we were a few short years ago

when many fewer applications were dependent on very sensitive computing technology which shuts down even if the power supply is only slightly less than optimal. New threats like cyberterrorism pose significant challenges and costs to our grid. But as the daily news cycle makes plain, citizens everywhere are not only disconnected from a good understanding of some basic energy realities but these same citizens are not especially keen to support what needs to be done to reach what Bakke describes as 'The Holy Grail' of a better electricity/energy future. For her, there is no doubt that that future will be some version of the Amory Lovins 'soft energy path' because both Bakke and Lovins believe that 'the traditional or hard path' to solving these energy challenges places too much faith in technology. It is simply unreasonable they argue to expect that such a complex machine as our modern grid built on the central station model can survive what present and future threats hold for it. For Bakke, the soft energy path can succeed if 'we the people' – engineers, environmentalists, business leaders, engaged citizens – come together and develop a plan which incorporates many solutions. The US military, for example, has developed some very transferable models of effective microgrids, university communities in states like New York and California have done the same. Elon Musk and others seem to be revolutionizing energy storage. The electrification of transportation holds great promise, much of which has been demonstrated on continents other than North America. Building design is another area where Bakke believes enormous possibilities can be found that will both please and serve the consumer at an affordable cost. Is it not possible to imagine the wireless distribution of electricity she asks?

As another winter grips North America – from Halifax to Atlanta, from Chicago to Whitehorse – millions of us will settle in to home or workplace expecting that the lights and heat will stay on as the cold winds blow, the snow falls and the ice forms. This winter those of you interested in the energy/electricity policy debate might enjoy taking some time to read what a hungry squirrel, an unexpected storm or just plain bad luck could do our overstressed, under-resourced and sadly, under-appreciated electricity system. This book will please some more than others and I can hear many of my engineering and business colleagues complaining that critical technical and economic issues have been either ignored or treated rather lightly. Overall, Gretchen Bakke has done us a service by raising important questions that need to be understood and addressed; the fact that she has done so from the perspective of a cultural anthropologist is an added bonus. ■

*THE ELECTRIC BATTERY: CHARGING FORWARD TO A LOW-CARBON FUTURE**

by By Kevin B. Jones, Benjamin B. Jervey, Matthew Roche and Sara Barnowski

*Reviewed by William A. Mogel***

This slim book (212 pages), which is packed with lots of energy information in addition to discussing everything you wanted to know about batteries, is the product of the Smart Grid Project at the Vermont Law School's Institute for Energy and Environment. Its Director, Kevin B. Jones, is the lead author. The other authors also are affiliated with the Institute.

The Electric Battery's thesis is that twenty-first century battery technology can be a foundation for a low carbon future: "The battery has emerged as an essential technological component in the push to integrate renewables and decarbonize transportation and the electric grid."[1]

Chapter 1 opens with a ten page synopsis of the history of batteries, offering tidbits such as that the term "battery" was coined by Benjamin Franklin, and Alessandro Volta invented the first battery in 1800, using the "Volta Pile"—the stacking of different types of metals to increase current.[2] In an interesting aside, *The Electric Battery* prudently reminds us that all our cell phones combined consume the same amount of electricity used in 9,000 homes per year.[3]

The following chapter discusses new battery technologies, such as lithium-ion batteries (LIBs)—the "first major leap in battery technology in decades."[4] Other new technologies include lithium sulfur chemistry, flow batteries, such as vanadium redox flow.[5] Based on a review of these technologies, the authors optimistically conclude, "[w]e are in the midst of a battery revolution, with storage technologies poised to dramatically change the way utilities, developers, and regulators approach electricity generation and distribution."[6]

Chapter 3 is entitled "The Battery's Environmental Footprint: How Clean is the Technology?"[7] After a prolonged and unnecessary discussion of "life cycle assessment," it is noted: "[T]he electric battery . . . has both positive and negative environmental impacts. Studies consistently indicate, however, that the electric battery offers a lower carbon solution

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1 Kevin B. Jones et al., The Electric Battery: Charging Forward to a Low-Carbon Future 4 (2017).
2 *Id*. at 11-14.
3 *Id*. at 19.
4 *Id*. at 33. "Yet, despite their relatively impressive metrics, LIBs have plateaued in their ability to offer increased capacity, power, and longevity for given weights and costs." *Id.*
5 Jones et al., *supra* note 1, at 34-35.
6 *Id.* at 43.
7 *Id.* at 45.

to transportation and [it] can help reduce the carbon intensity of the electric grid."[8]

Chapter 4's thirty pages deal with the use of batteries in transportation.[9] The authors state at the outset: "[T]here is no path to combating climate change that doesn't adequately address carbon pollution and other greenhouse gas emissions from transportation."[10] It is confidently asserted that, even with current battery technology, electric vehicles (EVs) "can meet 87 percent of Americans' daily driving needs."[11] The chapter goes on to discuss EV development, China as the world's leading EV manufacturer, the EV battery ("indirectly. . . the biggest factor in consumer purchasing decisions"), EV range ("every kWh of [battery] capacity provides roughly three to four miles of range"), battery recycling, and mass transit (busses).[12] Also discussed is California's leadership in EV sales (54 percent of the U.S. market in 2015) and Norway's role as the global leader in EV sales.[13] Chapter 4 concludes, without supporting authority, but wishfully:

> It is clear that electric batteries are going to play a major role in both electrifying mobility and transitioning to a low-carbon economy. . . . [I]nvestments must continue to be made in R&D. If resources are invested, we can expect that batteries will become lighter, smaller, more efficient, longer lasting and feature greater range. That burden falls [to] the government, which has the ability to provide incentives to increase adoption.[14]

Chapter 5 offers an enthused endorsement to manufacturers of batteries —Tesla's Powerwall battery ($3,500.00) and larger cousin, PowerPack ($25,000.00), as well as Germany's Sonnen.[15] The authors claim that batteries for the home and business have several end-use opportunities beyond transportation: "[P]rovide the customer with backup power when the local electric grid is down or give the consumer the option to manage either home solar generation or off-peak electricity to generate value from energy arbitrage."[16]

The balance of Chapter 5 discusses such disparate subjects as distributed energy resources (DER), peak/off-peak pricing, innovative rates, and demand charges, all of which energy professionals are familiar with.[17] It concludes that there is a business case for battery storage, provided that "challenges . . . [can] be overcome."[18]

In Chapter 6, batteries for grid storage are reviewed, along with renewable energy, microgrids, and the use of end-of-life car batteries.[19] Unfortunately, the discussion is overly long and breaks no new ground, possibly except the observation that "[g]rid battery storage is beginning to demonstrate meaningful growth opportunities. The continued development, as well as the declining cost, of lithium-ion batteries will continue to support this growth."[20]

The next chapter catalogues alternative forms, some familiar and some not, of electric storage — pumped hydro, flywheels, compressed air, liquid air, molten salt, thermal ice and water, rail energy storage (to replace water), super conducting magnetic energy storage, supercapacitors, and pumped heat.[21] Ultimately, the test for the best form of storage

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8 *Id.* at 58-59. Unfortunately, terms such as "intensity of the electric grid" are not defined.
9 *See generally* Jones et al., *supra* note 1, at 61-92.
10 *Id. at 62.* The U.S. "transportation sector accounts for 26 percent of greenhouse gas emissions . . . ranking second to electricity generation." *Id.*
11 *Id.* at 63. Unfortunately, the book relegates citations to authorities to a section at the end. It would be preferable if the cites were located at the bottom of the page or, at least, following each chapter.
12 *Id.* at 71-72, 76-78, 86-90.
13 Jones et al., *supra* note 1, at 83, 85.
14 *Id.* at 91.
15 *Id.* at 95-97. "The PowerPacks can be grouped to scale from 500kWh to over 10mWh and can be utilized for two-hour or four-hour [periods]." *Id.* at 96.
16 *Id.* at 95.
17 *See generally* Jones et al., *supra* note 1, at 95-120. Entities using innovative rates for solar and storage are Salt River Project, SMUD and Green Mountain Power. *Id.*
18 *Id.* at 119.
19 *Id.* at 121-38.
20 *Id.* at 138.
21 *See generally id.* at 139-58.

"is how quickly the stored energy can be discharged."[22]

The concluding chapter is beyond batteries and more about other factors that can have a positive impact on our environment.[23] Cited are the Paris Agreement (to which the U.S. is no longer a signatory), which the authors believe is "the most notable positive development in international climate policy;" ending fossil fuel subsidies (which may be inconsistent with the Administration's policy toward coal); advancement in CAFÉ standards; implementation of the Clean Power Plan (slowed by court review); and consistent state policies toward, *inter alia,* battery storage development.[24]

Despite the observation that 2015 was a "breakout year for the U.S. energy storage market," *The Electric Battery* does not successfully make the argument that the electric battery is "charging forward."[25] Clearly, there has been growth in the use of batteries, especially in conjunction with renewable energy and for transportation. But what was not discussed is when and if batteries will be used in conjunction with generation from fossil fuels. It is that combination which will provide us with a low carbon future. ■

22 Jones et al., *supra* note 1, at 140.
23 *See generally id.* at 159-69.
24 *Id.* at 161-64.
25 *Id.* at 169 (citation omitted).

THE WASHINGTON REPORT

*Robert S. Fleishman**

Energy regulatory developments in the United States impact numerous sectors of the energy industry and address a wide range of issues. We report on key federal and state energy and environmental regulatory and litigation developments in the United States during 2017 and early 2018 that should be of interest to readers of the ERQ.

I. TRUMP ADMINISTRATION EFFORTS TO UNWIND PRESIDENT OBAMA'S CLIMATE ACTION PLAN

Stymied by Congressional inaction on climate change, President Obama issued the Climate Action Plan (the Plan) in June 2013,[1] a series of administrative – rather than legislative – actions aimed at reducing greenhouse gas (GHG) emissions throughout the U.S. Over the course of President Obama's second term, his administration implemented the Plan across U.S. federal agencies primarily through administrative rulemaking, policy guidance and changes to government spending, lending and leasing. Among the hundreds of actions falling under the Plan, the Obama Administration's effort to limit GHG emissions from power plants through rulemaking under the *Clean Air Act*[2] – known as the U.S. Environmental Protection Agency's (EPA) Clean Power Plan (CPP)[3] – was perhaps the most significant in terms of cost and complexity.

In 2017, President Trump began systematic efforts to unwind the Obama Climate Action Plan. The new president is able to do this because the Plan was made up of administrative actions. However, few changes were possible overnight, and the Trump Administration continues to move along the long and uncertain path to unwind the Climate Action Plan. Like the Plan itself, the Trump Administration's efforts are also quite numerous and being advanced formally and informally across administrative rulemaking, policy guidance and changes to government spending, lending and leasing.

A subset of these efforts has received the most attention from the president and press corps largely as a result of their potential economic impact and the clout of associated constituencies. These include: fuel economy standards for automobiles; emissions standards for power plants (i.e., the previously mentioned CPP); and two tools used to harmonize decisions across the government – the *National Environmental Policy Act (NEPA)*[4] climate guidance and guidance on the "Social Cost of Carbon" (SCC).

First, on March 15, 2017, the EPA announced that the agency and the U.S. Department of Transportation (DOT) would jointly reconsider an Obama-era determination by the EPA not to change GHG emission standards for light-duty cars and trucks manufactured in model years (MYs) 2022–2025. Although this decision did not alter the 2012 regulations that require automakers to achieve specified GHG emission–reduction standards for MYs 2022–2025, it kicked off a

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1 Executive Office of the US President, *The President's Climate Action Plan (June 2013)*, online: <https://obamawhitehouse.archives.gov/sites/default/files/image/president27sclimateactionplan.pdf>.

2 *Clean Air Act*, 42 USC §7401 et seq (1970).

3 Robert Fleishman et al, "Client Alert: Obama Administration Adopts Landmark Clean Power Act," *Morrison & Foerster LLP* (5 August 2015), online: <https://media2.mofo.com/documents/150805cleanpowerplan.pdf>.

4 *National Environmental Policy Act*, 42 USC §4321 et seq (1970).

process of revisiting those requirements. After the initial reconsideration announcement, both DOT and EPA took key procedural steps toward reconsideration. In July 2017, DOT published a "Notice of Intent" to reopen the environmental impact review associated with the standards.[5] And between August and October 2017, EPA held a public comment period open associated with the reconsideration.[6] These steps lay the groundwork for decision-making by the agencies in mid-2018. Any decision is likely be litigated upon finalization.

Second, as part of the sweeping March 28, 2017 "Executive Order on Promoting Energy Independence and Economic Growth" that took aim at a broad range of federal climate and energy programs and regulations,[7] the Trump Administration started a process to roll back the CPP. On the same day the executive order was signed, the U.S. Department of Justice on behalf of the EPA filed a motion asking the D.C. Circuit to hold CPP litigation pending from the prior administration "in abeyance" while the EPA conducts a review of the CPP. This suspension of litigation in the courts opened the window for a repeal-and-replace strategy now being advanced by the EPA. Specifically, EPA proposed a repeal of the Obama-era CPP in October 2017,[8] and, in late December 2017, announced that it was starting the lengthy process of developing a replacement rule with an "Advance notice of proposed rulemaking."[9] Together, these steps do more to stall the CPP than to repeal or replace the standards – given the complexity of the subject matter and process that will likely take years.

Third, the March 28, 2017 Executive Order also took two other significant steps that cascade through many features of government decision-making: the repeal of the *NEPA* climate guidance and guidance on the SCC. Unlike the formal rulemaking process associated with the fuel economy standards and CPP, the *NEPA* and SCC guidance documents were put in place more informally by the Obama Administration. As a result, their repeal was easier for the Trump Administration to execute. The implication is significant, as the U.S. government today no longer has a standard, harmonized approach to how it factors climate change into its environmental reviews as part of *NEPA*, nor does it have a consistent way to calculate SCC for use in rulemaking, procurement and other economic analyses. However, even this success for the Trump Administration may be limited in impact as courts have already started to opine – with different effect – on these issues of administration.[10]

II. CLIMATE CHANGE

A. Litigation

Seeking compensation for the costs of mitigating climate change impacts, the City of New York and various local governments in California have filed civil lawsuits against major oil companies. The suits allege that the oil companies bear responsibility for large percentages of total GHG emissions in the previous century and endangered the public despite having knowledge for decades of the catastrophic impacts of climate change.[11] While the U.S. Supreme Court dismissed a similar suit brought under federal law in 2011,[12] the local governments' current suits claim damages under

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5 Notice of Intent, 82 Fed Reg 34,740 (26 July 2017), online: <https://www.federalregister.gov/documents/2017/07/26/2017-15701/notice-of-intent-to-prepare-an-environmental-impact-statement-for-model-year-2022-2025-corporate>.

6 Request for Comment, 82 Fed Reg 39,551 (21 August 2017), online: <https://www.gpo.gov/fdsys/pkg/FR-2017-08-21/pdf/2017-17419.pdf>.

7 Executive Order No 13783, 82 Fed Reg 16,093 (28 March 2017), online: <https://www.gpo.gov/fdsys/pkg/FR-2017-03-31/pdf/2017-06576.pdf>.

8 US Environmental Protection Agency, News Release, "EPA Takes Another Step to Advance President Trump's America First Strategy, Proposes Repeal of 'Clean Power Plan'" (10 October 2017), online: <https://www.epa.gov/newsreleases/epa-takes-another-step-advance-president-trumps-america-first-strategy-proposes-repeal>.

9 Proposed Rule, 82 Fed Reg 61,507 (28 December 2017), online: <https://www.federalregister.gov/documents/2017/12/28/2017-27793/state-guidelines-for-greenhouse-gas-emissions-from-existing-electric-utility-generating-units>.

10 For example, see Miles H Imwalle, Robert S Fleishman & Ali A Zaidi, "NEPA, Energy, and Infrastructure – The Times They Are a Changin'?," *Morrison & Foerster LLP* (18 September 2017), online: <https://www.mofo.com/resources/publications/170918-nepa-energy-infrastructure.html>.

11 Denis Cuff, "Another East Bay city sues oil companies over climate change," *East Bay Times* (22 January 2018), online: <https://www.eastbaytimes.com/2018/01/22/another-east-bay-city-sues-oil-companies-over-climate-change/>; Chris Mooney & Dino Grandoni, "New York City sues Shell, ExxonMobil and other oil companies over climate change," (10 January 2018), online: <https://www.washingtonpost.com/news/energy-environment/wp/2018/01/10new-york-city-sues-shell-exxonmobil-and-other-oil-majors-over-climate-change/?utm_term=.33f3dc4dde28>.

12 Chris Mooney & Dino Grandoni, "New York City sues Shell, ExxonMobil and other oil companies over climate change," *Washington Post* (10 January 2018), online: <https://www.washingtonpost.com/news/energy-environment/wp/2018/01/10/new-york-city-sues-shell-exxonmobil-and-other-oil-majors-over-climate-change/?utm_term=.33f3dc4dde28>; *Am Elec Power Co v Conn*, 564 US 410 (2011).

state law theories, including public nuisance, negligence and negligent failure to warn. The oil industry has disparaged the lawsuits as a distraction and is expected to defend the suits aggressively in court.[13] It remains to be seen whether the current round of litigation will gain any traction in New York and California state courts.

The five oil company defendants named in New York City's suit have not yet responded to the city's complaint.[14] In three of the suits brought by cities and counties in California, the parties are currently litigating whether the claims should be heard in federal or state court.[15]

B. Methane Emissions

The U.S. Department of the Interior (DOI) under the Trump Administration has taken steps to roll back regulations intended to reduce GHG emissions from on-shore oil and gas production. In November 2016, the Bureau of Land Management (BLM) under Obama finalized a regulation known as the "Methane and Waste Prevention Rule" that limited venting, flaring and leaking from oil and gas operations. In December 2017, the BLM issued a rule delaying the Methane and Waste Prevention Rule's compliance dates until January 2019 to allow the agency time to reexamine the costs and benefits of oil and gas operators' compliance with this regulation.[16]

A coalition of state governments, tribes and environmental groups has filed suit to block the BLM's suspension of the Methane and Waste Prevention Rule.[17] As with the proposed CPP repeal, ongoing litigation over regulatory rollbacks of GHG regulations is likely to continue as the Trump Administration implements its policy of reducing regulatory burdens on energy production.

C. Withdrawal from Paris Agreement

In June 2017, President Trump announced his intention to withdraw the United States from the Paris Agreement, a global accord among nations to limit GHG emissions and mitigate the effects of climate change. However, the official withdrawal process does not allow a nation to leave the agreement until November 2020.[18] Further muddying attempts to understand the United States' current position on the accord, the Trump Administration sent delegates and negotiators to the November 2017 Paris Agreement Summit in Bonn, Germany.

In opposition to President Trump's stated decision to leave the agreement, state and local governments within the United States have committed to independently upholding the country's obligations in the absence of federal participation.[19] Although President Trump's statements regarding withdrawal could shake global commitment to the Paris Agreement, it is too early to discern the effect on the accord's success.

III. CARBON MARKETS TRADING

Although federal climate policy took a hit in 2017, carbon markets continued to take root in the United States – with action being led by the states. Three key events confirm this momentum.

First, in July 2017, California passed legislation to extend its cap-and-trade program by ten years

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13 See, e.g., Matt Egan, "Exxon claims California climate change hypocrisy," *CNN Money* (9 January 2018), online: <http://money.cnn.com/2018/01/09/investing/exxon-climate-change-california-san-francisco-oakland/index.html>.
14 *City of New York v BP PLC et al*, No 1:18-cv-00182 (SDNY 2018).
15 Complaint, *County of San Mateo v Chevron Corp*, No 17CIV03222, ECF No 1 (Cal Super Ct 17 July 2017), online: <https://www.sheredling.com/wp-content/uploads/2017/07/SMC-Endorsed1_2017-07-17-SMCO-Complaint-5bFINAL-ENDORSED5d.pdf>; Complaint, *County of Santa Cruz v Chevron Corp*, No 17CV03242, ECF No 1 (Cal Super Ct 20 December 2017), online: <https://www.sheredling.com/wp-content/uploads/2017/12/SC-Co-Intro.pdf>; Pl's Reply in Supp of Mot to Remand to State Ct, *People of the State of California v BP PLC*, No 3:17-cv-06011-WHA, ECF No 108 (ND Cal 15 January 2018).
16 US Department of the Interior, Bureau of Land Management, "BLM Suspends or Delays Parts of Waste Prevention Rule" (7 December 2017), online: <https://www.blm.gov/node/14305>; Final Rule, 82 Fed Reg 58,050 (8 December 2017), online: <https://www.gpo.gov/fdsys/pkg/FR-2017-12-08/pdf/2017-26389.pdf>.
17 Environmental Defense Fund, "EDF, Conservation and Tribal Groups Urge Court to Block Unlawful Delay of BLM's Waste Prevention Rule" (25 January 2018), online: <https://www.edf.org/media/edf-conservation-and-tribal-groups-urge-court-block-unlawful-delay-blms-waste-prevention-rule>.
18 United Nations Framework Convention on Climate Change, "On the Possibility to Withdraw from the Paris Agreement: A Short Overview" (14 June 2017), online: <http://newsroom.unfccc.int/paris-agreement/on-the-possibility-to-withdraw-from-the-paris-agreement-a-short-overview/>.
19 Hiroko Tabuchi & Henry Fountain, "Bucking Trump, These Cities, States and Companies Commit to Paris Accord," *New York Times* (1 June 2017), online: <https://www.nytimes.com/2017/06/01/climate/american-cities-climate-standards.html>.

until 2030.[20] The legislation includes a broad suite of new policies. The most significant, however, is the ratcheting down of emissions over time. Under the new law, California will reduce free carbon allowances over 40 per cent by 2030, decarbonizing its economy and increasing the value of carbon-reducing investment. Second, in September 2017, California, Ontario and Quebec announced a linkage agreement between the jurisdictions' cap-and-trade programs.[21] The addition of Ontario to this linkage builds out the sort of cross-border collaboration that has previously limited the full effect of cap-and-trade mechanisms. Third, in December 2017, the nine states participating in the Regional Greenhouse Gas Initiative – a Northeast and Mid-Atlantic centered cap-and-trade program – announced a Model Rule that, once implemented, will allow the states to achieve their new consensus target of an additional 30 per cent regional cap reduction between 2020 and 2030.[22]

IV. EXPANSION OF OFFSHORE DRILLING (OIL AND GAS)

On January 4, 2018, the DOI released its Draft Proposed Program (DPP) for offshore leasing in U.S. waters. Interior Secretary Ryan Zinke's announcement is in response to President Trump's April 2017 executive order, "Implementing an America-First Offshore Energy Strategy."[23] It directs DOI to review the five-year leasing program for offshore oil and gas exploration and production on the Outer Continental Shelf (OCS), while reconsidering certain regulations pertaining to offshore energy potential. The DPP is the second of five regulatory steps under the *OCS Lands Act*[24] and *NEPA* prior to program approval.

The DPP dramatically expands proposed offshore leasing in U.S. waters, allowing for lease sales in 25 of the 26 planning areas, approximately totalling ninety per cent of U.S. offshore waters. In contrast, the Obama Administration's final National OCS Program for 2017-2022 allowed for lease sales in only six per cent of coastal waters.

The DPP drew fierce criticism following its announcement. Of the 32 potentially affected coastal state governors and state agencies that DOI surveyed for the DPP, only seven offered full support for the plan, while 23 stood in opposition.[25]

Secretary Zinke withdrew waters surrounding the state of Florida from consideration for offshore leases in his Department's 2019-2024 plan following a meeting with Florida Governor Rick Scott. California Congressman Ted Lieu and Delaware Attorney General Matthew Denn, among others, suggested the Secretary's unilateral action to remove Florida from the Program was arbitrary, capricious and illegal under federal law.[26] The Secretary's public actions to remove the "unique" state of Florida from the DPP will provide fodder for states' legal challenges to the DPP.

The DOI's proposed opening of vast planning areas for offshore leasing comes at a time when regulatory controls over offshore extraction lessen under a Republican-controlled government. As of 2018, the previous nine cents-per-barrel companies were taxed to support the Oil Spill Liability Trust Fund was eliminated.[27] As of late 2017, the DOI's Bureau of Safety and Environmental Enforcement (BSEE) announced it was embarking on a major overhaul of post-

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20 Office of California Governor, Edmund G Brown Jr, "Governor Brown Signs Landmark Climate Bill to Extend California's Cap-and-Trade Program (25 July 2017), online: <://www.gov.ca.gov/2017/07/25/news19891/>.

21 Office of California Governor, Edmund G Brown Jr, "California, Quebec and Ontario Sign Agreement to Link Carbon Markets" (22 September 2017), online: <https://www.gov.ca.gov/2017/09/22/news19963/>.

22 Regional Greenhouse Gas Initiative Inc, Press Release, "RGGI States Release Updated Model Rule, Concluding Regional Program Review Process" (19 December 2017), online: <https://www.rggi.org/sites/default/files/Uploads/Program-Review/12-19-2017/Announcement_Completed_Model_Rule.pdf>.

23 Executive Order No 13795, 82 Fed Reg 20,815 (28 April 2017), online: <https://www.gpo.gov/fdsys/pkg/FR-2017-05-03/pdf/2017-09087.pdf>.

24 *Outer Continental Shelf Act*, 43 US §1344 et seq (1953).

25 Megan Geuss, "Trump proposed a massive expansion of offshore drilling–what can states do?" *Ars Technica* (6 January 2018), online: <https://arstechnica.com/tech-policy/2018/01/trump-proposed-a-massive-expansion-of-offshore-drilling-what-can-states-do/>.

26 Ted Lieu (@tedlieu), Twitter (9 January 2018, 5:13 PM), online: <https://twitter.com/tedlieu/status/950898298172395520?lang=en>; Letter from Del Attorney Gen Matthew P Denn to DOI Sec'y Ryan Zinke (11 January 2018), online: <https://www.regulations.gov/document?D=BOEM-2017-0074-0640&utm_source=newsletter&utm_medium=email&utm_campaign=&stream=top-stories>.

27 Umair Irfan, "Florida got an exemption to the offshore drilling plan. Now 12 other states want one too" *Vox Media* (12 January 2018), online: <https://www.vox.com/energy-and-environment/2018/1/10/16870450/ocs-offshore-drilling-oil-gas-lease-zinke-florida>.

Deepwater Horizon safety regulations.[28] Finally, included in the December 2017 tax overhaul sought by the Trump Administration was the opening of the Arctic National Wildlife Refuge (ANWR) to oil drilling. In the tax plan that lifted the ban on drilling ANWR, Congress ordered the DOI to conduct two lease sales within the wildlife refuge, one within four years and the second within seven.[29]

For Canadian-American relations, the DPP is a sharp contrast to the cooperation exhibited in imposing the December 2016 Arctic offshore drilling moratorium, put into place simultaneously by President Obama and Prime Minister Trudeau. The DPP has the potential to place planning areas along the Canadian borders in the Arctic, Pacific and Atlantic regions under offshore lease sales, exacerbating tensions between the national governments on both sides.

The Obama-era 2017-2022 offshore leasing program will continue to be implemented until the new National OCS Program is approved and the DPP for 2019-2024 is still three comment periods away from final program approval. As such, expect to continue seeing a wide variety of stakeholders, including governments, agencies, public interest groups, industry and the public get involved in this process.

V. FEDERAL AND STATE ATTEMPTS TO SUBSIDIZE COAL AND NUCLEAR RESOURCES

At both the state and federal levels, policymakers pursued new coal and nuclear subsidies designed to improve the economics of those generation sources, especially in organized power markets. Notably at the state level, both New York and Illinois targeted nuclear generation – focusing the subsidy on a cleaner power source.

In New York, the state began implementation of a new Clean Energy Standard (CES) in 2017,[30] which created new zero emissions credits (ZECs) compensating "the zero-emissions attributes of one megawatt-hour of electricity production by" an eligible facility. In part, the ZEC program was designed to "encourage the preservation of the environmental values or attributes of zero-emissions nuclear-powered electric generating facilities for the benefit of the electric system, its customers and environment." Competitive generators unsuccessfully challenged New York's program in federal district court as a July 25, 2017 decision concluded that the New York program is constitutional. That decision is now before the Second Circuit on appeal.[31]

A similar ZEC program was created contemporaneously in Illinois.[32] On December 7, 2016, Illinois also passed the *Future Energy Jobs Act* which included a ZEC program to subsidize baseload nuclear generation for ten years, prompting competing generators to file legal challenges at FERC and in federal court. On July 14, 2017, a federal district court judge upheld the legality of the Illinois program. That decision is now before the Seventh Circuit on appeal.[33]

At the federal level, the U.S. Department of Energy (DOE) relied upon on rarely used authority in Section 403 of the *DOE Act*[34] to propose a rule on "Grid Resiliency Pricing" for action by the Federal Energy Regulatory Commission (FERC).[35] The proposed rule sought to create out-of-market compensation for certain coal and nuclear generation on the contention that those sources of electricity generation were "fuel secure," meaning ready access to on-site fuel. In framing resilience in

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28 David Blackmon, "Trump Is Taking The Regulatory Shackles Off Oil Drillers. Can The Industry Avoid Messing It Up?," *Forbes* (4 January 2018), online: <https://www.forbes.com/sites/davidblackmon/2018/01/04/can-the-oil-industry-avoid-messing-up-the-trump-policy-boom/#731a68cb5590>.

29 Michael Collins, "Despite congressional approval, oil and gas drilling in Alaska's ANWR is still years away," *USA Today* (11 January 2018), online: <https://www.usatoday.com/story/news/politics/2018/01/11/despite-congressional-approval-oil-and-gas-drilling-alaskas-anwr-still-years-away/1022524001/>.

30 Order Adopting a Clean Energy Standard, *Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard*, NYPSC Case No 15-E-0302 (1 August 2016), online: <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7b44C5D5B8-14C3-4F32-8399-F5487D6D8FE8%7d>.

31 Memorandum Opinion & Order, *Coalition for Competitive Electricity, et al v Zibelman*, No 1: 16-cv-08164, ECF No 159 (SDNY, 25 July 2017).

32 Public Act 99-0906 (the "Future Energy Jobs Bill"), SB 2814, 99th General Assembly, Ill (7 December 2016), online: <http://www.ilga.gov/legislation/publicacts/99/PDF/099-0906.pdf>.

33 Memorandum Opinion & Order, *Village of Old Mill Creek, et al v Star*, No 1:17-cv-01164, ECF No 107 (ND Ill 14 July 2017).

34 *Department of Energy Organization Act*, 42 USC §7101 et seq (1977).

35 Grid Resiliency Pricing Rule, 18 CFR pt 35, online: <https://energy.gov/sites/prod/files/2017/09/f37/Notice%20of%20Proposed%20Rulemaking%20.pdf>.

that way, the proposed rule drew a contrast with shipped natural gas as well as renewable sources like solar and wind. After an extremely short comment period and review process, FERC ultimately chose to reject the DOE's proposal.[36] However, the issue of grid resilience continues to be a point of focus for the Commission as it opened a new proceeding to examine the issue.

VI. STATE ENVIRONMENTAL CHALLENGES TO PERMITTING OF NEW NATURAL GAS PIPELINE INFRASTRUCTURE

A. *Millennium Pipeline*

On June 23, 2017, the U.S. Court of Appeals for the District of Columbia Circuit denied Millennium Pipeline Co. (Millennium)'s petition under Section 19(d)(2) of the *Natural Gas Act* to review "an alleged failure to act by a . . . State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit required under Federal law."[37] Under Section 19(d)(3), if the court finds that the state agency has delayed unlawfully, the court must remand the proceeding to the agency and "set a reasonable schedule and deadline for the agency to act on remand."[38] Millennium argued in its petition that the New York State Department of Environmental Conservation (NYSDEC) failed to act within the one-year window under Section 401 of the U.S. *Clean Water Act*[39] to issue a water quality certificate, and asked the court to compel the NYSDEC either to grant its application or to take action within a specified schedule. The court held that Millennium lacked standing to pursue its petition. The court ruled that, even if NYSDEC unlawfully delayed acting on Millennium's application, its inaction would operate as a waiver of the certification requirement and Millennium would be able to proceed with its application at FERC: "If we were to determine the Department exceeded the *Clean Water Act* deadline, we necessarily would conclude the *Clean Water Act* requirements have been waived. At that point, the Department's decision to grant or deny would have no legal significance."[40] Because the NYSDEC's inaction would not cause Millennium "cognizable injury," the court held that Millennium lacked standing.[41] The court said that Millennium could petition FERC to find that NYSDEC had waived the certification requirement.

On July 21, 2017, Millennium filed a request with FERC to approve issuance of a notice to proceed with construction and to find that NYSDEC had waived the Section 401 certification requirement.[42] While that request was pending, NYSDEC on August 30, 2017 "deemed denied" Millennium's water quality certification and its requests for state law stream disturbance and freshwater wetlands permits, until FERC reopens its environmental review process under the *National Environmental Policy Act (NEPA)* to adequately address downstream greenhouse gas (GHG) impacts of the power plants to be served by the Millennium pipeline. On September 15, 2017, FERC issued a Declaratory Order finding that NYSDEC waived certification because it had not acted within one year of receipt of Millennium's "application", which FERC interpreted to mean the date that Millennium filed the application, notwithstanding NYSDEC's position that receipt of the application means receipt of a "complete" application and that was not the case when Millennium filed, as the agency issued several notices that the application was incomplete.[43] On October 13, 2017, NYSDEC filed a request for rehearing, and request for a stay, of the Declaratory Order, which FERC denied in an order issued November 17, 2017. That same date, NYSDEC filed a petition for review with the U.S. Court of Appeals for the Second Circuit of FERC's finding in the

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36 US Department of Energy, Federal Energy Regulatory Comm'n, News Release, "FERC Initiates New Proceeding on Grid Resilience, Terminates DOE NOPR Proceeding" (8 January 2018), online: https://ferc.gov/media/news-releases/2018/2018-1/01-08-18.pdf>; Order Terminating Rulemaking Proceeding, Initiating New Proceeding, and Establishing Additional Procedures, Docket Nos AD18-7-000 and RM18-1-000, 162 FERC ¶ 61,012 (8 January 2018), online: < https://ferc.gov/CalendarFiles/20180108161614-RM18-1-000.pdf>.

37 15 USC § 717r(d)(2); *Millennium Pipeline Co v Seggos*, 860 F3d 696, 699 (DC Cir 2017).

38 *Ibid* § 717r(d)(3).

39 *Clean Water Act*, 33 USC § 1251 et seq (1972).

40 *Millennium Pipeline Co*, 860 F.3d at 700-01.

41 *Millennium Pipeline Co*, 860 F.3d at 699-700.

42 Meghan Mandel & Daniel Archuleta, "FERC Rules that NY DEC Waived Authority on Water Quality Permit for Pipeline Project," *Troutman Sanders LLP* (20 September 2017), online: <https://www.troutmansandersenergyreport.com/2017/09/ferc-rules-ny-dec-waived-authority-water-quality-permit-pipeline-project/>.

43 Declaratory Order, In re *Millennium Pipeline Co*, No CP16-17-000 (FERC 15 September 2017).

Declaratory Order that NYSDEC had waived the certification requirement.

On October 27, 2017, Millennium filed in the federal district court for the Northern District of New York claiming that the *Natural Gas Act* preempted NYSDEC from applying any state permitting requirements that would delay or interfere with the construction and operation of the project.[44] On December 13, 2017, the court ruled that New York's stream disturbance permit regulations and freshwater wetlands permit regulations are preempted by the *Natural Gas Act*. The court held that "States may deny [a] Section 401 certification based on state environmental standards that have been approved by the EPA … but states are preempted from independently enforcing those standards through the denial of state permits."[45] A federal district court in Massachusetts reached a similar decision in 2017 involving a local government's determination that the developer of a proposed pipeline compressor station needed an environmental permit. In *Algonquin Gas Transmission, LLC v. Weymouth Conservation Commission*, the court granted summary judgment in favor of the pipeline, holding that a town's wetland protection ordinance that required the pipeline to obtain a permit as a condition to constructing a compressor station that had been approved by FERC was preempted.[46]

B. *Constitution Pipeline*

On August 18, 2017, the Second Circuit upheld NYSDEC's April 2016 decision denying a Section 401 water quality certification for Constitution Pipeline Co. (Constitution)'s proposed 121-mile pipeline in Pennsylvania and New York.[47] Constitution had argued that the state had waived certification or, alternatively, that its denial was an unlawful attempt to impose a preferred route for the pipeline. The court upheld NYSDEC's decision to deny the certification, and dismissed Constitution's failure-to-act claims on grounds that Section 19(d)(2) of the *Natural Gas Act* vests original and exclusive jurisdiction to hear those claims in the D.C. Circuit. On October 19, 2017, the court denied Constitution's petition for rehearing en banc.

On October 11, 2017, Constitution petitioned FERC for a declaratory order finding that NYSDEC had failed to act within a reasonable period of time on its application.[48] FERC denied Constitution's petition on January 11, 2018.[49] FERC affirmed that one year is "a reasonable period of time" for the state agency to act on a water quality certificate application under Section 401. Here, however, FERC focused on the fact that Constitution had withdrawn and resubmitted its application to the NYSDEC. FERC held that "once an application is withdrawn, no matter how formulaic or perfunctory the process of withdrawal and resubmission is, the refiling of an application restarts the one-year waiver period…."[50]

C. *Northern Access*

On February 3, 2017, FERC approved the application by National Fuel Gas Pipeline to construct and operate a new natural gas pipeline, Northern Access, conditioned among other things on receipt of all required state authorizations.[51] On March 3, 2017, National Fuel filed a request for clarification or rehearing asking FERC to find (1) that state permits, approvals, authorizations and requirements are preempted by the *Natural Gas Act* and not required to commence construction of the pipeline, and (2) that NYSDEC's failure to issue a decision on the pipeline's application for a water quality certificate by the end of the authorization period in FERC's Notice of Schedule for Environmental Review was a failure

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44 Complaint, *Millennium Pipeline Co v Seggos*, No 1:17-cv-01197, ECF No 1 (NDNY 27 October 2017).
45 Memorandum Decision & Order, *Millennium Pipeline Co v Seggos*, No 1:17-cv-01197, ECF No 29 (NDNY 13 December 2017).
46 *Algonquin Gas Transmission, LLC v Weymouth Conservation Comm'n,* No 17-10788, 2017 WL 6757544 (D Mass 29 December 2017).
47 Order, *Constitution Pipeline Co v NYSDEC*, No 16-1568, ECF No 240-1 (2d Cir August 18, 2017).
48 Petition for Declaratory Order, In re *Constitution Pipeline Co*, No CP18-5-000 (FERC 11 October 2017); *Notice of Petition for Declaratory Order*, 82 Fed Reg 49,364 (25 October 2017), online: <https://www.gpo.gov/fdsys/pkg/FR-2017-10-25/pdf/2017-23109.pdf>.
49 Order on Petition for Declaratory Order, Docket No CP18-5-000, 162 FERC ¶ 61,014 (11 January 2018), online: <https://www.ferc.gov/CalendarFiles/20180111122739-CP18-5-000.pdf>.
50 *Ibid* at para 23.
51 Order Granting Abandonment and Issuing Certificates, Docket Nos CP15-115-000, CP15-158-001, 158 FERC ¶ 61,145 (3 February 2017), online: <https://www.ferc.gov/CalendarFiles/20170203194955-CP15-115-000.pdf>.

to act within a "reasonable period of time" as required by Section 401 and therefore resulted in a waiver of any requirement to obtain the water quality certificate with respect to its facilities in New York State. National Fuel argued that NYSDEC's failure to act on the application was one of many allegedly improper actions to "blockade" construction of a FERC-authorized natural gas pipeline. Subsequently, on April 7, 2017, NYSDEC issued a denial of the water quality certificate.[52] On April 21, 2017, National Fuel filed a petition with the Second Circuit challenging NYSDEC's denial.[53]

VII. FRACKING

A. State Developments

In April 2017, Maryland banned fracking statewide. In a reversal from his past position that fracking could be conducted in a safe manner, Republican Governor Larry Hogan supported the ban and urged state legislators to send fracking ban legislation to his desk.[54] Following Vermont and New York, Maryland is now the third U.S. state to have enacted a statewide fracking ban. However, it is the first U.S. state with significant shale resources to pass a ban through the legislative process, as Vermont's ban is largely symbolic due to the state's lack of gas resources and New York's ban was enacted via executive order.[55]

In November 2017, the Delaware River Basin Commission, an interstate regulatory body covering territory in Delaware, New Jersey, Pennsylvania and New York, proposed a fracking ban in the basin. The proposed ban has significant ramifications for natural gas exploration in Pennsylvania, as the location of the Marcellus Shale formation has led to significant fracking activity throughout the state, including the state's northeastern counties abutting the Delaware River Basin.[56] The draft regulations notably permit importing and exporting of water within the basin for fracking purposes, which has led to criticism from environmental groups.[57] The proposal remains in its comment period, with a final vote expected later in 2018.[58]

Legal challenges opposing a fracking ban passed by ballot initiative in Monterey County, California secured a partial victory – a ruling by the Monterey County Superior Court struck portions of the ballot measure prohibiting the drilling of new wells and phasing out of wastewater impoundment and injections due to preemption by existing state and federal law.[59] The fracking ban itself remains in place, as the court ruled that plaintiffs lacked standing because no fracking operations are currently conducted within the county.[60] The fracking ban, passed in November 2016 with 56 per cent of voters, drew national attention and heavy opposition from the oil and gas industry. Unlike the other five counties in California that have already banned fracking, Monterey County has a significant oil and gas industry.[61] The decision is likely to be appealed and may ultimately be decided by the California Supreme Court.

B. Federal Developments

In December 2017, the BLM rescinded proposed environmental regulations implemented under the Obama Administration regulating fracking activities on federal and tribal lands.[62] The prior

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52 NY State Department of Environmental Conservation, "DEC Statement Regarding Water Quality Certificates for the Proposed Northern Access Pipeline," (8 April 2017), online: <http://www.dec.ny.gov/press/109767.html>.

53 *Natural Fuel Gas Supply Corp v NYSDEC*, No 17-1164 (2d Cir, filed 21 April 2017).

54 Josh Hicks & Ovetta Wiggins, "Governor calls for ban on fracking in Maryland," *Washington Post* (17 March 2017), online: <https://www.washingtonpost.com/local/md-politics/md-gov-hogan-calls-to-ban-fracking-in-the-state/2017/03/17/2ea1e00c-0b45-11e7-93dc-00f9bdd74ed1_story.html?utm_term=.a603d96a6376>.

55 Pamela Wood, "Maryland General Assembly approves fracking ban," *Baltimore Sun* (27 March 2017), online: <http://www.baltimoresun.com/news/maryland/politics/bs-md-fracking-ban-passes-20170327-story.html>.

56 Jon Hurdle, "Fracking ban proposed for Delaware River basin; 'significant risks' cited," *NPR StateImpact* (30 November 2017), online: <https://stateimpact.npr.org/pennsylvania/2017/11/30/fracking-ban-proposed-for-delaware-river-basin-significant-risks-cited/>.

57 *Ibid.*

58 Susan Phillips, "Delaware River Basin fracking ban hearings center on environment, economy," *NPR StateImpact* (25 January 2018), online: <https://stateimpact.npr.org/pennsylvania/2018/01/25/drbc-hears-comments-on-fracking-ban/>.

59 James Herrera, "Monterey County Judge: Measure Z fracking ban remains; two other bans preempted, invalid by existing laws," *Monterey Herald* (29 December 2017), online: <http://www.montereyherald.com/article/NF/20171229/NEWS/171229840>.

60 *Ibid.*

61 Claudia Melendez Salinas, "Big Oil sues Monterey County to stop Measure Z," *Mercury News* (16 December 2016), online: <http://www.mercurynews.com/2016/12/16/big-oil-sues-monterey-county-to-stop-measure-z/>.

regulation, which concerned water contamination, well integrity and containment and recovery of hydraulic fluids, had initially been issued in March 2015 but remained stayed pursuant to a decision from the U.S. federal district court in Wyoming.[63]

In response, California Attorney General Xavier Becerra filed suit to block the repeal in January 2018. The lawsuit argues for the imposition of a mandatory injunction that would reinstate the Obama Administration fracking regulations due to the fact that the rescission was not based on any "reasoned analysis."[64] Environmental organizations, including the Sierra Club and Earthjustice, filed similar actions against the government.[65] The litigation represents the latest development in a string of environmental legal challenges brought by the California Attorney General's office against the Trump Administration – Becerra and New Mexico Attorney General Hector Belderas successfully sued the BLM regarding its decision to stop enforcing a waste rule designed to limit "flaring" and venting of unused methane from oil and natural gas wells and continue to seek legal remedies against the Trump Administration for attempting to rescind the rule.[66]

VIII. FERC AND CFTC ENFORCEMENT

A. FERC Enforcement

In 2017, FERC Enforcement settled two long-running market manipulation cases that involved extensive non-public investigations, show cause proceedings and hard-fought federal district court litigation.

1. Barclays Bank PLC

On November 7, 2017, FERC approved a Stipulation and Consent Agreement between Enforcement and Barclays Bank PLC, Daniel Brin, Scott Connelly and Karen Levine (together, the Barclays Defendants) resolving all claims for alleged violations of *Federal Power Act* section 222 [67] and the FERC's Anti-Manipulation Rule,[68] as well as the FERC's federal district court action to enforce such alleged violations, captioned *FERC v. Barclays Bank et al.*, 2-13-cv-02093-TLN-DC (E.D. Cal.).[69] Under the Stipulation and Consent Agreement, the Barclays Defendants neither admitted nor denied the allegations and agreed to pay a $70 million civil penalty and to disgorgement of $35 million.[70] In addition, the traders each agreed to trader bans.

Earlier in 2017, the court in the federal court action granted defendant Ryan Smith's motion for judgment on the pleadings and dismissed him from the case, holding that the FERC's claims against Smith were time-barred by the applicable federal statute of limitations, 28 U.S.C. § 2462.[71] FERC's prior Order Assessing Penalties found that the Barclays Defendants were liable for $435 million in civil penalties and $43.9 million in disgorgement, the largest amounts ever assessed by the agency in an enforcement case.[72]

2. City Power Marketing, LLC and K. Stephen Tsingas

On August 22, 2017, the FERC approved a Stipulation and Consent Agreement between Enforcement and City Power Marketing, LLC (City Power), and its owner, K. Stephen Tsingas (together, the City Power Defendants). The agreement resolved allegations that the City Power Respondents violated FPA Section 222

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62 Chris Mooney, "To round out a year of rollbacks, the Trump administration just repealed key regulations on fracking," *Washington Post* (29 December 2017), online: <https://www.washingtonpost.com/news/energy-environment/wp/2017/12/29/to-round-out-a-year-of-rollbacks-the-trump-administration-just-repealed-key-regulations-on-fracking/?utm_term=.68b9c9833e78>.

63 Order on Petitions for Review of Final Agency Action, *Wyoming v Jewell, et al*, No 2:15-cv-043, ECF No 219 (D Wyo 21 June 2016); Final Rule, 80 Fed Reg 16,128 (26 March 2015), online: <http://www.federalregister.com/Browse/AuxData/339D2790-9618-4145-B6E3-EEA1BC041032>.

64 Melissa Daniels & Keith Goldberg, "Calif. AG Sues Over Trump Admin.'s Fracking Rule Repeal," *Law360* (24 January 2018), online: <https://www.law360.com/articles/1005217>.

65 *Ibid.*

66 Bryan Koenig, "Calif., NM Warn BLM Over Suspending Methane Waste Rule," *Law360* (6 November 2017), online: <https://www.law360.com/articles/982359/calif-nm-warn-blm-over-suspending-methane-waste-rule>.

67 16 USC § 824v.

68 18 CFR § 1c.

69 Order Approving Stipulation and Consent Agreement, Docket No IN08-8-000, 161 FERC ¶ 61,147 (7 November 2017), online: <https://www.ferc.gov/CalendarFiles/20171107142151-IN08-8-000.pdf>.

70 *Ibid* at ¶ 10.

71 Order, *FERC v Barclays Bank, et al*, No 2-13-cv-02093, ECF No 234 (ED Cal 29 September 2017).

72 Order Assessing Civil Penalties, Docket No IN08-8-000, 144 FERC ¶ 61,041, at paras 132, 151 (16 July 2013), online: <https://www.ferc.gov/eventcalendar/Files/20130716170107-IN08-8-000.pdf>.

and the FERC's Anti-Manipulation Rule, 18 C.F.R. § 1c, by placing Up-To-Congestion (UTC) transactions in the market operated by PJM Interconnection, L.L.C. (PJM) in a manner designed to artificially inflate City Power's eligibility for Marginal Loss Surplus Allocation (MLSA) payments. Enforcement alleged that the City Power Respondents had placed UTC transactions in a manner designed to minimize the risk of the transaction while increasing City Power's trading volume and eligibility for MLSA payments.

The FERC previously had issued an Order Assessing Penalties finding that the City Power Respondents' conduct violated the Anti-Manipulation Rule and assessing a $14 million civil penalty against City Power and a $1 million civil penalty against Mr. Tsingas and directing City Power collectively to disgorge about $1.3 million. FERC later brought an action in the U.S. District Court for the District of Columbia seeking to enforce its assessment of civil penalties. In the settlement, the City Power Defendants stipulated to the facts set forth in the agreement, but neither admitted nor denied the alleged violations. To resolve the allegations, City Power agreed to pay a civil penalty of $9 million, and Mr. Tsingas agreed to pay a civil penalty of approximately $1.4 million and disgorge $1.3 million to PJM. In addition, Mr. Tsingas agreed to a trading ban on participating directly or indirectly in any FERC-jurisdictional market.

B. CFTC Enforcement Advisories

1. January 2017 Cooperation Advisories

On January 19, 2017, the Commodity Futures Trading Commission (CFTC) issued two Enforcement Advisories – one for individuals and one for companies – outlining factors that the CFTC's Enforcement Division will consider in evaluating cooperation in a CFTC investigation or enforcement action.[73] Both advisories note that "[t]he Division considers three broad policy issues in its assessment of whether cooperation was provided and the quality of that cooperation: (1) the value of the company's cooperation to the Division's investigation(s) and enforcement actions; (2) the value of the company's cooperation to the Commission's broader law enforcement interests; and (3) the balancing of the level of the company's culpability and history of prior misconduct with the acceptance of responsibility, mitigation and remediation."[74]

2. September 2017 Enforcement Advisory on Self Reporting and Full Cooperation

On September 25, 2017, the CFTC issued an additional advisory to provide further guidance and clarity regarding the earlier January advisories.[75] The goal of the September 2017 Advisory is to "encourage companies and individuals to detect, report, and remediate wrongdoing, thus increasing voluntary compliance with the law."[76] The CFTC notes that any disclosure must have been made "prior to an imminent threat of exposure of the misconduct," "within a reasonably prompt time after the company or individual becomes aware of the misconduct" and "must include all relevant facts known to the company or individual at the time of the disclosure, including all relevant facts about the individuals involved in the misconduct."[77] "To receive full credit under this self-reporting program, the company/individual must adhere to the terms of the Division's January 2017 Advisories," and the CFTC's evaluation of whether a company timely and appropriately remediated flaws in compliance and control programs "[w]ill be fact and circumstance dependent."[78]

With respect to the credit given to a company or individual, the advisory states that "[i]n all instances, the company or individual will be required to disgorge profits (and, where applicable, pay restitution) resulting from any violations."[79] Given satisfaction of this requirement, "[i]f the

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73 US Commodity Futures Trading Comm'n, Enforcement Advisory, *Cooperation Factors in Enforcement Division Sanction Recommendations for Companies* (19 January 2017), online: <http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisorycompanies011917.pdf> [*hereinafter* Company Advisory]; US Commodity Futures Trading Comm'n, Enforcement Advisory, *Cooperation Factors in Enforcement Division Sanction Recommendations for Individuals* (19 January 2017), online: <http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisoryindividuals011917.pdf> [*hereinafter* Individual Advisory].

74 Company Advisory, at 1; Individual Advisory at 1.

75 US Commodity Futures Trading Comm'n, Enforcement Advisory, *Updated Advisory on Self Reporting and Full Cooperation* (25 September 2017), online: <http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisoryselfreporting0917.pdf >.

76 *Ibid* at 2.

77 *Ibid* at 2-3.

78 *Ibid* at 3.

79 *Ibid*.

company or individual self-reports, fully cooperates, and remediates," the Enforcement Division "will recommend the most substantial reduction in the civil monetary penalty that otherwise would be applicable."[80] In a September 25, 2017 speech at the NYU Institute for Corporate Governance & Finance, the CFTC's Enforcement Division Director James McDonald discussed the three advisories and how the CFTC's Enforcement Division might rely on them going forward.[81]

IX. CFTC POLICIES IMPACTING ENERGY TRADING

The year 2017 was a relatively quiet year for energy companies with regard to the CFTC, with most of the *Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank")*[82] regulations regarding derivatives already completed and the outgoing administration under Chairman Timothy Massad having granted significant relief in important areas of concern, specifically with respect to forward contracts with volumetric optionality and trade options, for energy companies. Other areas of concern to the energy industry, such as position limits, appear to not likely see action in the short term, since the new CFTC Chairman, J. Christopher Giancarlo, has publicly stated that he does not want to take action on position limits until there is a full panel of commissioners.[83] Currently, there are two vacancies at the Commission that remain to be filled, and it could be some time before there is a full panel again. Still, there were a few developments relevant to energy companies that use derivatives in the areas of recordkeeping and the *de minimis* exception from swap dealer registration, which we describe below.

With regard to recordkeeping, on May 23, 2017, the CFTC finalized rule amendments to its recordkeeping rule, CFTC Reg. 1.31, which became effective on August 28, 2017.[84] CFTC Reg. 1.31 specifies the form and manner in which records required by CFTC regulations must be kept by entities required to keep such records, referred to in the rule as "records entities." The regulation does not specify the types of records required to be kept; types of records are specified in other CFTC regulations. For example, for swaps, most of the types of records required to be kept are specified in CFTC Reg. 45.2. In general, the amendments to CFTC Reg. 1.31 modernize and make technology neutral the form and manner in which regulatory records must be kept. The CFTC notes that the final rule amendments do not impose any new recordkeeping requirements on any records entity and that existing recordkeeping methods under CFTC Reg. 1.31 remain valid for compliance with the rule as amended.

Moreover, the CFTC notes that the amendments "[d]o not override other methods of maintaining records that may be specified elsewhere in the [Commodity Exchange] Act or other Commission regulations." Thus, the CFTC states that commercial end-users, such as energy companies, that are records entities, for example, "may continue to maintain records in accordance with their current practices if such are permitted by the Act, Commission regulations, or existing relief or guidance."[85]

With regard to the *de minimis* exception from swap dealer registration, the CFTC issued an order on October 26, 2017, extending by one year the date on which the CFTC may lower its swap dealer *de minimis* threshold.[86] The *de minimis* threshold is the amount of swap dealing activity in a 12-month period that if exceeded requires a swap market participant to register as a swap dealer. The order has the effect of preserving the *de minimis* threshold at its current level, $8 billion in aggregate gross notional amount, which was set to drop at the end of December 2018, until December 31, 2019. The order means that, at least until the end of 2019, no swap dealing entities will likely be required to register as regulated swap dealers on the basis of dealing activity of less than $8 billion in notional

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80 *Ibid*.
81 US Commodity Futures Trading Comm'n, Enforcement Advisory, *Speech of James McDonald, Director of the Division of Enforcement Commodity F utures Trading Commission Regarding Perspectives on Enforcement: Self-Reporting and Cooperation at the CFTC* (25 September 2017), online: <http://www.cftc.gov/PressRoom/SpeechesTestimony/opamcdonald092517>.
82 *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub L 111-203, 124 Stat 1376.
83 See US Commodity Futures Trading Comm'n, Enforcement Advisory, *Testimony of J. Christopher Giancarlo Chairman U.S. Commodity Future Trading Commission before the House Committee on Agriculture* (11 October 2017), online: <http://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo-29>.
84 17 CFR § 1.31 (2017).
85 See Final Rule, 82 Fed Reg 24,479, 24,480 (30 May 2017), online: <https://www.gpo.gov/fdsys/pkg/FR-2017-05-30/pdf/2017-11014.pdf>.
86 See Order Establishing a New De Minimis Threshold Phase-In Termination Date, 82 Fed. Reg 50,309 (31 October 2017), online: <https://www.gpo.gov/fdsys/pkg/FR-2017-10-31/pdf/2017-23660.pdf>.

amount over a 12-month period.

X. SOLAR – IMPORT TARIFFS

On January 23, 2018, President Trump signed a proclamation increasing tariffs on solar cells and modules under section 201 of the *Trade Act of 1974*.[87] This law has not been used to impose tariffs since 2002, when it was used on steel imports. The solar imports tariff goes into effect February 7, 2018 and is set at 30 per cent in the first year, decreasing to 25 per cent in the second year, 20 per cent in the third year and 15 per cent in the fourth year.[88] The first 2.5 gigawatts of imported cells (but *not* modules) are excluded from the new tariffs, establishing a tariff rate quota, meaning that exporters will likely rush to import cells in order to be within the 2.5 gigawatt exclusion.

This is the third set of tariffs the U.S. government has issued on solar imports in recent years; however, the Obama Administration's tariffs were on a narrower set of imports.[89] The Trump Administration's tariffs are based on the International Trade Commission's recommendations, which found that low-priced imports have been negatively impacting domestic manufacturers.[90] Currently, more than 95 per cent of America's solar panels are imported, with half of those imports coming from Malaysia and South Korea. Two solar manufacturers, Suniva Inc. and SolarWorld Americas, requested the tariffs.

The Trump Administration has stated that the tariffs are largely directed at China, which has moved its production to other countries to avoid prior U.S. restrictions imposed on Chinese solar products. The tariff applies to solar products worldwide, and no countries with free trade agreements with the United States are excluded. However, countries that are eligible for the General System of Preferences benefits (some less developed countries) are excluded if they account for less than three per cent of total imports of the solar products.[91]

Tariffs are opposed by most of the solar industry, as companies fear that trade barriers will thwart the solar industry's growth. Goldman Sachs analysts predict a potential three to seven per cent cost increase for residential and utility-scale solar costs, respectively, with a declining effect as the penalties lessen in later years.[92] It is uncertain whether certain components of solar panels or modules are covered. The Office of the U.S. Trade Representative has stated that by the end of February 2018, it will publish procedures in the Federal Register for requests for exclusion of particular components from the tariffs.[93]

XI. DISTRIBUTED ENERGY/RESOURCES

State public utility/service commissions across the United States continue to grapple with how to incorporate distributed generation and net metering into rate design. Different states are addressing these issues in divergent ways.

A. California's Integrated Resource Plan and Long Term Procurement Plan Proceedings (IRP-LTPP)

1. California's Distribution Energy Resources and Distribution Resources Plan Proposals

For more than a decade, it has been California's policy to require each of its investor-owned utilities (IOUs) to consider nonutility-owned distribution energy resources (DERs) as a possible alternative to investments in its distribution system to ensure

87 Proclamation No 9693, 83 Fed Reg 3541 (23 January 2018), online: <https://www.gpo.gov/fdsys/pkg/FR-2018-01-25/pdf/2018-01592.pdf>.
88 US Trade Representative, *Fact Sheet* (22 January 2018), online: <https://ustr.gov/sites/default/files/files/Press/fs/201%20FactSheet.pdf>.
89 See Diane Cardwell & Keith Bradsher, "U.S. Will Place Tariffs on Chinese Solar Panels," *New York Times* (10 October 2012), online: <http://www.nytimes.com/2012/10/11/business/global/us-sets-tariffs-on-chinese-solar-panels.html?smid=pl-share>; Diane Cardwell, "U.S. Imposes Steep Tariffs on Chinese Solar Panels," *New York Times* (16 December 2014), online: <https://www.nytimes.com/2014/12/17/business/energy-environment/-us-imposes-steep-tariffs-on-chinese-solar-panels.html?smid=pl-share>.
90 Proclamation No 9693, 83 Fed Reg 3541 (23 January 2018), online: <https://www.gpo.gov/fdsys/pkg/FR-2018-01-25/pdf/2018-01592.pdf>.
91 US Trade Representative, *Fact Sheet* (22 January 2018), online: <https://ustr.gov/sites/default/files/files/Press/fs/201%20FactSheet.pdf>.
92 Henning Gloystein & Christoph Steitz, "U.S. solar panel import tariff to hit European, Asian manufacturers," *Reuters* (23 January 2018), online: <https://www.reuters.com/article/us-usa-trade-tariffs-solar/u-s-solar-panel-import-tariff-to-hit-european-asian-manufacturers-idUSKBN1FC0EZ>.
93 Proclamation No 9693, 83 Fed Reg 3541 (23 January 2018), online: <https://www.gpo.gov/fdsys/pkg/FR-2018-01-25/pdf/2018-01592.pdf>.

reliable electric service at the lowest possible cost.[94]

Senate Bill (SB) 350 (2015) required the California Public Utilities Commission (CPUC) to undertake an integrated approach to resource planning.[95] The CPUC historically dealt with various different types of resources in proceedings specific to those resources (e.g., the Integrated Distributed Energy Resources proceeding (R.14-10-003)). While resource-specific proceedings have continued, the Commission's goal is to wrap as many of these proceedings as possible into an omnibus planning proceeding. The planning for this omnibus approach is happening in R.16-02-007, the Rulemaking to Develop an Electricity Integrated Resource Planning Framework and to Coordinate and Refine Long-Term Procurement Planning Requirements.

On December 28, 2017, the CPUC issued a proposed decision in R.16-02-007 for consideration at the CPUC's February 8, 2018 meeting. The proposed decision directs utilities to file integrated resource plans covering three years (but reviewed every two years). If the CPUC adopts the proposed decision, the first plans will be due June 1, 2018.

2. California Net Energy Metering

Under Assembly Bill (AB) 327,[96] enacted in 2013, the CPUC had until December 31, 2015, to develop a standard contract or tariff that applies to customer-generators who own rooftop solar installations or other distributed generation. On January 28, 2016, the CPUC approved Decision 16-01-044, adopting a NEM successor tariff that continues the existing NEM structure while making adjustments to align the costs of NEM successor customers more closely with those of non-NEM customers. The CPUC has stated it will not revisit NEM policy for three years.

AB 327 mandated each large investor-owned utility to adopt the successor tariff either on July 1, 2017 or when NEM generating capacity exceeded five per cent of their aggregate peak demand. SDG&E and PG&E hit the program limit on June 29, 2016 and December 15, 2016, respectively, and SCE rolled over on July 1, 2017. New NEM customers must now (a) pay a one-time interconnection fee, (b) pay non-bypassable charges and (c) transfer to a time-of-use rate.

C. Nevada's Evolving Regulatory Regime for Rooftop Solar

In 2015, the Nevada legislature enacted SB 374[97] directing utilities to prepare a cost-of-service study for rooftop solar installations and to prepare a new tariff. On December 23, 2015, the Public Utilities Commission of Nevada (PUCN) issued a controversial order approving tariff filings by Nevada's two major utilities[98] that significantly reduced the economic benefits customers would see when they installed rooftop solar panels.[99]

In the wake of public criticism and court challenges, Nevada courts and the PUCN in 2016 restored some net metering benefits to some rooftop solar customers, including by restoring the status quo ante for grandfathered customers. Subsequently, the PUCN reopened net metering for new customers in the Northern portion of the state (Sierra Pacific's service territory).[100]

In 2017, the Nevada legislature passed AB 405.[101] It sets net metering compensation at 95 per cent of retail rates; a highly favorable amount for rooftop solar owners. As solar installations proliferate, at 80 MW increments, the compensation steps down by seven percentage points, bottoming out at 75 per cent of retail rates. In September, the PUCN ordered utilities to implement AB 405. The PUCN rejected utility proposals to increase fixed charges for rooftop solar customers and to eliminate "netting" of customer generation and load.

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94 Cal Pub Util Code § 353.5.
95 US, SB 350, *Clean Energy and Pollution Reduction Act of 2015*, 2015-2016, Cal, 2015.
96 US, AB 327, *An act to amend Sections 382, 399.15, 739.1, 2827, and 2827.10 of, to amend and renumber Section 2827.1 of, to add Sections 769 and 2827.1 to, and to repeal and add Sections 739.9 and 745 of, the Public Utilities Code, relating to energy*, 2013-2014, Cal, 2013.
97 US, SB 374, *An act relating to energy; revising provisions relating to certain energy conservation standards adopted by the Director of the Office of Energy and the governing body of a local government*, 78th session, Nev, 2015.
98 Order re NV Energy and Sierra Pacific Power Applications, PUCN Docket Nos 15-07041 and 15-07042, Doc ID No 8412 (23 December 2015).
99 *Ibid*; Advice Letter No 453-R, PUCN Docket No 15-07041, Doc ID No 8551 (30 December 2015) at 2, 6 ROD 006938.
100 Order Granting in Part and Denying in Part General Rate Application by Sierra Pacific Power, PUCN Docket Nos 16-06006, 16-06007, 16-06008, 16-06009, Doc ID No 17757 (20 December 2016).
101 US, AB 405, *An act relating to renewable energy; creating the contractual requirements for an agreement for the lease or purchase of a distributed generation system and a power purchase agreement*, 79th Sess, Nev, 2017.

D. Hawaii Rooftop Solar Rule Changes

In October 2017 in the same order establishing a storage program for rooftop solar, Hawaii established the "CGS+" or "Controllable CGS" as a successor to its Customer Grid Supply (CGS) program - Under this new program, CGS+ customers can install a solar PV-only system (no energy storage needed) that exports energy to the electric grid during the daytime, if they use advanced equipment that allows the electric utility to manage power from the CGS+ system. When grid conditions require, the electric utility may alter CGS+ system output in order to maintain a stable grid. It also allowed existing customers to add "non-export" systems and retain their status in the NEM program and authorizes activation of new "advanced inverter" functions in PV and storage systems.[102]

E. State Rate Changes Regarding Distributed Generation

In Hawaii, a state with the highest penetration rate for rooftop solar in the country, customers reached the state's limit on rooftop solar eligible to export power to the grid. Rooftop solar customers in Hawaii must now use the customer self-supply (CSS) option, which is for solar PV installations that are designed to not export any electricity to the grid. Customers are not compensated for any export of energy. CSS customers must pay a minimum $25/month to their utility.

Another state with considerable insolation, Arizona, allowed utilities to impose fixed charges on distributed generation owners of $0.70 per KW/month.[103] Arizona has now ended its retail net metering program for new customers.[104] Customers who already have solar rooftops will be grandfathered under the prior rate structure. New customers will receive 12.9 cents/kWh, but each year the rate for new customers will be stepped down, until reaching wholesale prices.

XII. ENERGY STORAGE

A. Background

FERC issued an important order regarding energy storage—Order 784—in 2013.[105] That order directed wholesale market operators to find ways to monetize "fast response" resources–storage devices such as batteries and flywheels. On April 11, 2016, FERC issued a series of data requests and requests for comments in a new informational docket, "Electric Storage Participation in Regions with Organized Wholesale Electric Markets," Docket No AD16-20-000.[106] This docket concerns the participation of electric storage resources in the organized wholesale electric markets, that is, the regional transmission organizations or RTOs and the independent system operators or ISOs.[107]

FERC opened another informational docket concerning storage in late 2016: "Utilization In the Organized Markets of Electric Storage Resources as Transmission Assets Compensated Through Transmission Rates, for Grid Support Services Compensated in Other Ways, and for Multiple Services," Docket No. AD16-25-000.[108] FERC staff convened a technical conference on November 9, 2016. FERC then issued a Notice of Proposed Rulemaking to "remove barriers to the participation of electric storage resources and distributed energy resource aggregations in the organized wholesale electric markets."[109] The proposed rulemaking would also allow storage to provide services not necessarily procured through markets, such as black start, primary frequency response and reactive power. FERC

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102 Decision and Order No 34924, *Instituting a Proceeding to Investigate Distributed Energy Resource Policies,* Docket No 2014-0192 (Haw 20 October 2017), online: <https://dms.puc.hawaii.gov/dms/OpenDocServlet?RT=&document_id=91+3+ICM4+LSDB15+PC_DocketReport59+26+A1001001A17J23B15234B0218118+A17J23B51330I324501+14+1960>.

103 Order approving Arizona Public Service Company's Application for Approval of Net Metering Cost Shift Solution at 19-20, Ariz Corp Comm'n Docket No E-01345A-13-0248, Decision No 74202 (3 December 2013).

104 Arizona Corp Comm'n, Docket No E-00000J-14-0023 (20 December 2016).

105 Order 784, *Third-Party Provision of Ancillary Services; Accounting and Financial Reporting for New Electric Storage Technologies,* Docket Nos AD10-13-000, RM11-24-000, 144 FERC ¶ 61,056 (18 July 2013).

106 Data Requests and Request for Comments, *Electric Storage Participation in Regions with Organized Wholesale Electric Markets*, FERC Docket No AD16-20-000 (11 April 2016).

107 *Transcript of Commission Meeting*, (FERC, issued 21 April 2016), online: <https://www.ferc.gov/CalendarFiles/20160509131051-transcript.pdf>.

108 *Utilization In the Organized Markets of Electric Storage Resources as Transmission Assets Compensated Through Transmission Rates, for Grid Support Services Compensated in Other Ways, and for Multiple Services,* FERC Docket No AD16-25-000 (30 September 2016).

109 Notice of Proposed Rulemaking, *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Docket Nos AD16-20-000, RM16-23-000, 157 FERC ¶ 61,121 (17 November 2016).

has not yet acted on the proposed rulemaking.

FERC issued a "policy statement" on cost recovery for storage resources in January 2017.[110] The statement established that storage resources *may* provide transmission grid support services at a cost-based rate while participating in organized markets and earning market-based revenues. The policy statement, however, establishes no precedent. Cost recovery will be determined on a case-by-case basis.

A. State Storage Proposals

B. California

As detailed in prior years' Washington Reports, California has taken the lead to include energy storage in its electric utilities and energy suppliers' resource planning. Assembly Bill (AB) 2514 required the CPUC to determine appropriate targets, if any, for each load-serving entity to procure viable and cost-effective energy storage systems. In response to AB 2514, the CPUC set a target of 1,325 megawatts (MW), allocated to each of the investor-owned utilities. Subsequently, AB 2868 required utilities to propose programs and investments up to 500 megawatts of additional distributed energy storage resources. In Decision (D.) 17-04-039, the CPUC determined that the 500 MW of distributed resources described in AB 2868 are to come out of the amounts already specified under AB 2514 ("no additional increase to the existing 1,325 MW target is warranted.")[111] Utilities continue to make progress towards, those storage targets, as reported in Table 2 of D.17-04-039:

On January 11, 2018, the CPUC issued a "Decision On Multiple-Use Application Issues." The decision addresses "the fact that

Energy Storage Procurement to Date (MWs) Data as of February 2017					
Service Territory	Procurement Approved by Commission Customer/Distribution/ Transmission			TOTAL BY UTILITY	Remaining Obligation
PG&E	9.63[112]	16[113]	50[114]	*75.63*	504.37
SCE	190.14[115]	52.22[116]	100[117]	*342.36*	257.78[118]
SDG&E	13[119]	43.65[120]	40[121]	*96.65*	68.35
TOTAL BY DOMAIN	192.63[122]	95.87	190	*478.5*	846.5

110 Policy Statement, *Utilization of Electric Storage Resources for Multiple Services When Receiving Cost-Based Rate Recovery*, Docket No PL17-2-000, 158 FERC ¶ 61,051, (19 January 2017).
111 Decision on Track 2 Energy Storage Issues, Cal Pub Util Comm'n, Decision 17-04-039 at 65 (8 May 2017), online: <http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M185/K070/185070054.PDF>.
112 6.5 MWs of SGIP/Permanent Load Shifting projects (A.1512004, page 1, footnote 2) + 3.13 MWs of 2016 SGIP (PG&E Advice Letter (AL) 4968E).
113 6 MWs (D.1410045, Attach A.) + 10 MWs in 2014 procurement (D.1609004).
114 60 MWs in 2014 solicitation (D.1609004) less termination of a 10 MW project as of February 14, 2017 PG&E Update.
115 16.34 MW existing (D.1410045, Attach A.) + 163.64 MWs in West LA Basin via SCE 2013 LCR RFO to replace San Onofre Nuclear Generating Station's (SONGS) capacity (D.1511041) + 10.3 MWs of 2016 SGIP (SCE AL 3521E).
116 13.78 MW existing (D.1410045, Attach A.) + 22 MW of ACES storage projects (Resolution E4804) + 16.3 MWs in 2014 procurement (D.1609004).
117 100 MWs in West LA Basin via SCE 2013 LCR RFO to replace SONGs capacity (D.1511041).
118 As SCE can only count up to 170 MWs of customer domain resources (200 per cent of 85 MW target), the total for "remaining procurement obligation" only considers 170 MWs, and not the actual total.
119 0.05 MW of 2016 SGIP credits, per SDG&E AL 3011E) + 8.29 MWs of SGIP (A.1603003, Attachment B) + 4.66 MWs existing (D.1410045, Attach A.).
120 6.15 MWs existing (D.1410045, Attach A.) + 37.5 MWs Aliso Canyon (Resolution E4798).
121 40 MWs existing (D.1410045, Attach A.).
122 Only 170 MWs of SCE customer domain procurement is counted.

current market rules (i.e., utility standard contracts and program tariffs) do not support the ability of an energy resource to access, or 'stack,' more than one service, including any incremental values to the wholesale market, distribution grid, transmission system, resource adequacy requirements and customers. As a result, energy storage cannot realize its full economic value to the electricity system even though it may be capable of providing multiple benefits and services to the electricity system." D.18-01-003. The decision adopts a matrix of definitions of compensable storage services and establishes rules governing utility payment for those services. The decision also passes a number of issues to a working group, contemplates utility storage RFOs for 2018 and closes the CPUC's long-running storage Rulemaking (R.) 15-11-030.

Also noteworthy is storage's role in backing up California's electricity grid in the face of reduced natural gas supplies caused by the Aliso Canyon storage leak. California deployed 100 megawatts of storage across several sites in just six months.

The CPUC also rejected a Southern California Edison request for approval of a PPA with NRG for the Puente power plant. This decision was based in part on the availability of storage as an alternative to the power plant.

In addition to activities at the CPUC, stakeholders have been focused in parallel on the California Independent System Operator's (CAISO's) ongoing Energy Storage and Distributed Energy Resources (ESDER) stakeholder initiative to enable wholesale market level participation of energy storage systems interconnected to the distribution grid.

1. Oregon

The Oregon legislature passed an energy storage bill in 2016, Oregon House Bill 2193 (HB 2193),[123] requiring Oregon's major investor owned utilities to obtain up to one per cent of 2014 load of energy storage in service by January 1, 2020 and directing the Oregon Public Utility Commission to adopt guidelines for proposals of projects providing at least 5 MWh of storage. On December 28, 2016, the Commission adopted the required guidelines, establishing a technology-neutral framework for development and evaluation of storage proposals but leaving many details to utilities, bidders and Commission staff.[124] In November 2017, Portland General Electric Company filed a proposal with the Oregon PUC for up to 39 MW of storage in its service area.

2. Massachusetts

Massachusetts adopted an energy storage law in August of 2016, deferring to the Massachusetts Department of Energy Resources (MADERS) on whether to set appropriate targets for electric companies to procure viable and cost-effective energy storage systems to be achieved by January 1, 2020. [125] In response to this legislation, MADERS adopted an "aspirational" 200 Megawatt hour (MWh) energy storage target for electric distribution companies, to be achieved by January 1, 2020. In December 2017, Massachusetts disbursed $20m in grants to fund storage projects. Electric distribution companies were to submit annual reports on storage activities beginning on January 1, 2018.

3. Other States With Newly-Adopted Storage Laws/Regulations

In 2017, New York joined the club of states with energy storage mandates. AB 6571 requires NYPSC to develop an Energy Storage Deployment Program, including a storage procurement target for 2030. The NYPSC is to determine by December 31, 2018 the "appropriate suite of policies" for an energy storage deployment goal.

Nevada passed SB 204.[126] This bill "Requires the Public Utilities Commission of Nevada to investigate and establish biennial targets for certain electric utilities to procure energy storage systems under certain circumstances." Nevada regulators are to implement the bill by October 1, 2018. In addition, Nevada SB 145[127] establishes an incentive program for

123 US, HB 2193, *An act relating to energy storage; and declaring an emergency,* 78th Leg Assemb, Reg Sess, Or, 2015.
124 Order Implementing Energy Storage Program Guidelines pursuant to House Bill 2193, Docket No UM 1751, Order 16-504 (Or 2016).
125 US, HB 4568, *An act to promote energy diversity*, 2015-2016, Mass, 2016.
126 US, SB 204, *An act relating to energy; requiring the Public Utilities Commission of Nevada to investigate and establish biennial targets for certain electric utilities to procure energy storage systems if certain criteria are satisfied*, 79th Sess, Nev, 2017.
127 US, SB 145, An act relating to energy; establishing as part of the Solar Energy Systems Incentive Program a program for the payment of incentives for the installation of certain energy storage systems, 79th Sess, Nev, 2017.

energy storage within the state's solar program.

Hawaii has not adopted storage targets. However, in an October 20, 2017 decision, the Hawaii Public Utilities Commission ("HPUC") approved two new programs that will expand opportunities for customers to install rooftop solar and battery energy storage systems.[128]

XIII. ENERGY EFFICIENCY

The federal government has long promoted energy efficiency in various ways, ranging from setting efficiency standards for consumer products such as lightbulbs[129], sponsoring research at National Laboratories into how to build more energy efficient buildings, and implementing the "Energy Star" labelling program overseen by the EPA.

Many states have laws requiring regulated entities to undertake energy efficiency activities. State-mandated energy efficiency activities commonly include rebates for efficient equipment and efficiency-focused changes to building codes. For illustrative purposes, we will focus on California.[130]

Public Utilities Code Sections 454.55 and 454.564[131] require the CPUC, in consultation with the California Energy Commission (CEC), to identify potentially achievable cost-effective electricity and natural gas efficiency savings and establish efficiency targets for electrical or gas corporations to achieve. Public Utilities Code Section 381 mandates that the CPUC "allocate funds spent to programs that enhance system reliability and provide in-state benefits including: (1) cost-effective EE and conservation activities . . ."[132]

The CPUC devotes approximately $1 billion per year in customer funds to energy efficiency programs, spread across all CPUC-jurisdictional energy utilities. The CPUC devotes another approximately $300 million per year to low-income energy efficiency programs. The CEC, for its part, develops building codes, appliance standards and also funds energy efficiency research. Utilities have filed "business plans" with the CPUC to administer energy efficiency programs for up to ten years. The CPUC is evaluating these plans in proceeding A.17-01-013.

The CPUC rejected a PG&E proposal to spend an additional $200 million per year to procure energy efficiency to partially offset the loss of capacity from PG&E's proposed closure of the Diablo Canyon Nuclear Power Plant (Diablo Canyon).[133]

Assembly Bill 793[134] directed California IOUs to provide incentives to residential and small and medium business (SMB) customers for "energy management technology" (EMT), which may include a product, service, or software that allows a customer to better understand and manage electricity or gas use in the their home or place of business. AB 793 also required the IOUs to educate residential and SMB customers about incented EMT offerings available to them. On March 23, 2017, the CPUC approved the utility AB 793 programs.

XIV. DEMAND RESPONSE

Demand response–compensation for the curtailment of electric use during periods of peak demand and high system marginal cost–is an increasingly integral feature of wholesale power markets by reducing peak system demands and forestalling the need for costly new generation capacity. On

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128 Decision and Order No 34924, *Instituting a Proceeding to Investigate Distributed Energy Resource Policies,* Docket No 2014-0192 (Haw 20 October 2017), online: <https://dms.puc.hawaii.gov/dms/OpenDocServlet?RT=&document_id=91+3+ICM4+LSDB15+PC_DocketReport59+26+A1001001A17J23B15234B0218118+A17J23B51330I324501+14+1960>.

129 See, e.g., *Energy Independence and Security Act of 2007*, HR 6, 110 Cong (2007).

130 The American Council for an Energy Efficient Economy (ACEEE) ranks states annually on the extent to which states promote energy efficiency. In 2016, the two states tied for first place on the "ACEEE Scorecard" were California and Massachusetts, online: Weston Berg et al, "The 2016 State Energy Efficiency Scorecard," *American Council for an Energy-Efficient Economy* (26 September 2016), online: < http://aceee.org/research-report/u1606 >.

131 Cal Pub Util Code §§ 454.55, 454.564.

132 Cal Pub Util Code § 381.

133 Decision Approving Retirement of Diablo Canyon Nuclear Power Plant, Cal Pub Util Comm'n, Decision 18-01-022 (16 January 2018), online: http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M205/K423/205423920.PDF>.

134 US, AB 793, *An act to amend Section 2790 of, and to add Section 717 to, the Public Utilities Code, relating to public utilities*, 2015-2016, Cal, 2015.

December 28, 2017, FERC staff issued its annual Assessment of Demand Response and Advanced Metering Staff Report.[135] The report provides a comprehensive survey of state and local demand response activities. Perhaps the more interesting observation in the report is that "the contribution of demand resources to meeting peak demand decreased to 5.7 per cent in 2016 from 6.6 per cent in 2015."[136] Demand response programs are growing, but peak demand is growing faster.

XV. THE RISE OF COMMUNITY CHOICE AGGREGATION

Community Choice Aggregators (CCAs) are governmental entities that purchase power on behalf of, and sell that power at retail to, their residents and businesses. CCAs displace private utilities from the power procurement role within the CCA footprint, though customers may opt back in to utility service. The incumbent utility remains responsible for transmission and distribution services.

CCAs are legal in a handful of U.S. states – California, Illinois, Massachusetts, New York, New Jersey, Ohio and Rhode Island. Legislation authorizing CCAs has been in place in some cases for over two decades. However, CCA formation has remained slow until recently.

After a delayed start – Marin formed the state's first CCA in 2010 – CCA formation has rapidly accelerated in California. By late 2017, CCAs had formed in San Francisco, Sonoma County, San Mateo County, Lancaster, Richmond and parts of Contra Costa County. New CCAs that the CPUC certified to begin serving customers in 2017 were Silicon Valley Clean Energy, Apple Valley Energy, Hermosa Beach Choice Energy and Redwood Coast Energy Authority. CCAs are now on track to serve up to or over half of the load historically served by private utilities, including customers currently served by Southern California Edison in Los Angeles County. ■

135 Fed Energy Regulatory Comm'n, *Assessment of Demand Response and Advanced Metering Staff Report* (28 December 2017), online: <https://www.ferc.gov/legal/staff-reports/2017/DR-AM-Report2017.pdf>.
136 *Ibid* at 1.