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MISSION STATEMENT

The mission of Energy Regulation Quarterly (ERQ) 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 ERQ 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 ERQ will express their independent views on the issues.

EDITORIAL POLICY

The ERQ is published online by the Canadian Gas Association (CGA) 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 ERQ will maintain a "roster" of contributors and supporters 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 ERQ 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 (www.energyregulationquarterly.ca).

ENERGY REGULATION QUARTERLY

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Rowland J. Harrison, Q.C. and Gordon E. Kaiser
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Perhaps the word that best describes the current Canadian energy regulation landscape is "challenged". The issues facing energy policy-makers and regulators are profound, described by many as "existential". The challenges, however, go well beyond addressing specific policy and regulatory issues to redefining the very role of energy regulation — and of regulators in particular — as it has been understood until now.

By the time this Issue of *Energy Regulation Quarterly* (*ERQ*) is released, the National Energy Board — established by Parliament 60 years ago, in 1959, to be a truly independent, arm's length decision-maker[1] — will have been abolished and replaced by the Canadian Energy Regulator (CER). Public discussion of the legislation enacting this change, Bill C-69[2], has focused on the implementation of a fundamental restructuring of the assessment process for proposed energy infrastructure and other developments under federal jurisdiction. Little attention has been paid to the fact that the structure and organization of the CER are based on a model that is radically different from past models for energy regulation tribunals in Canada. It is a model that was implemented in Alberta with the establishment in 2012 of the Alberta Energy Regulator and is being implemented in Ontario to "reform" the Ontario Energy Board.

In essence, the model trifurcates the roles of regulatory decision-making (vested in the case of the CER in a Commission, consisting of up to seven full-time "commissioners" and an unspecified number of part-time commissioners), executive management (vested in the Chief Executive Officer, who is neither a commissioner nor a member of the board of directors) and "governance" (vested in a part-time board of directors, under the leadership of a part-time Chairperson). The model might be described as a "seismic" shift in approach, with clear implications for "independence" as that principle has previously been understood in the context of energy regulation.

The Cambridge English Dictionary definition of "seismic" includes: "having very great and **usually damaging** effects…"[3] Future Issues of *ERQ* will explore the implications for the role of energy regulation tribunals and regulators.

Meanwhile, the proposed restructuring of the Ontario Energy Board is outlined in this Issue of *ERQ* by David Stevens in "Ontario Government takes steps to reform the Ontario Energy Board" and Bob Heggie discusses some governance and management issues raised by the new model in "Governance of Administrative Agencies: Is the tail wagging the dog?"

An important role for *ERQ* continues to be to provide analysis and context that go beyond the day-to-day headlines. In the lead article in this Issue of *ERQ*, "Canada's Energy Future in an Age of Climate Change: Public Confidence and Institutional Foundations for Change"[4], Michael Cleland and Monica Gattinger make a persuasive argument that "Canadian climate policy from the early 1990s is most easily understood if one assumes that

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[1] Harrison, "The Elusive Goal of Regulatory Independence and the National Energy Board: Is Regulatory Independence Achievable" What Does Regulatory 'Independence' Mean? Should We Pursue It?" (July 2013) 50:4 Alta L Rev 757.

[2] Bill C-69, *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*, 1st Sess, 42th Parl, 2019 cl 28 (as passed by the House of Commons June 21 2019).

[3] Cathy Armor, *The Cambridge English Dictionary*, (Cambridge: United Kingdom, 2019) *sub verbo* "seismic", online: <https://dictionary.cambridge.org/dictionary/english/seismic> (emphasis added).

[4] This article is the most recent contribution to Energy Regulation Quarterly generated by ongoing research by the Positive Energy project at the University of Ottawa.

energy and climate imperatives had simply been disconnected." The country has achieved little on greenhouse gas emissions reductions, they assert, while the viability of the country's single largest export industry has been compromised. Finding solutions, they add, will require, among other things, resolving questions around the roles and responsibilities of decision-making institutions and their essential architecture.

Jeffrey Simpson's article on "Canada's Climate Change Challenge" also discusses the need for balance in the climate change/energy development debate. While he believes there is a growing awareness of climate change as an issue, "there is also support for balanced and commonsensical approaches that reject apocalyptic rhetoric, unreasonable solutions and little, if any concern, for people who work in resource-dependent areas where there are few, if any alternatives, to developing them."

This Issue of *ERQ* also includes the regular "Washington Report" feature, by Robert S. Fleishman, covering key federal and state energy and environmental regulatory and litigation developments in the U.S. from 2018 through mid-2019.

ERQ is collaborating in conducting a series of interviews with the chairs of Canada's public utility tribunals, as described more particularly in the introduction in this Issue to the interview with Mark Kolesar, Chair of the Alberta Utilities Commission.

Scott Hempling provides a view on "'Regulatory Settlements': When Do Private Agreements Serve the Public Interest?" He cautions that settlements are double-edged swords: "They have positive value if they solve public-interest challenges, negative value if they edge the commission out of its statutory role."

In the public policy world of today, energy and climate change are inextricably interlinked and, increasingly, the debate focuses on mechanisms for pricing carbon. Now, the debate has moved to the courts where four provinces have launched constitutional challenges to the federal government's legislation imposing a carbon pricing regime on provinces that do not meet a threshold standard. In "Canada's Existential Crisis over Climate Change Regulation: Tempest in a Teapot?", Lisa DeMarco and Jonathan McGillivray review the current litigation that is headed to the Supreme Court of Canada. The authors point out that, notwithstanding what might appear to be another "existential crisis" (as reflected in their title), "a closer examination of the evidence in all of the proceedings tells a very different story — a story of nation-wide consensus on the urgency of climate change and the necessity of addressing it, in part through carbon pricing." ■

ONTARIO GOVERNMENT TAKES STEPS TO REFORM THE ONTARIO ENERGY BOARD

David Stevens

In March 2019, the Ontario Government announced a series of plans aimed at reforming the structure of the Ontario Energy Board (OEB), as well as lowering electricity costs for consumers.[1] Some of the Government's proposed plans will be implemented through legislative amendments set out in the now-passed Bill 87[2] (which amends the *Ontario Energy Board Act*[3] *(OEB Act)* and other statutes), while other changes are to be implemented through regulatory and policy updates. The changes to the *OEB Act* were passed by the Legislature and received Royal Assent on May 9, 2019.[4] As of July 2019, no date has been provided as to when the changes will be proclaimed into force.

A main part of the planned changes is to update the governance and accountability within the OEB, assigning the strategic oversight to a board of directors, with administration to be coordinated by a chief executive officer and adjudication to be undertaken by commissioners (overseen by a chief commissioner). These changes are intended to "reform" the governance structure of the OEB, and "ensure a greater separation of its administrative and adjudicative functions".[5]

BACKGROUND – THE OEB MODERNIZATION REVIEW PANEL

As explained by the Government when Bill 87 was released, the planned changes to the structure of the OEB were "informed" by the recommendations in the Ontario Energy Board Modernization Review Panel Final Report.[6]

The OEB Modernization panel was appointed by the previous Ontario Government in December 2017 as an expert panel to conduct a review of the OEB, examine best practices from other jurisdictions and report back about potential changes and improvements. The Panel began its work in early 2018, meeting with many interested parties, and gathering information. In August 2018, the Review Panel was asked by the current Ontario Government to continue its work. On March 15, 2019, the Ontario Government published the OEB Modernization Report. No explanation is provided as to why

[1] Ministry of Energy, Northern Development and Mines, News Release, "Ford Government Taking Bold Action to Fix Hydro Mess" (21 March 2019), online : <https://news.ontario.ca/mndmf/en/2019/03/ford-government-taking-bold-action-to-fix-hydro-mess.html>. See also David Stevens, "Ontario Government Releases Its Plan to Reform the OEB and Reduce Electricity Costs", (2 October 2012), *energy insider* (blog), online: <https://www.airdberlis.com/insights/blogs/energyinsider/post/ei-item/ontario-government-releases-its-plan-to-reform-the-oeb-and-reduce-electricity-costs>.

[2] Bill 87, *An Act to amend various statutes related to energy*, 1st Sess, 42nd Leg, Ontario, 2019, online: <https://www.ola.org/sites/default/files/node-files/bill/document/pdf/2019/2019-05/b087ra_e.pdf>.

[3] *Ontario Energy Board Act*, SO 1998, c 15, Schedule B amended RSO 2019, c 6, Schedule 2, online: <https://www.ontario.ca/laws/statute/98o15> [*OEB Act*].

[4] Bill 87, *An Act to amend various statutes related to energy*, 1st Sess, 42nd Leg, Ontario, 2019 (assented to 9 may 2019), SO 2004, online : <https://www.ola.org/en/legislative-business/bills/parliament-42/session-1/bill-87/status>.

[5] Ontario, Ministry of Energy, Northern Development and Mines, "Building a Modern, Efficient, and Effective Energy Regulator for Ontarians", Backgrounder (Toronto: Queen's Printer for Ontario, 21 March 2019), online: <https://news.ontario.ca/mndmf/en/2019/03/building-a-modern-efficient-and-effective-energy-regulator-for-ontarians.html>.

[6] Ontario Energy Board Modernization Review Panel, (Toronto: October 2018), online: <https://files.ontario.ca/endm-oeb-report-en-2018-10-31.pdf>.

the Report (which is dated October 2018) was not released until March 2019.

The key recommendations in the OEB Modernization Report include the following:

- The OEB should be renamed the Ontario Energy Regulator (OER) and should adopt a new governance framework. This governance framework is proposed to include a president, a chief commissioner responsible for adjudication and a board of directors. The proposed governance structure is shown in the image below.[7]

- The OER's president and chief commissioner should develop a plan "to enhance the independence, the certainty and the efficiency of the adjudication process".

- The OER should be required to report to a committee of the Ontario Legislature about the OER's "plans, priorities and performance" on a periodic basis.

- The OER should develop new performance indicators focused on matters like decision time, stakeholder satisfaction and organizational excellence.

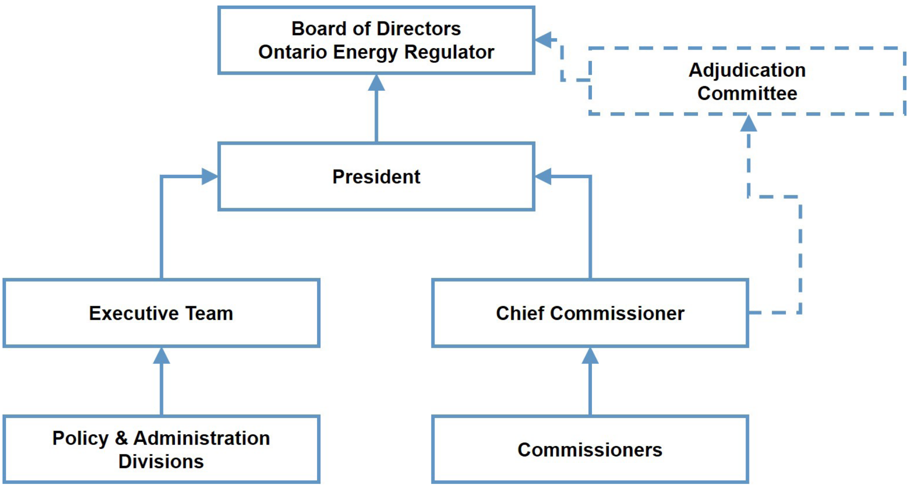
- The OER should develop and maintain a prioritized list of emerging policies to address and a related schedule. This should be developed through consultation with stakeholders.

- The OER should address regulatory treatment of innovation within its first year.[8]

Details about how each of these recommendations could be implemented are set out in the body of the OEB Modernization Report. The Appendices to the Report describe the roles and responsibilities and experience of other energy regulators in Canada and elsewhere and summarize the information and comments provided to the Review Panel by stakeholders.

CHANGES TO THE OEB ACT THAT WILL REFORM THE OEB

Bill 87 includes a series of amendments to the *OEB Act* to amend its governance structure and operations. To large extent, these amendments



[7] *Ibid* at 12.

[8] *Ibid* at 12–13.

are consistent with the recommendations of the OEB Modernization Report.

Among the key changes to the OEB's structure and governance are the following[9]:

- A board of directors will be created, and they will be responsible for governance and strategic oversight of the OEB, "interfacing" with the Minister of Energy and the Government. The board of directors will be composed of between 5 and 10 members, including a board chair.[10]

- The board chair will "oversee the efficient administration of the business of the board of directors" and "be accountable to the Minister for the independence of persons and entities hearing and determining matters within the Board's jurisdiction in their decision-making".[11]

- The board of directors will establish an "adjudication committee" that may require the chief commissioner to provide information "respecting the efficiency, timeliness and dependability of the hearing and determination of matters over which the Board has jurisdiction.[12]

- The board of directors will appoint a chief executive officer (CEO) to provide executive leadership for all operational and policy aspects of the OEB.[13]

- The board of directors will appoint between 5 and 10 commissioners to take on the adjudicative roles for hearing and determining matters within the OEB's jurisdiction. No person who has any material interest in any market participant or who is a director or officer of a market participant, generator, utility or similar entity is eligible to be a commissioner.[14]

- The board of directors will, on the recommendation of the CEO, appoint a commissioner to the position of chief commissioner. The chief commissioner will assign cases and "ensure the efficiency, timeliness and dependability of the hearing and determination of matters over which the Board has jurisdiction".[15]

Implementation of the new roles at the OEB will require some transition, as described in the amendments to the *OEB Act*. Among other things, the initial appointments of a CEO and commissioners will be made by the Lieutenant Governor in Council, rather than by the OEB's new board of directors.[16]

The transition has already begun. The prior Chair/CEO of the OEB has now departed her role. As set out in the new provisions of the *OEB Act*, that role will be filled by several different people in the future. No announcements have yet been made as to when the changes to the *OEB Act* will be proclaimed into force, nor about who will be appointed to the OEB's CEO, board chair or chief commissioner roles. ■

[9] Other changes to the *OEB Act* are intended to reduce "duplicate responsibilities in transmission procurement" between the OEB and the Independent Electricity System Operator (IESO), and to take away the OEB's statutory obligation to promote the education of consumers. See *OEB Act*, *supra* note 3, ss 97(1), 97(3).

[10] *Ibid*, s 4.1.

[11] *Ibid*, s 4.1(9).

[12] *Ibid*, ss 4.1(15)–(16).

[13] *Ibid*, s 4.2.

[14] *Ibid*, ss 4.3(1)–(2).

[15] *Ibid*, ss 4.3(3), 4.3(11).

[16] *Ibid*, ss 4.2(8), 4.3(16).

GOVERNANCE OF ADMINISTRATIVE AGENCIES

Bob Heggie

IS THE TAIL WAGGING THE DOG?

Good corporate governance is fundamental to any effective, well-managed corporate entity.

This principle applies equally to administrative agencies within a government framework. However, tribunals carrying out a quasi-judicial function within a parliamentary system present unique accountability and independence issues.

For over a century there has been an unresolved problem in Canadian political theory presented by the competing objectives of simultaneously maintaining the independence of adjudicative agencies while holding them accountable for their decisions.

With the creation of the Alberta Energy Regulator in 2012, the evolution of the National Energy Board as the Canadian Energy Regulator and the Ontario Energy Board as the Ontario Energy Regulator, both in 2019, a new governance model has emerged for three of Canada's largest and most important regulatory bodies that has laid plain the issues that arise when independent adjudicative bodies are placed under more direct control by their political masters.

This article will discuss some governance and management issues raised by this new governance structure and question whether the approach will have the advantages claimed when compared to the status quo or other incremental approaches.

THE PREMISE

There are two general principles and two specific realities about agency governance:

Principle 1: Form (or structure) should follow function.

Reality 1: The functions that are performed by adjudicative administrative agencies are complex, diverse and specialized. One size does not fit all. Legislative templates are a blueprint for box tickers that ignore the value of intelligent exercise of discretion in designing a successful agency.

Principle 2: Corporate governance provides an architecture of accountability — but architecture in itself does not deliver good outcomes.

Reality 2: People are the key. Effective agencies depend on behaviours and relationships more than procedures and structures.

THE GOVERNANCE CONTEXT IN WHICH ADMINISTRATIVE AGENCIES OPERATE

Agency powers and authority are assigned to it by the legislature. Agency accountability is to the legislature. Only the legislature can disband an agency or change its mandate.

Individual Commission or Board members are typically appointed by the Lieutenant Governor in Council (provincial) or the Governor in Council (federal). Only the Lieutenant Governor/Governor in Council can cancel the appointments. Individual Commission members are accountable to the Lieutenant Governor/Governor in Council.

The Lieutenant Governor/Governor in Council approves Cabinet decisions and so when decisions are said to be made by the Lieutenant Governor/Governor in Council those decisions are in reality, decisions of Cabinet. The *Government Organization Act* specifies that there will be a responsible minster for each act of the legislature.[1]

In practical terms, agencies are accountable to the legislature through the responsible minster and individual Commission members are accountable to the Lieutenant Governor/Governor in Council through the responsible minister.

The accountability for adjudicative decisions for many agencies lies with the Court of Appeal on questions of law or jurisdiction, and ultimately, the legislature through legislative change. With respect to financial and administrative functions, there are well established procedures and controls already in place to provide robust accountability mechanisms. Through the responsible minister an agency is accountable to the legislature through the legislative committee process. The estimates debates in Committee of Supply are designed to review initial spending budget proposals. Post spending review is carried out by the Auditor General and the Public Accounts Committee.

In addition, certain agencies are financially and administratively accountable to the legislature through various directives related to governance and accountability, financial management, human resource management and procurement promulgated by Treasury Board, Cabinet and the Ministry of Finance under the authority of other acts of the legislature.

GOVERNANCE MODELS

Central to the governance structure of a quasi-judicial adjudicative agency is demonstrating that the agency operates at arm's length from government, is immune from short term political and interest group pressures and that decisions about the sector are made fairly. While there are a number of possible approaches to corporate governance systems within administrative agencies, the following briefly summarizes and comments on the options that are most relevant for an adjudicative agency.

Independent adjudication role

This approach would have the agency member fill only an adjudication role and would have a separate staff organization, headed by other than an agency member that would handle financial and administrative matters and any other regulatory issues, independent of the appointed members. The main advantage of such an approach would be the preservation of independence for the agency members in the adjudication role, and allowing them to focus all of their time and effort on adjudication.

Corporate board of directors

A board of directors type of governance model involves the provision of strategic direction at a very high level and of certain financial and other controls. It is typically a part time assignment.

The corporate board of directors is typically implemented in two possible structures: unitary or two tiered. Unitary boards share responsibility between executive and non-executive directors while two-tiered boards separate responsibility between management and a supervisory board.

Committee of the whole

This governance model would have the agency members involved in essentially all matters related to its responsibilities. Attempting to involve all of the agency members in all issues, coupled with the time-consuming adjudication role, could place major time demands on the agency members. In turn this could mean that all agency members would have some relatively shallow involvement in all matters, and the quality of decisions related to such matters could suffer. Additionally, it could lead to delays, wasted staff time and cause friction and a loss of respect between the agency members and staff.

Specific committees

This approach might involve a number of committees, with two or so agency members and selected senior staff that would be given

[1] *Government Organization Act*, RSA 2000, c G-10, online: <http://www.qp.alberta.ca/1266.cfm?page=g10.cfm&leg_type=Acts&isbncln=9780779806836>.

the responsibility to deal with certain matters. The delegation of specific matters to committees could, in some cases, include the making of the final decision, with a report back to the entire board. In other cases, the committee would be charged with bringing recommendations back to the full board to deal with.

The triumvirate structure

The Alberta Energy Regulator structure, similar to structures proposed for the Canadian Energy Regulator and the Ontario Energy Regulator, is based on a triumvirate model. The model is asserted to better address key issues of independence and accountability.

This "three-legged" structure separates corporate board, management and adjudicative functions. The critical characteristic of the triumvirate structure is the virtually complete split between the adjudicative function and the balance of the organization's functions.

ASSESSMENT

The fundamental problem in fragmenting the governance framework of an adjudicative agency is deciding just what and whose interest the organization is supposed to protect given the agency is primarily a guardian of the public interest and is accountable to a responsible minister. A traditional corporate board's responsibility is a fiduciary duty towards the corporations they oversee. This creates a conflict between the interests of the organization and the interests of the public.

The adjudicative functions must be guided by founding legislation while safeguarding the public interest, subject only to review by courts or by the legislature changing the law.

An asserted benefit of the triumvirate model is increased independence from government or interest-group politics.

A separate buffered governance board composed of stakeholder representatives, or non-experts or political appointees will have its own problems and challenges. Limited, direct current knowledge of the industry and potential influence by political factors among them.

Recall the unitary model largely employed for decades by adjudicative agencies. Combined CEO and board chair with an integrated management structure. Oversight of the CEO/chair was provided through the responsible minister. Such a structure requires a strong individual and the ability to make executive decisions — not a part-time chair, separate from the executive and the chief hearing commissioner.

The unitary structure provides a focused entity with clear accountabilities, rather than a diffused and fragmented arrangement. Communications, resources, expertise and accountability are unnecessarily divided in a three-legged structure, when an inherently integrated unitary structure provides a clear, relatively manageable approach.

The legislation establishing adjudicative agencies typically assigns a number of important responsibilities to the agency and then to the members that constitute the agency. In order to discharge those responsibilities in an effective manner, the members need a degree of knowledge and involvement that goes beyond those typically associated with a corporate board of directors structure or elected members of government.

Legislation that mandates a system where agency members are only adjudicators is unnecessary and may reduce the effectiveness of the agency in delivering its regulatory objectives. A complete separation of agency members from the other agency operations, including regulatory and finance/administration functions will preserve the independence of members and allow them to focus all of their time on adjudications.

However, in a regulatory system that is broad and complex, members are better served by having a degree of involvement in the broader work of the agency. This will mean varying degrees of involvement depending on the function.

Integration of members will, in addition to improving proper discharge of responsibilities, allow members to be proactive to new issues and challenges, foster an effective relationship between agency staff and members and create a system that is unified, easy to describe and understand and manage.

Financial and administration functions represent the areas where there is the least need and rationale for member involvement. The need can be satisfied with a committee approach involving the chair, chief executive and a subset of the agency members. There are clearly variations on this approach, however the end result is members are not using their time extensively in delivering financial and administrative matters, however the complexities, expense and bureaucracy of a third governance leg, board of directors, is avoided.

Reporting and communication between members and staff would clearly still be required, but at the right level and frequency.

CONCLUSIONS

The recent movement to a three-legged governance model for adjudicative agencies seems largely based on theoretical corporate governance, with little consideration for the existing governance, accountability mechanisms and complexities of operating a quasi-judicial agency in the parliamentary system. Nor does it seem to consider whether this new structure would improve the agency objective of delivering its responsibilities in the most effective manner.

The separation of responsibilities among administrative/financial, management and adjudicative functions is likely to make it harder, not easier, to develop effective managerial, governance, performance and accountability arrangements.

If changes are required, a minimum incremental change approach is preferable, particularly given the risk of unintended consequences in making large changes to a complex and nuanced institutional relationship.

Issues of governance and accountability are important to effectively run adjudicative agencies — but as the tail, not the dog. ■

CANADA'S ENERGY FUTURE IN AN AGE OF CLIMATE CHANGE: PUBLIC CONFIDENCE AND INSTITUTIONAL FOUNDATIONS FOR CHANGE

*Michael Cleland and Monica Gattinger**

INTRODUCTION: LEARNING FROM HISTORY

What if Canada developed climate change policy as if energy mattered? While this question may sound glib, Canadian climate policy from the early 1990s is most easily understood if one assumes that energy and climate imperatives had simply been disconnected.

The following chart provides a picture of four successive international commitments made by Canada's federal government, each of which could be said to be fundamental expressions of climate policy. It plots them against the country's actual greenhouse gas emissions performance over that time. An observer with an inclination to learn from history might wonder whether Canada has been missing something important in its policy thinking over the past thirty years. As we look out to the really important mid-century goal of the 2016 Paris Agreement[1], there is an interesting symmetry in that mid-century is now approximately thirty years in the future. Might there be some useful policy lessons from the past thirty years that could be applied to policy for the next thirty? To our knowledge neither policymakers nor many analysts and advisors have sought to do this. That is our starting point.

A few key learnings have emerged over the last thirty years. The first concerns public confidence and trust in decision-making systems. Confidence and trust have steadily declined[2] over those three decades and, on its face, with good reason. Governments have often over-committed and underperformed on climate. This relates to the second learning about progress on emissions reductions. Despite much debate, as shown in the above graph, the country has achieved little on greenhouse gas emissions reductions.[3] At the same time, rising social opposition to energy infrastructure projects of all sorts and lack of clarity over the future of Canada's oil and gas industry in an age of climate change have undercut not only public but, increasingly, investor confidence.

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[1] Schleussner et al, "Science and Policy Characteristics of the Paris Agreement Temperature Goal" (2016) 6: Nature Climate Change 827.

[2] "2017 Edelman Trust Barometer" (17 January 2017), *Edelman* (blog), online: <https://www.edelman.com/research/2017-edelman-trust-barometer> [*Edelman*].

[3] Rosenbloom et al, "Transition Experiments: Opening Up Low-Carbon Transition Pathways for Canada through Innovation and Learning" (2018) 44:4 Canadian Public Policy 368.

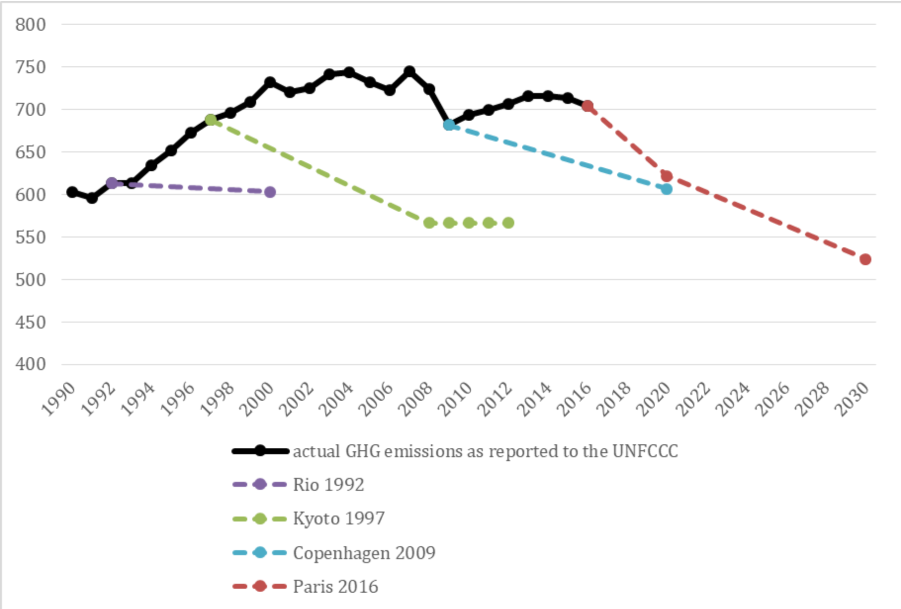
The consequence has been to compromise the viability of the country's single largest export industry, and in some parts of the country, has compromised a pivotal attribute of energy policy in the public mind: affordability. This is the third lesson of the last thirty years: affordability, competitiveness and the investment climate need to be taken into consideration when it comes to climate policy. In short, economic imperatives matter.

With these three lessons in mind, our fundamental proposition is that the most important lesson to emerge over the last thirty years is that climate policy can only be truly effective if it is developed as if energy mattered.

This article begins to lay out how that might done, drawing on recent research and engagement at the University of Ottawa's Positive Energy initiative.

Launched in 2015, Positive Energy's mandate is to identify how to strengthen public confidence and trust in energy decision-making systems.[4] Positive Energy's focus for the coming three years of research and engagement is on Canada's energy future in an age of climate change, specifically, how to strengthen confidence in public authorities making decisions about Canada's energy future.[5] Research and engagement will tackle three of the most important barriers to reconciling these two vital areas of public policy: the destructive effects of polarization on debate, public confidence and decision-making; the increasing ambiguity and confusion as to where public decision-making authority actually resides and should reside; and the models of and limits to building consensus so that concrete actions by governments (federal, provincial, territorial, municipal, Indigenous), regulators and private investors — programs, regulations,

Figure 1: Canadian Greenhouse Gas Emissions, 1990 to 2016 ($MtCO_2e$) and Canada's International Commitments



Source: Figure produced by Positive Energy with data from Environment and Climate Change Canada (2018b)

[4] For more information on Positive Energy, see, online: <https://www.uottawa.ca/positive-energy>.

[5] Michael Cleland & Monica Gattinger, "Canada's Energy Future in an Age of Climate Change: How Partisanship, Polarization and Parochialism are Eroding Public Confidence" (2019): University of Ottawa, online: <https://www.uottawa.ca/positive-energy/sites/www.uottawa.ca.positive-energy/files/canadas_energy_future_design_rd_web.pdf> [Canada's Energy Future].

projects, new businesses — can move forward expeditiously and cost-effectively.

Several themes have emerged from Positive Energy's research and engagement to date that will inform the work program going forward. All of the themes will be of vital interest to the energy regulatory community, by which we mean not only regulators but also policymakers who create and sustain regulatory systems and stakeholders who work within those systems. For purposes of this article, we have chosen to focus on two of the themes: language and decision-making institutions.[6]

WHAT IF CANADA DEVELOPED ENERGY AND CLIMATE POLICY AS IF LANGUAGE MATTERED?

A key element of the larger societal context for the energy and climate debate is the rise in polarization around many policy and political issues throughout the western world.[7] In other words, polarization over energy and climate issues is far from unique. Still, energy and climate stand out due to several factors: a surfeit of scientific complexities and controversies, an extremely weighty and multi-dimensional set of economic consequences associated with both action and inaction, diverse effects on citizens and communities that are sometimes difficult to reconcile with the broader societal interest, complex questions of jurisdiction, and distinct and highly variable regional implications.

Flowing from and contributing to this polarized environment are questions of language, by which we mean terminology, vocabulary and framing.

Positive Energy's research and engagement efforts over almost five years reveal that many thoughtful people see choice of language as a vital aspect of the debate. The scholarly literature on this topic is relatively scant, but it does underscore the important role of language, narrative and terminology in energy and climate change policy and politics.[8] At the extreme, language has become not so much a means for communicating but a mechanism for either driving polarization or for avoiding actually coming to grips with matters.

Looking again through the lens of history it is interesting to reflect on the evolution of language surrounding questions of public or community influence on decisions around energy and resource projects. The term NIMBY (Not In My Backyard), although rather clever as an acronym and possibly useful as a short form, also very quickly became pejorative[9] and a signal that the user was frustrated and treating community concerns dismissively. In many instances, frustration with community opposition was justified, but so, in many cases, were community concerns justified. What was needed was respectful dialogue on all sides. Language in this case was polarizing in its effect.

The successor term "social licence" originated in the mining sector and was inherently more respectful of local concerns. It has emerged in Canada as a short form for the consultation and engagement that now accompanies virtually any project. But unhelpfully, the term as commonly used has acquired an ostensible meaning — framed cleverly but unhelpfully as "governments grant permits but communities grant permission"[10] — that is at odds with the foundations of representative government and generates confusion and uncertainty over who ultimately decides when it comes to a proposed energy project.

Turning specifically to the realm of climate policy, the term "clean" energy has become a commonplace, so commonplace in fact that it means whatever the user wants it to mean. For many in the forefront of the climate movement

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[6] For treatment of all themes, see *ibid*.

[7] Nik Nanos, *The Age of Voter Rage* (London: Eyewear Publishing, 2018).

[8] See e.g. Daniel Rosenbloom "Framing low-carbon pathways: A discursive analysis of contending storylines surrounding the phase-out of coal-fired power in Ontario" (2018) 27: Environmental Innovation and Societal Transitions 129; Daniel Rosenbloom, Harris Berton & James Meadowcroft, "Framing the Sun: A Discursive Approach to Understanding Multi-dimensional Interactions within Socio-technical Transitions through the Case of Solar Electricity in Ontario, Canada" (2016) 45:6 Research Policy 1275; Rupinder Mangat, Simon Dalby & Matthew Paterson, "Divestment Discourse: War, Justice, Morality and Money" (2018) 27:2 Environmental Politics 187.

[9] William R. Freudenburg & Susan K. Paster, "NIMBYs and LULUs: Stalking the Syndromes" (1992) 48:4 Journal of Social Issues 39.

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

it means zero greenhouse gas emissions (for example, the *100 per cent Possible* movement, which advocates for a shift to one hundred percent renewable energy). But for a local community concerned with air quality or with potential impacts on local ecosystems, "clean" can mean something quite different. For a producer or user of almost any source of energy, clean often means as clean as possible: highly efficient and with state-of-the-art pollution control and waste management systems.

For yet others, "clean" means renewable energy and specifically only wind, solar and a few others such as run of river hydro and geothermal sources. In this view, energy sources like large hydro and biomass, which are renewable under a dictionary definition but that have potentially large impacts on the landscape, don't count.

If, how and where nuclear energy fits in the world of clean energy as a non-emitting — but not "clean" in the view of some given the issue of waste — is far from clear. It is also far from clear what "counts" as clean in the oil and gas sector — if anything at all. Are emissions reductions technologies like carbon capture clean?

Thus, some terminology such as "NIMBY" could be directly dismissive and polarizing. In the cases of social licence or clean energy or renewable energy, language could be used as a short form to facilitate conversations, what Henry Kissinger is credited as having dubbed "constructive ambiguity". But more often, language seems to have become a way to avoid actually addressing underlying issues or allowing a user to sound progressive irrespective of whether any substantive meaning lies behind its use. If this is not directly contributing to polarization, then it is at best putting off the hard choices for another day.

The term "low carbon", also a commonplace, has emerged as another source of both ambiguity and polarization. The objective of climate policy is of course low emissions of greenhouse gases into the atmosphere.[11] But low carbon is often taken to exclude all fossil fuel energy[12] regardless of the efficiency with which it is used and dismissing the possibility of emissions being mitigated and managed. It has thereby acquired a technologically deterministic quality, and thus become not only a polarizing term but also a dangerous road for policy to follow, particularly in a time of rapid, disruptive and unpredictable technological change.

All of this has built a shaky foundation for another term that emerged in the context of the Paris agreement of 2016: the "transition" to a low carbon future. At a high level this term can be understood to refer to the Paris agreement goals for mid-century. But recent Positive Energy research and engagement[13] reveal that the term "transition" has certain characteristics. While it is widely used by academics, non-government organizations, companies, trade associations and governments, it has almost as many meanings as it has users. The key differences in interpretation relate to time frame, choice of fuel, choice of technology, structure of energy systems, energy production or energy use, human behaviour and social values.

"Transition" is a term that could be construed as being constructively ambiguous if it facilitates dialogue. It is a polarizing term if it is used in a way that is technologically deterministic or highly ambitious with respect to pace of change. This is particularly the case when it comes to Canada's oil and gas sector: if the term "transition" refers to the elimination of fossil fuels — rather than the aggressive reduction of emissions — it can be polarizing and stand in the way of productive debate. Similarly, ambitious time frames raise questions about feasibility[14] in political, economic, technical or social terms.

[11] Positive Energy has adopted the term 'low emissions' to ensure that our choice of language is focused on the objective rather than the means.

[12] See "Introduction" in Horace Herring, ed, *Living in a Low-Carbon Society in 2050* (Energy, Climate and the Environment Series, Palgrave Macmillan, 2012) 1; See also Frank W. Geels,"Regime Resistance against Low-Carbon Transitions: Introducing Politics and Power into the Multi-Level Perspective", *Theory, Culture & Society* 31:5 (2014) 21 [Geels].

[13] Aimee Richard, "Literature Review on Understandings of the Term Transition in Canada and Beyond" (2019): University of Ottawa, Positive Energy (available upon request); Marisa Beck with Michael Cleland & Aimee Richard, "Qualitative Research Study on Canadian Decision-Makers' Understandings of the term 'Transition" [forthcoming].

[14] See Geels, *supra* note 12 and Alain Gras, "The Deadlock of the Thermo-Industrial Civilization: The (Impossible?) Energy Transition in the Anthropocene" in *Transitioning to a Post-Carbon Society: Degrowth, Austerity and Wellbeing* (International Political Economy Series, London: Palgrave Macmillan, 2017).

But perhaps more than anything, in Canada, "transition" seems to be a term that leads to people talking past each other. It can be taken to imply inevitability when in fact any major energy system change, whether understood as process or end state, will require enormous acts of will and determination[15] on the part of policymakers and acceptance of (and, ideally, support for) some very tough choices[16] by citizens and consumers. It can also lead to complacency, or what we term "dangerous optimism,"[17] by masking the underlying scale of change that is called for.

The practical implications of language are, simply put, that all participants in energy and climate debates need to be constantly aware of the effect of the language they choose. Language can allow a conversation to begin or it can push people away from the table. It can lead to practical agreement or simply mask underlying disagreement and lead nowhere. It can allow political actors to claim certain credentials while masking the fact that they are really saying very little. And it can crystallize debate and lead to action or it can allow real choices to be put off for another day.[18] In short, language matters.

What if Canada approached energy and climate policy as if institutional foundations were as important as technology and economics to manageable change?

THROUGHOUT CANADA'S ALMOST 30 YEAR HISTORY SINCE THE RIO AGREEMENT OF 1992, TWO INTELLECTUAL DISCIPLINES HAVE DOMINATED THE DEBATE OVER ENERGY AND CLIMATE.

The first is science and engineering, specifically that underlying technological change. Many argue that the technology to underpin a low emissions economy exists[19] or, at the very least, that several decades of technological evolution have led us to the cusp of it existing. Taken to extremes, for some, "technology", in particular information technology and "smart" systems, but also electric vehicles, wind and solar power, and other new and emerging electricity-based technologies, are essentially all that is needed to reduce emissions. And this, despite the increasingly evident risks that accompany rapid technological change (viz social acceptance or lack thereof of technologies like smart meters, autonomous vehicles and artificial intelligence).

The other discipline is economics. Beginning in the early 1990s, economic modelers have regularly assessed the feasibility of targets. And while economists and models have often disagreed in their findings, the dominant question for policy has been whether targets, given certain assumptions about technology, are economically feasible.

But another lesson of the last 30 years of history in Canada is that if technological and economic feasibility are necessary conditions for change, they are far from sufficient.[20] In a democracy and particularly in one coping with low and fluctuating levels of trust in[21] and deference to[22] expertise and authority, social acceptability and the scholarly disciplines and institutions lying behind it are determining factors at least as weighty as technology and economics.

As Canada reflects on what might drive or shape change, the country should, therefore, look beyond conventional wisdom and clichés concerning technology and economics and ask whether energy and climate policy are being framed as if people mattered. With that question in mind, Canada needs to look to whether institutions are up to the job and where decision-making responsibility should

[15] Sam Fankhauser, "A practitioner's guide to a low-carbon economy: lessons from the UK", *Climate Policy* 13:3 (2013) 345 [Lessons from the UK].

[16] Jeff Beyer, "A Climate Tale of No Tactics" (2010) 36:6 Alternatives J 38.

[17] Canada's Energy Future, *supra* note 5 at 10.

[18] Daniel Rosenbloom, "Framing Low-carbon Pathways: A Discursive Analysis of Contending Storylines Surrounding the Phase-out of Coal-fired Power in Ontario" (2018) 27: Environmental Innovation and Societal Transitions 129.

[19] Lessons from the UK, *supra* note 15.

[20] Timothy Foxon, "Transition pathways for a UK low carbon Electricity future", *Energy Policy* 52: (2013) 10.

[21] *Edelman*, *supra* note 2.

[22] See Neil Nevitte, *The Decline of Deference: Canadian Value in Change in Cross National Perspective* (Toronto: University of Toronto Press, 1996) and "The Decline of Deference Revisited: Evidence after 25 Years" (Paper delivered at the Mapping and Tracking Global Value Change: A Festschrift Conference for Ronald Inglehart, University of California Irvine, 11 March 2011.

rest. Positive Energy has, therefore, made this an important area of focus for research and engagement in the coming three years. There are several obvious dimensions to consider, some of which may lead to the conclusion that the institutional architecture simply is what it is, and, therefore, is something all actors have to learn to work with. But institutions can adapt, adjust and transform over time. Indeed, many decision-making institutions have changed or tried to change over the past number of years, which opens up many avenues for constructive consideration as to how they might best evolve.

Start with the most basic institutional structure of all, which is the division of federal and provincial powers laid out in the constitution and interpreted by the courts over time. If one were setting out today to design arrangements that would facilitate an effective approach to energy and climate, it seems doubtful that Canada's approach to federalism would be the preferred architecture. In recent years, that already difficult context has become more so as the federation becomes more fractured and regional divisions over energy and climate have grown. Nonetheless, it seems likely that for those leading energy and climate policymaking, the federal system is essentially context within which they have to work. Paying careful attention to language and other measures to attenuate polarization may well be a good place to start.

Perhaps a much bigger challenge but one that may be more tractable is the capacity of governments to articulate policy, and to plan, execute and sustain policy coherence on contested topics like energy and climate within and across electoral cycles. In an increasingly fractured and polarized polity it appears that even when coherent policy is articulated and implemented, it may well not survive a change of government. Recent years' experience with energy and climate policy reversals and policy incoherence both within and across governments suggests that this challenge has not diminished despite (or perhaps even because of) the growth of analytical and communications tools at their disposal. It is worth asking how much of this is just the way things are, or, alternatively, whether institutional reform could ameliorate the situation.

Arguably the most important institutional change in Canada is the ascendance of Indigenous governments as key institutional actors in energy and climate decision-making.[23] This relates to both their growing roles as governments in and of their own right exercising control over their territories, but also their capacity to act expertly and consistently, and to influence, engage and cooperate (or not) with actors beyond their borders. In many ways, this is a good news story, but there is much work to be done both by Indigenous communities themselves and by other institutions working with them to develop a shared understanding of respective roles and responsibilities, as well as to build capacity and establish frameworks for cooperation.

The emergence of local governments in the realm of energy and climate is also a good news story[24] but is similarly fraught with potential for parochialism to overwhelm larger societal interests.[25] Local governments are actors with the capacity to incorporate energy and climate into their roles as land use planners, providers or owners of local infrastructure and as influencers in decisions beyond their jurisdiction. Some of this relates to the vexed questions of "NIMBY" and social licence. Much of it, however, is new.[26] And much remains to be done to define roles and responsibilities, as well as to develop the capacity to exercise local roles and responsibilities constructively within the larger context of Canada as a whole.

Many institutions outside of government such as non-government organizations, think tanks, industry associations, and trade unions have over time been both facilitators of and impediments to constructive policy. For the future, as Canada looks to overcome the

[23] Stewart Fast, "Who Decides? Considering the Roles of Local and Indigenous Authorities in the Canadian Energy Decision-Making" (2017) University of Ottawa,Positive Energy System Under Stress-Interim Report #1.

[24] See e.g. the work of QUEST (questcanada.org) with hundreds of local governments across the country.

[25] *Ibid.*

[26] Eve Bourgeois, "Literature Review on The Role of Local in Canada's Energy Future in an Age of Climate Change: Municipal Governments and Communities" (2019): University of Ottawa, Positive Energy (available upon request). Municipal governments have typically been active providers of transport, water, sanitation and a variety of social services but except where they have been owners of local power distribution utilities they typically have had only limited roles respecting energy and limited capacity to understand or manage it in a broader sense.

malign effects of partisanship and parochialism in formal political discourse, a fruitful line of inquiry relates to how such unofficial institutions might further develop their potential to be constructive contributors to effective energy and climate policy.

In the meantime, over the past few decades, certain trends have emerged when it comes to regulatory bodies and their capacity to act. There has been, arguably, an erosion of what might be termed the regulatory compact. Regulators, as we use the term here, are bodies that operate with some measure of autonomy from politics and governments. They operate of course within legislative and policy frameworks established by political actors, but traditionally as they deal with individual applications they have functioned as deciders, as quasi-judicial actors — in essence, courts of first instance and triers of fact — whose work led to stable decisions that had broad legitimacy and provided certainty for interested parties. Looking to the future, this system faces fundamental questions about its perceived legitimacy in the eyes of affected stakeholders, and even in the eyes of governments. Perhaps just as fundamental is the question of whether regulators are deciders or merely advisors to political decision-makers. Canada needs to ask itself what new — or renewed — regulatory compact is most appropriate to the challenge of managing energy and climate policy in the twenty-first century.

Finally, Canada needs to consider the role of the courts. Typically, quasi-judicial actors such as energy regulators are expert triers of fact and the role of courts (usually courts of appeal) are guarantors of the rule of law. Courts consider whether regulators have drawn conclusions that are reasonably supported by facts, consistent with the law and the constitution and with procedures that meet standards of openness and fairness. But in some cases, courts have a significant impact on the substance of decisions. This is done inconsistently, as sometimes courts are extremely deferential and other times they impose more substantive obligations. One area where the courts have a major impact is the meaning and scope of Indigenous rights. There is both a need for and constructive potential in standing back from individual controversies to examine whether reforms are needed to the respective roles and responsibilities of the courts, regulators and policymakers as Canada works through complex and difficult energy and climate change questions.

CONCLUSION: ENERGY AND CLIMATE CHANGE POLICY AS IF RESULTS MATTERED

Too much of the so-called energy and climate debate has become a shouting match where clichés, prejudices and narrow interests often outweigh considered dialogue and well understood and widely accepted decision processes. What Canada's energy future looks like in an age of climate change is a societal question whose implications are vastly greater than energy and climate policy, but it seems clear that all the technology in the world will be for naught if the country is unable to recreate public and — increasingly — investor confidence and trust in decision systems.

Within this context, Positive Energy has outlined a program of research and engagement that addresses many of the questions posed in the foregoing sections.

The broadest challenges relate to polarization and its cousins, parochialism and partisanship, and here, solutions appear to be very elusive. The first steps clearly require forming a deeper understanding of these phenomena both with respect to public policy as a whole and more specifically respecting energy and climate. One promising area of focus centres on the question of language and the simple capacity to communicate both respectfully and effectively. Here, Positive Energy's research agenda includes projects that aim to get a better grip on how participants in Canada's energy and climate debate understand and use terms like "clean energy" and "transition".

Potentially more fruitful for framing concrete solutions are questions surrounding the roles and responsibilities of decision-making institutions and the essential architecture of those institutions. For some in the energy and climate community, there appears to be a growing realization that the chief business of government is to build and sustain the foundations on which individual decisions are made. Several avenues of enquiry present themselves: how policy machinery can be strengthened; how regulatory machinery can be structured to facilitate evidence-based decisions leading to action while maintaining public accountability; and how emerging institutional actors — notably Indigenous and municipal governments — can be beneficiaries and facilitators of change.

Behind the individual controversies in the energy and climate debate lie fundamental principles such as commitment to democratically established and accountable responsible governments and to the rule of law. Building on these and other principles there is much potential through analysis and engagement to rebuild structures for civil discourse, for coming to grips with problems rather than shouting matches on twitter and for reestablishing trust in what may turn out to be an institutional architecture for the twenty-first century quite different from that which has prevailed through most of the energy and climate policy process to date. If Canada is serious about tackling its energy and climate challenges, these matters should be priorities for all governments and for Canadians as a whole. ■

CANADA'S CLIMATE CHANGE CHALLENGE[1]

*Jeffrey Simpson**

I am delighted, and honoured, to be asked again to speak to representatives of one of Canada's most important and far-reaching industries. A lot of us take this industry for granted, because natural gas heats our homes and powers our factories. It's used by 21-million Canadians. It is exported, rather unobtrusively and efficiently. And it is transported, as many of you know, through more than half a million kilometres of pipelines without any fuss or making any headlines. This performance, however, doesn't stop the industry from being caught in maelstroms of controversy, but then it's hard for any natural resource industry today to avoid these maelstroms, and it about these maelstroms that I wish to offer some modest thoughts this morning.

Before I do, let me open a digression that I will close later in my remarks. I used to be critical of this and other natural resource industries for the lack of attention paid to climate change caused by greenhouse gas emissions largely from human activity. There was a lot of denial about the land when I co-authored a book about climate change with Professor Marc Jaccard in 2007. It was entitled *Hot Air: Meeting Canada's Climate Change Challenge*.[2] It became one of my many instant rare books. I still have many unsold copies for those looking for something other than a sleeping pill at night.

The book attempted to explain in clear, non-polemical language that climate change was happening, that it posed a long-term challenge, and suggested what we could reasonably do about it. I emphasize "reasonably," since we were not polemicists or scaremongers. But we did not think the country, including governments and industries, were taking the climate change challenge seriously enough, and we outlined a series of steps we thought could and should be taken to turn the emissions trend line from up to down. We were realists. This is what we wrote in 2007: "Successful policies will require decades to produce substantial reductions in GHG emissions."[3] Our preferred options involved placing a price on carbon and introducing various regulations.

That book made me fleetingly a mini-celebrity among environmental groups. Here was a bigfoot national columnist and author taking their issue seriously. I was invited to many conferences by environmental groups, allowing me to get to know them rather well. I admired their passion and I was glad they were drawing attention to the issues, but after a while my natural journalistic skepticism led me to recoil at their unwillingness to compromise and to acknowledge that solutions to climate change were complex, costly and would take time. They asked hard questions of others but did not ask hard questions of themselves. They preferred to assert certainties.

I meant what I said to them — and what I say to you today — that climate change must be tackled but it is what policy analysts call a "wicked problem," that is extremely complex, that requires action at the global level, at the continental level in North America with its integrated economies, at the national level because Ottawa has many powers, at the

* Jeffrey Simpson is a former national affairs columnist for *The Globe and Mail.*

[1] This is a transcription of Jeffrey Simpson's speech that was delivered at the 58th Annual CGA Gas Measurement and Regulation School (GMRS) held in Whistler, June 2019.

[2] Jeffrey Simpson, Mark Jaccard and Nic Rivers, *Hot Air: Meeting Canada's Climate Change Challenge*, (Douglas Gibson Books, 2005).

[3] *Ibid* ch 7.

provincial level since provinces control natural resource policy, at the municipal level because towns and cities have many pertinent powers, and by choices individuals make and policies they are willing or encourage their politicians to make.

This kind of observation did not make me popular among the "True Believers". Nor did my comments to industrial groups that it was time to wake up and smell the coffee. They needed to change policies and attitudes. I was where I felt most comfortable as a result: criticized by everyone!

However, I am distressed, indeed alarmed, that in Canada today we are talking past each other, with too many groups unwilling to compromise and hard-line advocates for the cause of the environment unwilling to consider the costs of what they want, in the time frames they want it.

This obduracy contributes but is in no way entirely to blame for a myriad of confusions and contradictions that have ensnared natural resources projects, including those involving natural gas, and made proceeding with projects difficult to the point of absurdity. Indeed, I would argue that these confusions and contradictions fairly raise the question about Canada's ability to govern itself, or at least push forward important projects in natural resources in a timely and cost-efficient manner.

I stress two points about these confusions and contradictions. First, although they are particularly evident in plaguing fossil fuel projects and the transmission of these products, the confusions and contradictions are also apparent around mining projects, hydro dams, transmission lines and even roads. Second, these confusions and contradictions do not arise from international pressures, treaties or policies. No one outside our borders has invented these problems and foisted them on Canada; indeed, competitors (and they do exist) are quietly delighted that Canada has wrapped itself in these confusions and contradictions. One more natural resource-rich competitor knocking itself out of the international ring with self-inflicted punches delights competitors. Nowhere is this more obvious than in the natural gas industry where Canada's inability to get LNG projects going on a timely basis, or at all, has left the door wide open to the United States, Australia and others to capture markets without worrying about Canadian competition.

I mention the U.S. and Australia and natural gas as a way of illustrating what too many Canadians apparently do not understand. We are, pretensions to the contrary, a quite parochial people. We are certainly not an "energy superpower," as former Prime Minister Stephen Harper used to say.[4] Superpowers can dictate or influence. Canada cannot. Canada is a price-taker, not a price-setter. We have plenty of natural resources, but these are found elsewhere in the world too, and if it is less expensive, cumbersome, controversial and time-consuming to access the resources elsewhere, money will go elsewhere. Under our feet, the ground is shifting without enough people realizing the costs. The U.S., courtesy of the shale revolution, will no longer oblige us by taking every drop of oil or cubic metre of natural gas or Kilo-watt of hydro that we can export. The U.S. is now a competitor. Moreover, it turns out that hard-line environmentalists are alive and kicking in the U.S., and they have stalled Canadian export projects from Keystone XL to Quebec's hydro exports to Massachusetts to Enbridge's Line 3 in Minnesota. The burgeoning Asian economies, many of which are energy poor, scour the globe for what they need. If China or Japan cannot get LNG from Canada, they will get it from Qatar and the Middle East, from African suppliers and of course from the U.S. and Australia.

When we think of the balance between global warming and resource development, it is easy to think of just Canada and what we are doing, or not doing, without realizing that the rest of the world doesn't really care. If Asian countries want to replace coal with natural gas, they will look around and if Canada isn't interested, because groups here say all fossil fuels are bad and none should be developed in Canada, those countries will shrug and get the gas elsewhere. We may not like this. We might wish that they got off coal AND gas and do everything the way our hard-line environmentalists want (solar and wind and conservation), but that isn't how the world works, or how it will work. The most misleading commercial slogan in Canada is: "The World Needs More Canada". No, it

[4] See e.g. Jane Taber, "PM brands Canada an 'energy superpower'", *The Globe and Mail* (15 July 2006), online: <https://www.theglobeandmail.com/news/world/pm-brands-canada-an-energy-superpower/article1105875>.

doesn't. If Canada doesn't want to give more by exporting products, nobody will care. We will only hurt ourselves.

The International Energy Agency (IEA) projects that global energy demand will grow by 25 per cent from 2017 to 2040. It forecasts that renewable energies will meet 45 per cent of that increase, but natural gas will meet 35 per cent. Fossil fuels are expected to account for almost three-quarters of global primary energy demand in 2040.[5] Even if the Paris Accord targets were reached, the IEA says oil and gas will account for half of demand in 2040.[6] Half.

We Canadians account for 0.5 per cent of the world's population but we have 4.7 per cent of the world's natural gas and 4.8 per cent of its oil.[7] We have the supply; the world will still have the demand. Are we seriously going to shut down using fossil fuel products in Canada and exporting them with that kind of supply-demand equation?

Here is one among many hard questions to ask those who want extremely aggressive GHG reduction targets leading, as the Green Party wants, to the elimination of all fossil fuels by 2040. Today, renewable energies, including nuclear, account for about 20 per cent of the country's energy mix. A scenario from the Trottier Energy Future Project suggests that for Canada to accomplish this "elimination" target we would need to more than double — from 150 gigawatts to over 300 — our electricity capacity.[8] That would mean building more than 150 projects the size of B.C.'s Site C dam, which the Greens opposed by the way. We would need a massive increase in wind and solar. Can you imagine the reaction in Elizabeth May's riding among the Gulf Islands if it were proposed, as in Denmark or Germany, to build huge wind farms in the Georgia Strait or on the Gulf islands themselves? You would see NIMBYISM the likes of which we have seldom seen as Elizabeth and her constituents opposed the farms.

I've spoken of confusions and contradictions. Let me mention some, then speak about each.

- Federal-provincial constitutional disagreements.
- Inter-provincial disagreements.
- The contested legitimacy of regulatory institutions that are supposed to -depoliticize decisions but are themselves the target of political attacks.
- The fogginess around the definition of Indigenous rights, including who "owns" the land, and in particular what it means to "consult and accommodate" Indigenous concerns.
- Do Indigenous peoples, merely claiming a territory, have a right of veto within that territory?
- The increasingly public divisions within the Indigenous world between those nations that favour development and those who do not.
- The inability of the Trudeau government, in the real world of power as opposed to the imaginary one of opposition, to find a balance between much stricter environmental laws, Indigenous rights and projects completed. For example, how does one reconcile the government's ban on tanker traffic off the north B.C. coast where few people live but support, to the point of buying, a pipeline project that will triple tanker traffic where tens of thousands of people live? Or how does a province, Quebec, vociferously oppose an oil pipeline, while allowing crude oil shipped by tankers down the St. Lawrence River to refineries in Quebec while also allowing oil to pass through the province by train?

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[5] International Energy Agency, *World Energy Outlook 2018*, online: <https://www.iea.org/weo2018>.

[6] *Ibid*.

[7] Jeffrey Simpson, "The confusion around natural resources in Canada" (30 March 2019), *Resource Works* (blog), online: <https://www.resourceworks.com/resource-confusion> [*Resource Works*].

[8] Stewart Fast and Monica Gattinger, Address, (Paper delivered at the Positive Energy's Trust in Transition workshop, University of Ottawa, 23–24 January 2018), online : <https://www.uottawa.ca/positive-energy/sites/www.uottawa.ca.positive-energy/files/dp_for_trust_in_transition_workshop_final_lettterhead.pdf>.

- What is “social licence”? Who defines it? What does it mean?
- The gap in attitudes towards natural resource development between the inner cities and the hinterlands.
- A hard-line and well-organized environmental movement that opposes all natural resource developments that lead to more GHG emissions, but oppose carbon-free nuclear power and sometimes dams and transmission lines to bring more, cleaner hydro to the grid.
- Court decisions, especially but not exclusively from the Supreme Court of Canada, that are opaque and can be interpreted quite differently by different groups. The recent Federal Court of appeal ruling on the Trans-Mountain pipeline is vague to the point of irresponsibility.
- And I leave aside the obvious and necessary divisions between and among political parties which are always present in a healthy democracy.

So let’s just run through these confusions and contradictions.

Federal/provincial disputes: These are particularly acute with Conservative governments now running various provinces, while the NDP runs B.C. As you know, the Conservative provinces have taken the federal government to court contesting its constitutional authority to levy a carbon tax. They lost the first found in the court of Saskatchewan but of course they are appealing to the Supreme Court[9], an appeal that will take months to be heard. B.C. took Ottawa to court arguing, on environmental grounds, it had the right to regulate goods passing through its territory.[10] The court wasn’t fooled. This was aimed at fossil fuels, especially bitumen oil. B.C. lost 5-0 in the Court of Appeal.[11] I read the ruling. It was clear, precise and unanimous. And yet, having promised to use every tool in the toolbox to stop the Trans-Mountain project, the provincial government will appeal this devastating loss. This amounts to a plan not to win legally but to delay in hopes something will turn up to defeat the pipeline. We have turned to the courts to sort out confusions between Ottawa and the provinces, with attendant delays and costs.

Inter-provincial conflicts: I am not going to dwell on the venomous conflicts between Alberta and B.C. You know them well. I would merely observe a few political points. First, support for the Trans-Mountain pipeline is 50-50 in the polls in the Lower Mainland but strongly supported in the rest of the province.[12] A majority of British Columbians therefore report they favour the project[13], but the minority NDP government, propped up by the Greens, gets most of their support in the Lower Mainland and Vancouver Island, so it’s where the support and opposition come from, not the aggregate amounts, that dictate political considerations. Another political point. You can understand how Alberta feels when B.C. goes full steam ahead for a natural gas pipeline to supply B.C. gas to an LNG plant, but uses every trick to stop a pipeline bringing Alberta oil to the B.C. coast. And you can imagine further Alberta’s unhappiness with the dismissive attitude of the Quebec government to the Canada East project when, as I said before, Quebec is getting its oil from nasty regimes outside Canada.

Regulatory Institutions: The institutions governing natural resource development were created to de-politicize decisions, and to put experts to work to decide on the many technical issues surrounding the projects. The National Energy Board (NEB) and provincial environmental assessments bodies are two examples. These, however, have become political targets, mostly from environmentalists who believe the institutions are biased and favour industry, do not hear enough dissident voices and don’t pay attention to issues that are far beyond the capacity or jurisdiction of the institutions to assess, such as the state of global warming.

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9 *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40.

10 *Reference re Environmental Management Act (British Columbia)*, 2019 BCCA 181.

11 *Ibid*.

12 *Resource Works*, *supra* note 7.

13 See e.g. Kyle Braid, “Majority in BC Support Trans Mountain Pipeline Expansion Project”, *Ipsos* (17 July 2019), online: <https://www.ipsos.com/en-ca/news-polls/majority-support-trans-mountain-pipeline-expansion-project>.

In the Trans-Mountain case, the NEB granted participation status to 400 intervenors and 1,250 commentators.[14] The hearings went on for months. In approving the application, the board affixed 157 conditions that might have suggested to an objective observer that the board was no pushover.[15] Of course, opponents of the pipeline were not interested in conditions. They didn't want the pipeline, pure and simple, so their public relations campaign against the NEB resumed within minutes of the release of the board's report with claims that the NEB was biased, hadn't consulted enough, hadn't paid intervenors enough money for their efforts, etc.

The Trudeau government's response to the criticisms of the existing regulatory process has been to create a new one through legislation for which is now before the Senate. I don't have time to take you through in detail Bill 69, but in a nutshell the legislation tries to balance environmental, aboriginal and, yes, gender issues with the usual technical ones, but then adds further complications by asking the new regulator to figure out if there were other ways of doing the project — an impossible task without knowing the cost and viability of alternatives. As a report on the bill from the University of Ottawa's Positive Energy think tank observed: "The overall tone and probable effect appears to have taken an existing process which some critics see as too "industry friendly" and flipped it on its head."[16] My view is that the regulatory process, which was already laborious, will become even more arduous often to the point of paralysis. And, I can safely predict that if this new beast does favour a project environmentalists and certain aboriginal groups oppose, they will denounce the institution and put up a political fight. In other words, a new process will not persuade die-hard opponents.

Now, we come to the extremely opaque question of indigenous rights, which are often claimed and asserted without having been proven.

Let me give one example in the Federal Court of Appeal decision in the Trans-Mountain case. Thirty-three First Nations publicly supported the pipeline; five opposed and they went to court.[17]

The Federal Court decided that the Canadian government had not adequately respected the "honour of the Crown" in its consultations with First Nations. What did that mean? I ask that because, in addition to the NEB hearings, which Indigenous groups participated in, with funding from the NEB, when the decision was announced the government created another consultation process with former Yukon premier Tony Penikett and two prominent Indigenous leaders, Kim Baird and Sophie Pierre, who held more meetings with aboriginal and civic leaders in B.C. and Alberta. The government undertook direct consultations with aboriginal groups. The court rejected aboriginal complaints that the consultation process was inadequate. Said the jurist who authored the judgment: "I am satisfied that the consultation framework selected by Canada was reasonable."[18] The court said the Indigenous consultation process was "generally well-organized."[19] It said there was "no reasonable complaint that information…was withheld or that requests for information went unanswered."[20] Cabinet ministers were "available and engaged in respectful conversations and correspondence with representatives of a number of Indigenous applicants."[21] Additional funding had been provided for plaintiffs; a four-month extension of the consultation process was implemented.[22]

A reasonable person, upon reading how much consultation had occurred, how many opportunities to be heard had been afforded, how much time and money had been spent

[14] *Resource Works*, *supra* note 7.

[15] *Ibid*.

[16] Michael Cleland et al, "DURABLE BALANCE: INFORMED REFORM OF ENERGY DECISION-MAKING IN CANADA" (2018) University of Ottawa Working Paper at 20, online: <https://www.uottawa.ca/positive-energy/sites/www.uottawa.ca.positive-energy/files/180418-db-report-final.pdf>.

[17] *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153 [*Tsleil-Waututh*].

[18] *Ibid* at para 549.

[19] *Ibid* at para 553.

[20] *Ibid*.

[21] *Ibid* at para 554.

[22] *Ibid* at para 120.

might have concluded that enough was enough. But this is Canada, and all this was apparently not enough. The court could not have been more positive about the way the government had done its work. And yet, more was required. There had not been, said the court, enough “two-way dialogue.”[23] At which point, a reasonable person might throw up her or his hands and give up figuring out what is the definition of the duty to consult and accommodate.

Confusion reigns supreme. A court that was supposed to clarify merely added to the confusion. And until this confusion is cleared up, we frankly are a mess.

And then there is the question which will loom very large in the form of the *United Nations Declaration on the Rights of indigenous Peoples* (*U.N. Declaration*). I won’t take you through the history of the declaration. But here is the section where confusion in Canada is complete and might become paralytic. It says that Indigenous groups must give their “free and informed consent prior to the approval of any project.”[24]

The Oxford dictionary defines “consent” as “permission for something to happen.” In plain English, therefore, “free, prior and informed consent” — the key word being “consent” — means the right to “give permission” or to say no, in other words, a veto. Right now a bill is before Parliament that would incorporate the U.N. Declaration into Canadian law[25], which would present a huge obstacle to development. Courts, on the other hand, have said indigenous peoples do not have a veto, provided they have been consulted and reasonable efforts have been made to accommodate their interests. The Supreme Court, in its last two aboriginal rulings, said so. So did the Federal Court in the Trans-Mountain decision.[26] The law before Parliament declares a veto exists; the courts say it does not. Aboriginal leaders, without exceptions, have asserted they now have a veto; the courts say no; Parliament says yes. A more muddled situation could scarcely be imagined.

Speaking of muddled, what are we to make of a project involving [the gas] industry: the gas pipeline and LNG project in B.C. in which all 20 Indigenous councils along the line support the project but some hereditary leaders do not, and they purport to speak for the Wet-suisen nation[27] not that nation’s elected officials…***not the elected officials***. I am sorry, but I am offended by this.

Tens of millions of people around the world have died fighting against hereditary rule, be it by sultans or emperors, tsars and kings, princes and nobles. Violent and peaceful ones have turned overturned hereditary rulers. It still exists in remote Pacific Islands, places like Brunei and that lovely Kingdom of Saudi Arabia, but elsewhere it has gone the way of all flesh. Everywhere it was defended as the natural order of things, ordained by Gods, ancestors or customs. It has always been this way, said the defenders of hereditary rule, which they do now in a few Indigenous clans, until people revolted. Were I Prime Minister of Canada, I would state clearly: “We live in a democracy where people choose their rulers; as do the vast majority of Indigenous peoples for their governments. My governments will only deal with and recognize elected officials.” Period.

That project not only showed the intra-aboriginal conflicts between elected and hereditary leaders, or purported leaders, but also what can happen even when the federal AND provincial governments agree. The gas link was approved in 2014 by the B.C. Environmental Assessment Office, and it is supported by Ottawa. But here come the courts. Here come the environmentalists. Here come the protestors. And here comes a prominent B.C. environmental lawyer, Mike Sawyer, who applied for a federal review of the project by the NEB. So even when every Indigenous group’s elected council was in favour, and the provincial

[23] *Ibid* at para 558.

[24] *United Nations Declaration on the Rights of Indigenous Peoples*, UNGAOR, 61st Sess, UN Doc A/RES/61/295 (2007), s 32 (2).

[25] Bill C-262, *An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples*, 1st Sess, 42nd Parl, 2005.

[26] *Tsleil-Waututh*, *supra* note 17.

[27] See e.g. Brent Jang, “Canadian musicians sign letter backing opponents of Coastal GasLink pipeline”, *The Globe and Mail* (21 January 2019), online: <https://www.theglobeandmail.com/canada/british-columbia/article-celebrities-line-up-behind-pipeline-opponents>.

regulatory authority has okayed the project, there are still legal challenges and political opposition. To paraphrase Yogi Berra, “it ain’t over until it’s over, and then it ain’t over.” This is contemporary Canada, alas. Would you want to invest in such a place?

Social licence: The prime minister has mused on several occasions that projects need “social licence.” The premier of Quebec states no “social licence” exists so an oil pipeline cannot through his province.[28] The phrase has no legal meaning, but it can have a powerful political appeal.

How do we determine what is “social licence?” It is one of those portentous phrases, apparently pregnant with meaning that no one can define. How do we determine was is “social licence.” Do we take polls before every decision to determine what the population thinks? Do we take them among people living near a project? If so, how near? What about people in the rest of the country or the province? “Does Not in My Backyard” constitute “social licence?” Do we hold public hearings knowing from vast experience that those who speak at public hearings are often unrepresentative of the entire society? And where do elected officials fit it if their decisions cannot be allowed to stand because someone has defined “social licence” in such a way that it trumps decisions by elected officials? Put simply, the notion of “social licence” is vague, misleading and usually used by people who equate their own point of view of that of the general public. It adds yet another confusion to contemporary Canada.

The last two federal governments had different approaches to environmental policy, indigenous relations, attitudes to natural resources and relations with the business community and provinces. Neither the Harper nor Trudeau governments were able to make progress on finding a balance been development and environmental protection.

The Trudeau government presented what I might call a Grand Bargain. It would toughen environmental standards. It would ban tanker traffic, thereby killing a pipeline to the Pacific Coast. It would go soft-softly on the now-gone Canada East Pipeline. It would change regulatory institutions to make they legally required to pay more attention to gender (whatever that might mean for natural resource development, environment, upstream emissions etc.). It would declare that “reconciliation” with Indigenous people was the government’s most important priority. It crafted a mandate letter for the Minister of Natural Resources that read like one for the Minister of the Environment in previous governments. It signed onto the Paris Climate Change accord. It declared in opposition, and now in government, its support for the UN Declaration. I could go on. The Liberals believed by doing all these things they could win that ephemeral thing called “social licence” that would allow some natural resource projects to proceed. The Grand Bargain did not work. Not one environmental group — not one, and I know them all — was willing to accept the Bargain. Not even the ones that were supposed to be the most “reasonable.” And the same applied to the strident opponents in the Indigenous world.

And so here we are, as a country, confused, conflicted, with our elected institutions, our federal-provincial relations, our courts and civic society unable to come to conclusions in a timely fashion. And yet, I believe this is not what the country wants. All the data I have seen, and all my travels suggests a broad majority of citizens want to see a balanced approach to development and environmental protection. They want governments to work together; they want Indigenous people to participate in development without having a veto; they want co-operation. But the debate has been hijacked by environmental hard-liners and endless court challenges and now federal-provincial and inter-provincial conflicts that are delaying, even paralysing decisions.

And yet, I do see some signs of hope, genuine hope for finding better ways forward.

Most important of all, whereas many Indigenous leaders who wanted their people to participate in projects were afraid to speak out, lest they be accused by prominent aboriginal leaders of selling out their people, cavorting with “settler” governments, abandoning the dream of restoring full nationhood, destroying the environment, betraying Indigenous cultures or whatever; charges echoed strongly in the universities

[28] See e.g. Benjamin Shingler, “Quebec doesn’t want another pipeline, François Legault tells Jason Kenney”, *CBC* (17 April 2019), online: <https://www.cbc.ca/news/canada/montreal/quebec-legault-kenney-pipelines-1.5101793>.

which have become hotbeds for supporting oppositionist Indigenous attitudes towards resource development.

This fear is dissipating, as young chiefs and elected officials look at the limited opportunities for their peoples beyond hunting, fishing and trapping, and view daily the social problems that economic deprivation brings, and want now, their rights being protected to be sure, to participate in a wage economy. I have already noted that a strong majority of bands along the Trans-Mountain pipeline route favoured the project, and now two different coalitions of Indigenous groups want to own a portion of the pipeline. I have already noted how ALL the elected councils along the natural gas line in northern B.C. support the project. Cameco has developed very good working relations with Indigenous peoples in northern Saskatchewan for uranium mining. The Fort McKay and Misisew Cree First Nations have invested in Suncor's Fort Hills bitumen project.[29] The Athabaska Chippewa will become a partner with Teck Resources in developing a bitumen mine.[30] In Northern Ontario, a majority of the First Nations, most without road connections, want chrome mines developed since they will get roads, jobs and perhaps royalties, but of course a minority have gone to court to stop development.[31]

I could go on…

Suffice it to say that there is now a much greater awareness among younger aboriginal leaders, often well-educated and not prisoners of old rhetoric, that their people need work, their governments need money, and participation rather than opposition is the most fruitful way forward. This view is not unanimous by any means, and there are still councils and bands that are opposed to any and all developments. But there is now a change in attitude that is very evident, splitting aboriginal Canada over the best way of advancing the interests of aboriginal peoples. And I think there is now an awareness in this industry and others that the legal grounds (despite all the uncertainties about the meaning of title and duty to consult and the *U.N. Declaration*) for aboriginal involvement mean just that: some form of involvement is the best way forward.

I think you can see a political shift in the country, too, towards development, the flip side of the frustration with these self-imposed obstacles. I note, for example, that in the Maritime Provinces natural gas and mineral projects are by and large moving forward in a timely fashion. The opposition across the country lies in geographic pockets, not the broad swath of public opinion.

And I believe — to return to where I started my remarks — that there is a growing awareness of climate change is an issue, (this being so especially among younger people) and a desire that progress be made; but there is also support for balanced and commonsensical approaches that reject apocalyptic rhetoric, unreasonable solutions and little, if any concern, for people who work in resource-dependent areas where there are few, if any, alternatives, to developing them.

At least that is my hope. Whether the hope is justified, or forlorn, time will tell. ■

[29] Jeffrey Simpson, "Uncertainty and Confusion in Canada's Natural Resource Development", Commentary, (February 2019) Macdonald-Laurier Institute, online: <http://macdonaldlaurier.ca/files/pdf/MLICommentary_Feb2019_SImpson_F.pdf>.

[30] *Ibid*.

[31] *Ibid*.

THE WASHINGTON REPORT

*Robert S. Fleishman**

Energy regulatory developments in the United States influence 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 from 2018 through mid-2019, which should be of interest to readers of the *ERQ*.

I. GAS & ELECTRIC INFRASTRUCTURE

(A) FERC Gas Pipeline Certificates & GHG Emissions

FERC's 20-year old policy on the certification of interstate natural gas pipelines and LNG import/export facilities continues to foster both natural gas infrastructure development and litigation related thereto. In April 2018, FERC issued a Notice of Inquiry on whether changes to it 1999 policy statement were necessary or appropriate.[1] The comment deadline in that proceeding was in July 2018, and thousands of comments were submitted, but thus far FERC has taken no action in response to those comments.[2] Whether it will do so remains uncertain. In the meantime, there has been no shortage of FERC activity concerning the certification of natural gas pipeline infrastructure.

Over the past two years, FERC has continued to approve interstate natural gas pipeline infrastructure at a robust rate. However, those approvals have not been business-as-usual. Nearly all of FERC's certificate orders have been beset by controversy among the Commissioners concerning the scope of FERC's obligations under the *National Environmental Policy Act* (*NEPA*) to consider the indirect and cumulative effects of upstream and downstream greenhouse gas emissions associated with the proposed natural gas pipeline infrastructure. Although a majority of FERC Commissioners have consistently voted to approve certificate applications, the climate change issue has produced numerous split decisions from FERC, accompanied by separate statements from two Commissioners who are seeking to expand FERC's climate change analysis.[3]

The main source of the disagreement at FERC appears to be over the scope of the agency's *NEPA* obligations following the D.C. Circuit's August 2017 decision in *Sierra Club v. FERC* (*Sabal Trail*), which vacated and remanded a FERC certificate order for failing to consider in its *NEPA* analysis the downstream, indirect greenhouse gas emissions associated with combustion of the delivered gas.[4] That case

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[1] *Certification of New Interstate Natural Gas Facilities*, 163 FERC ¶ 61,042 (2018).

[2] See generally FERC Docket No PL18-1-000; Order Extending Time for Comments, 163 FERC ¶ 61,138 (2018).

[3] See e.g. *PennEast Pipeline Co.*, LLC, 164 FERC ¶ 61,098 (2018) (including separate statements from Commissioners Glick and LaFleur).

[4] *Sierra Club v FERC*, 867 F.3d 1357 (D.C. Cir. 2017) [*Saba Trail*].

involved a 685.5 mile pipeline being constructed to deliver natural gas to certain power plants in Florida.[5] FERC's unanimous order approved the pipeline certificate, based on a *NEPA* analysis that did not consider the downstream, indirect effects of the greenhouse gas emissions from the combustion of the natural gas at the power plants.[6] The court found that FERC was required to analyze those downstream, indirect effects because they were a reasonably foreseeable result of approving the certificate.[7] On remand, FERC analyzed the downstream, indirect greenhouse gas emissions and reissued the certificate based on that supplemental analysis.[8] However, FERC declined to take the additional step of quantifying the climate change impacts associated with those indirect emissions, explaining that it lacked a reliable method of converting the emissions into environmental impacts.[9] FERC's order on remand was not appealed.

The litigation over the issue did not end, however, with FERC's remand order in the S*abal Trail* case. The issue has been raised in numerous other FERC certificate proceedings over the past two years and several of the related FERC orders have been appealed to the D.C. Circuit. Thus far, those appeals have not settled the issue, because they have been dismissed on jurisdictional grounds. Specifically, in May 2019, the D.C. Circuit dismissed one case — *Otsego 2000, et al. v. FERC*[10] — without reaching the merits, because the court found that the petitioner did not have standing. Then, in June 2019, the D.C. Circuit denied a petition for review in another case — *Birckhead, et al. v. FERC*[11] after finding that the court lacked jurisdiction because the petitioner failed to first raise the downstream greenhouse gas arguments in the FERC proceeding. However, in *Birckhead*, the court leveled unsparing criticism of the merits of FERC's approach.[12] Whether, or how, FERC will respond to the D.C. Circuit's criticism in pending and future cases remains to be seen.

(B) LNG Exports (FERC/DOE)

Due in part to low natural gas prices, global demand for liquefied natural gas (LNG) has significantly increased in recent years. In response, a wave of NGA Section 3 applications to site, construct, and operate LNG facilities were filed at FERC. Entering 2019, FERC had a backlog of 13 such applications. Since February 2019, FERC has made significant progress on those applications, issuing certificates in five of the proceedings.[13] In addition, between March 2019 and May 2019, FERC finalized its environmental review of five other proposed LNG export projects.[14] Recently, FERC has been issuing orders on LNG export applications approximately 3-4 months after issuance of the project's environmental impact statement.[15] Thus, we expect FERC's progress on processing LNG export applications to continue through the second half of 2019.

Although most of the recent regulatory activity on LNG export facilities has taken place at FERC, there has also been activity at the U.S. Department of Energy (DOE). While FERC has jurisdiction over the LNG facilities, DOE has jurisdiction to authorize the export of natural gas, including the export of LNG from those facilities. DOE can permit exports to nations with which the U.S. has a free trade agreement, nations with which the U.S. has no free trade agreement, or both. In granting those authorizations, DOE typically imposes an obligation to submit periodic reports to DOE concerning the destination of the exported

[5] See *Fla. Se. Connection, LLC*, 154 FERC ¶ 61,080, at para 4; *Reh'g in part*, 156 FERC ¶ 61,160 (2016), v*acated and remanded sub nom*; *Sierra Club v FERC* (*Sabal Trail*), 867 F.3d 1357 (D.C. Cir. 2017), *on remand*; *Fla. Se. Connection, LLC*, 162 FERC ¶ 61,233 [Fla. Se. 162]; *Reh'g denied*, 164 FERC ¶ 61,099 (2018) [*Reh'g* 164].

[6] See *Fla. Se. Connection, LLC*, 156 FERC ¶ 61,160 at paras 62-63.

[7] *Sabal Trail*, *supra* note 4 at 1371-72.

[8] *Fla. Se. Connection, LLC*, 162 FERC ¶ 61,233; *Reh'g denied*, 164 FERC ¶ 61,099.

[9] See *Fla. Se. Connection, LLC*, 164 FERC ¶ 61,099 at PP 26-37.

[10] *Otsego 2000, et al. v FERC* 767 Fed. App'x 19 (D.C. Cir. 2019).

[11] *Birckhead, et al. v. FERC*, 925 F.3d 510 (D.C. Cir. 2019).

[12] See 925 F.3d at 518-20.

[13] *Venture Global Calcasieu Pass, LLC*, 166 FERC ¶ 61,144 (2019); *Port Arthur LNG, LLC*, 167 FERC ¶ 61,052 (2019); *Driftwood LNG LLC*, 167 FERC ¶ 61,054 (2019); *Freeport LNG Development, L.P.*, 167 FERC ¶ 61,155 (2019); *Gulf LNG Liquefaction Co., LLC*, 168 FERC ¶ 61,020 (2019).

[14] See FERC Environmental Documents, online:<https://www.ferc.gov/industries/gas/enviro/eis.asp>.

[15] See *supra* note13 (recent orders on LNG certificate applications and the associated NEPA analyses).

LNG or natural gas. In December 2018, DOE issued a policy statement announcing a change in practice with regard to such reporting requirements.[16] Specifically, DOE stated that it would end its recent practice of requiring authorization holders to report the nation(s) in which the exported LNG or natural gas was "received for end use."[17] Instead, DOE now requires authorization holders to report the nation(s) to which the LNG or natural gas "was actually delivered."[18] This change is expected to "enhance the accuracy of LNG reporting information provided by authorization holders, and to minimize administrative burdens on authorization holders in the U.S. LNG export market and those who may purchase U.S. LNG."[19]

(C) State Environmental Challenges

Over the past several years, various states have mounted challenges to natural gas and other infrastructure projects using authorities granted to them by federal environmental laws. New York has been at the forefront of those challenges, due in part to its critical location between natural gas production areas and the New England region, which is increasingly reliant on natural gas-fired electricity generation. New York's primary tool for challenging new natural gas infrastructure has been the *Clean Water Act* (*CWA*).

When FERC issues a certificate of public convenience and necessity for an interstate natural gas pipeline, it does so on the condition that the applicant acquire all necessary permits and approvals, including a water quality certification under Section 401 of the *CWA* that the project will comply with state water quality standards.[20] Section 401 of the *CWA* provides that a state must act on a certification request "within a reasonable period of time (which shall not exceed one year) after receipt of such request" or the certification requirement "shall be waived."[21] Certain states, including New York, California, and Oregon, attempted to get around this one-year time limitation by deeming the applications to be incomplete and requiring them to be refiled (or, in the case of California and Oregon, simply directing them to be withdrawn and resubmitted), and asserting that the new submission restarted the statutory clock.[22]

Those state actions were challenged in the courts and, in the past 18 months, two U.S. Circuit Courts of Appeals have addressed the issue of whether states may extend their *CWA* Section 401 reviews beyond the one-year statutory deadline. Although those two cases set some boundaries for the states, they did not entirely resolve the issue.

First, in a case arising from FERC-approval of a 7.8 mile interstate natural gas pipeline slated for construction in New York[23], the Second Circuit found that *CWA* Section 401 sets a bright-line rule that the one-year statutory clock starts when the state receives an application, regardless of whether the application is complete.[24] The Court explained that, if a state is concerned that an application is incomplete, the state may (1) deny the application without prejudice or (2) request that the applicant withdraw and resubmit the application.[25]

Second, in a case involving a FERC-approved hydroelectric project that was undergoing a license renewal and decommissioning process, *CWA* Section 401 certifications from both California and Oregon were required.[26]

[16] *Eliminating the End Use Reporting Provision in Authorizations for the Export of Liquefied Nat. Gas*, 83 Fed. Reg. 65078 (Dec. 19, 2018).

[17] See *ibid* at 65079.

[18] *Ibid*.

[19] *Ibid* at 65080.

[20] See *e.g. New York State Dep't of Envt'l Conservation v FERC*, 884 F.3d 450, 452-53 (2d Cir. 2018) (citing 15 U.S.C. §§ 717n(a)(1)-(2)) [*Millenium*].

[21] 33 U.S.C. § 1341(a)(1).

[22] See *e.g. Millenium, supra* note 20 at 453; *Hoopa Valley Tribe v FERC*, 913 F.3d 1099, 1103 (D.C. Cir. 2019).

[23] *Millenium, supra* note 20 at 452.

[24] *Ibid* at 455-56.

[25] *Ibid* at 456.

[26] See *Hoopa Valley Tribe*, 913 F.3d at 1101.

California and Oregon reached an agreement with the applicant under which the applicant repeatedly withdrew and resubmitted the same Section 401 application to restart the one-year statutory clock numerous times.[27] The Hoopa Valley Tribe petitioned FERC for an order declaring that California and Oregon had waived their Section 401 authority. After FERC denied that petition, the Hoopa Valley Tribe petitioned the D.C. Circuit for review of FERC's order. The D.C. Circuit vacated and remanded FERC's order. After noting that the states' "scheme" had allowed them to avoid rendering the *CWA* Section 401 decision for more than a decade, the court found that such an arrangement is impermissible because it "serves to circumvent a congressionally granted authority over the licensing, conditioning, and developing of a hydropower project."[28] However, the court limited its ruling by "declin[ing] to resolve the legitimacy" of an arrangement in which an applicant would withdraw its *CWA* request and submit "a wholly new one" rather than resubmitting the same request.[29] Nor did the court "determine how different a request must be to constitute a 'new request' such that it restarts the one-year clock."[30]

The questions left unanswered by the D.C. Circuit may allow the states to continue testing the limits of their *CWA* Section 401 authority, and those state actions likely will produce more judicial precedent in this area in coming years. In the meantime, FERC is moving pipeline projects forward in reliance on the recent court opinions.[31]

(D) Trump Administration Executive Orders

In April 2019, President Trump issued two executive orders aimed at promoting the development of energy infrastructure.[32]

The First Order, titled "Issuance of Permits with Respect to Facilities and Land Transportation Crossings at the International Boundaries of the United States", states that over the course of several decades, the process of reviewing Presidential permits for cross-border infrastructure has become "unnecessarily complicated…thereby hindering the economic development of the United States and undermining the efforts of the United States to foster goodwill and mutually productive economic exchanges with its neighbouring countries."[33] The First Order, therefore, directs the U.S. Secretary of State (Secretary of State) to adopt procedures (subject to certain specific guidelines) to ensure that, within 60 days of receiving an application for a Presidential permit for certain types of cross-border infrastructure, the Secretary of State shall advise the President on whether to request the opinion of the heads of other agencies and whether the Secretary of State has reached a conclusion on whether the issuance of the permit would, or would not, serve the foreign policy interests of the United States.[34] The First Order makes clear that "[a]ny decision to issue, deny, or amend a permit…shall be made solely by the President."[35]

The Second Order, titled "Promoting Energy Infrastructure and Economic Growth," seeks to foster private investment in energy infrastructure through, among other things, efficient permitting, timely action, and increased regulatory certainty.[36] The Second Order also provided specific guidance to, and imposed obligations on, certain federal agencies concerning topics ranging from environmental permitting to the energy sector investments made by pension plans.[37] The Second Order recognizes that "[o]utdated Federal guidance and regulations regarding Section 401 of the Clean Water Act…are causing confusion and uncertainty and are hindering the development of energy infrastructure."[38] Accordingly, the

[27] *Ibid* at 1103.

[28] *Ibid* at 1103-04.

[29] *Ibid* at 1104.

[30] *Ibid*.

[31] See *National Fuel Gas Supply Corp.*, 167 FERC ¶ 61,007 (2019) (citing *Hoopa Valley Tribe* in finding that New York waived its CWA section 401 authority by failing to act within one year of receiving application).

[32] See Exec. Order No. 13867, 84 Fed. Reg. 15491 (Apr. 10, 2019) (First Order); Exec. Order No. 13868, 84 Fed. Reg. 15495 (Apr. 10, 2019) (Second Order).

[33] See Exec. Order No. 13867, 84 Fed. Reg. 15491 (Apr. 10, 2019).

[34] *Ibid* at 15491-15492.

[35] *Ibid* at 15492.

[36] See Exec. Order No. 13868, 84 Fed. Reg. 15495 (Apr. 10, 2019).

[37] See *ibid* at 15495-15497.

[38] *Ibid* at 15496.

Second Order requires the Administrator of the U.S. Environmental Protection Agency (EPA) to consult with the States, tribes, and relevant agencies in reviewing the current regulatory framework; issue new guidance and rules, as appropriate; and then coordinate an interagency review to update other Federal agencies' guidance and regulations for consistency with EPA's changes.[39] The Second Order also directs the U.S. Department of Transportation to initiate two rulemakings: (1) to tailor its safety regulations for LNG facilities, to account for differences in the size and nature of different types of such facilities; and (2) to "treat LNG the same as other cryogenic liquids and permit LNG to be transported in approved rail tank cars."[40]

Finally, the Second Order directs the U.S. Secretary of Transportation, in consultation with the U.S. Secretary of Energy, to submit a report to the President within 180 days assessing whether, and to what extent, State, local, tribal, or territorial actions have contributed to "the inability to transport sufficient quantities of natural gas and other domestic energy resources" the States in New England (and potentially other States).[41] The Second Order also requires that a similar report be submitted to the President, on the same timeline, concerning "economic and other effects caused by limitations on the export of coal, oil, natural gas, and other domestic energy resources through the west coast of the United States."[42]

(E) FERC Notices of Inquiry on Transmission Incentives & ROE

In March 2019, FERC commenced two separate proceedings in interrelated policy areas that directly affect the financial returns from investments in electric transmission infrastructure. The first proceeding is an inquiry into FERC's policy on the transmission incentives (Incentives Inquiry).[43] The second proceeding is an inquiry into FERC's policy for determining the return on equity (ROE) for public utilities (ROE Inquiry).[44] FERC's motivation for these proceedings appears to be a desire to ensure that its transmission investment-related policies are attracting sufficient investment to build the more advanced and reliable power grid needed to support the increased market penetration of intermittent and distributed energy resources.

The Incentives Inquiry involves an examination of the transmission incentives that FERC grants pursuant to Section 219 of the *Federal Power Act* (*FPA*). That statutory provision, which Congress included as part of the *Energy Policy Act* of 2005, directs FERC to develop incentive-based rate treatments for interstate electric transmission assets.[45] It has been six years since FERC's most recent policy statement in this area.[46] Based on the nature of the questions on which FERC is now seeking stakeholder input, it appears that the Incentives Inquiry represents a comprehensive review of FERC's transmission incentives policy, signaling a potential willingness to overhaul fundamentally its approach to satisfying its statutory obligations under *FPA* Section 219.

Among other things, FERC has requested public comment on the following questions: (1) whether incentives should be based on the "risks and challenges" associated with a transmission project, or instead based on the project's benefits; (2) whether and how FERC should treat advanced transmission technology; (3) whether cybersecurity and physical security of transmission facilities should be addressed by the incentives policy; (4) can transmission incentives be used to improve existing facilities; and (5) how does the transmission incentives policy relate to FERC's policy of opening up transmission development to competition.[47]

Whereas the Incentives Inquiry reopens a relatively new policy area in the field of utility regulation, the ROE Inquiry goes to one of the most foundational elements of public utility

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[39] *Ibid*.

[40] *Ibid* at 15496-15497.

[41] *Ibid* at 15497.

[42] *Ibid*.

[43] *Inquiry Regarding the Commission's Electric Transmission Incentives Policy*, 166 FERC ¶ 61,208 (2019).

[44] *Inquiry Regarding the Commission's Policy for Determining the Return on Equity*, 166 FERC ¶ 61,207 (2019).

[45] 16 U.S.C. § 824s.

[46] *Promoting Transmission Investment Through Pricing Reform*, 141 FERC ¶ 61,129 (2012).

[47] *Inquiry Regarding the Commission's Electric Transmission Incentives Policy*, 166 FERC ¶ 61,208 at PP 14-48.

regulation, *i.e.* how to determine the just and reasonable ROE for a public utility under cost-of-service ratemaking. Since the 1970s, FERC's policy approach on that issue has been relatively straightforward: in general, FERC has relied solely on a discounted cash flow (DCF) model to estimate the range of reasonable returns for a public utility; FERC would then set the target utility's return somewhere within that range. However, over the past decade, that approach has repeatedly been called into question in FERC's public utility ROE proceedings. Those disputes culminated in 2016, when the D.C. Circuit vacated and remanded a FERC ROE order in *Emera Maine v FERC* (*Emera Maine*).[48] In so doing, the D.C. Circuit called into question certain foundational principles of FERC's ROE policies. In response to the *Emera Maine* opinion and concerns raised in other ROE proceedings in recent years, FERC issued the ROE Inquiry to seek public comment on whether modifications to its public utility ROE policies are warranted.[49] FERC also inquired as to whether corresponding changes to its ROE policies for natural gas pipelines and oil pipelines are warranted.[50]

The ROE Inquiry lists eight specific questions on which it seeks public comment, including: (1) how useful is the DCF model in estimating public utility cost of equity; (2) which financial model, or combination of financial models, FERC should use to estimate a public utility's cost of equity; (3) how should the ROE level be set relative to the cost of equity estimate produced by those financial models; (4) how does the FERC-approved ROE impact investment decision-making; and (5) how should FERC determine, as a legal matter, whether an existing ROE has become unjust and unreasonable under *FPA* Section 206.[51]

The comment deadline for both the Incentives Inquiry and the ROE Inquiry was June 26, 2019, with reply comments due by July 26, 2019. Dozens of entities filed comments seeking a broad range of reforms in both policy areas. It is not clear how or when FERC will take further action, but it seems likely that FERC will pursue policy reforms given that the Commissioners have publicly expressed unanimous, bipartisan agreement on the importance of these inquiries.

(F) Transmission Planning

In the past two years, the call for reforms to FERC's Order No. 1000 transmission planning and cost allocation requirements has steadily increased. FERC-watchers across the electricity sector have been eagerly awaiting a sign of things to come, but FERC has thus far taken no action. There have however, been significant developments at the state level concerning transmission planning.

Readers may recall that, in Order No. 1000, FERC eliminated the *federal* right-of-first-refusal (ROFR) that allowed franchised public utilities the opportunity to develop any new transmission projects in their service territories. FERC's goal in removing the federal ROFR was to create competition for transmission projects, by allowing non-incumbent transmission developers to compete with incumbent public utilities. However, in removing the federal ROFR, FERC declined to expressly preempt states from passing *state* ROFR laws that effectively reinstate the protections previously granted by the federal ROFR.

Two states — Minnesota and Texas — have now passed such laws. Both of those laws have been challenged in court and the judicial proceedings are ongoing. The Minnesota law is being challenged on dormant Commerce Clause grounds. The law survived that challenge at the U.S. District Court level, but the District Court's opinion has been appealed to the U.S. Court of Appeals for the Eighth Circuit.[52] The Texas state ROFR law was enacted in May 2019.[53] In June 2019, NextEra Energy Capital Holdings, Inc., et al. filed a complaint challenging the law in U.S. District Court for the Western District of Texas.[54]

[48] *Emera Maine v FERC*, 854 F.3d 9 (D.C. Cir. 2016).

[49] *Inquiry Regarding the Commission's Policy for Determining the Return on Equity*, 166 FERC ¶ 61,207 at P 3.

[50] *Ibid* at 32.

[51] *Ibid* at 28-38.

[52] See *LSP Transmission Holdings, LLC v. Lange*, 329 F. Supp. 3d 695 (D. Minn. 2018), *appeal pending*.

[53] See Tex. Util. Code §§ 37.051, 37.056, 37.057, 37.151, 37.154.

[54] See *NextEra Energy Capital Holdings, Inc.v Paxton, Complaint for Declaratory and Injunctive Relief*, Civil No. 1:19-cv-00626 (W.D. Tex.) (filed 17 June 2019).

Although it remains to be seen how these state ROFR cases will play out, their resolution has the potential to significantly impact the degree to which transmission infrastructure in the United States will be developed through competitive solicitations versus state or local franchise rights.

II. OIL AND GAS PRODUCTION

(A) Offshore Leasing and Drilling

As of this writing, the ultimate effect of President Trump's April 2017 executive order titled "Implementing an America-First Offshore Energy Strategy"[55] (2017 EO) remains uncertain. Section 5 of the 2017 EO explicitly changes the language of a 2015 and two 2016 Obama Administration memoranda to limit the withdrawal of leasing to "those areas of the Outer Continental Shelf designated as of July 14, 2008, as Marine Sanctuaries under the Marine Protection, Research, and Sanctuaries Act of 1972."[56] Previously, those memoranda together had withdrawn from future consideration for leasing the following planning areas: the Chukchi Sea Planning Area, the Beaufort Sea Planning Area, and certain parts of the North Atlantic and Mid-Atlantic Planning Areas (collectively, the Obama-era withdrawal area).[57]

In January 2018, the U.S. Department of Interior (DOI) responded to the 2017 EO by releasing its Draft Proposed Program (DPP) to replace the Obama Administration's 2017–2022 National OCS Oil and Gas Leasing Program (2017–2022 OCS Program) for oil and gas development in the U.S. Outer Continental Shelf. Under the DPP, all of the Obama-era withdrawal area would be open to leasing with the ultimate effect of expanding offshore leasing in U.S. waters from six per cent of U.S. offshore waters to approximately 90 per cent.[58]

In April 2019, the DOI temporarily paused further development of the DPP following a ruling by the U.S. District Court of Alaska invalidating provisions of the 2017 EO because the DOI believes that the ruling could likely lead to prolonged appeals process "that may be discombobulating" to the DOI's plans for block lease sales.[59] The DOI and the Trump administration have appealed the decision to the Ninth Circuit Court of Appeals with opening briefs due September 5, 2019. Because the DPP contemplates inclusion of areas under Obama era protections, the DOI is evaluating the appeal process and potential outcomes before attempting further progress on the DPP.[60] The DPP remains in the second of five regulatory steps needed for program approval under the *OCS Lands Act*[61] and *NEPA*. Thus, the Obama-era 2017–2022 OCS Program remains effective.

[55] Exec. Order 13795, 82 Fed Reg 20,815 (28 April 2017).

[56] Exec. Order 13754, 81 Fed. Reg. 90669, § 5 (Dec. 9, 2016); 16 U.S.C. §§ 1431–1434, 33 U.S.C. §§ 1401 et seq.

[57] Memorandum on Withdrawal of Certain Portions of the United States Arctic Outer Continental Shelf From Mineral Leasing, DCPD201600860 (Dec. 20, 2016), online: <https://www.govinfo.gov/content/pkg/DCPD-201600860/pdf/DCPD-201600860.pdf>; Memorandum on Withdrawal of Certain Areas off the Atlantic Coast on the Outer Continental Shelf From Mineral Leasing, DCPD201600861 (Dec. 20, 2016), online: <https://www.govinfo.gov/content/pkg/DCPD-201600861/pdf/DCPD-201600861.pdf>.

[58] 2019–2024 National OCS Oil and Gas Leasing Draft Proposed Program, Table 1, online: <https://www.boem.gov/NP-Draft-Proposed-Program-2019-2024>. See also U.S. Department of the Interior, Press Release, "Secretary Zinke Announces Plan for Unleashing America's Offshore Oil and Gas Potential"(4 January 2018), online:<https://www.doi.gov/pressreleases/secretary-zinke-announces-plan-unleashing-americas-offshore-oil-and-gas-potential>.

[59] *League of Conservation Voters v Trump*, 303 F.Supp.3d 985 (D. Alaska 2018). The ruling invalidated Section 5 of the EO, which states: Sec. 5. Modification of the Withdrawal of Areas of the Outer Continental Shelf from Leasing Disposition. The body text in each of the memoranda of withdrawal from disposition by leasing of the United States Outer Continental Shelf issued on December 20, 2016, January 27, 2015, and July 14, 2008, is modified to read, in its entirety, as follows: "Under the authority vested in me as President of the United States, including section 12(a) of the Outer Continental Shelf Lands Act, 43 U.S.C. 1341(a), I hereby withdraw from disposition by leasing, for a time period without specific expiration, those areas of the Outer Continental Shelf designated as of July 14, 2008, as Marine Sanctuaries under the Marine Protection, Research, and Sanctuaries Act of 1972, 16 U.S.C. 1431-1434, 33 U.S.C. 1401 et seq." Nothing in the withdrawal under this section affects any rights under existing leases in the affected areas. Exec. Order 13795, 82 FR 20815. See also Tom DiChristopher, "Trump is shelving plans to open virtually all federal waters to offshore drilling," *CNBC* (25 Apr. 2019), online: <https://www.cnbc.com/2019/04/25/trump-admin-shelves-vast-expansion-of-offshore-drilling.html>.

[60] Brian Scheid, "US offshore oil and gas plan on pause, potentially for years", *S&P Global* (23 May 2019), online: <https://www.spglobal.com/platts/en/market-insights/latest-news/oil/052319-us-offshore-oil-and-gas-plan-on-pause-potentially-for-years>.

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

Expansion of offshore drilling continues to face opposition from the majority of coastal states. In a DOI survey, 23 of the 32 coastal state governors and state agencies potentially affected by the DPP opposed it.[62] Since April 2018, Oregon, New York, Maine, New Jersey, Delaware, Maryland, California and Florida have passed legislation limiting or prohibiting offshore drilling in their respective state-controlled waters; similar legislation is pending in Connecticut, New Hampshire and Massachusetts.

Further, the U.S. House of Representatives is contemplating opposition to any further offshore drilling through provisions in its draft spending bill.[63] Certain adopted and proposed amendments would prohibit DOI from appropriating any of its funding for offshore oil and gas leasing.[64] The Bill is currently out of the House Committee on Rules and has been directed for consideration on the House floor.[65]

Although the DOI has insisted that a lease sale will take place in 2019 for leases in the Arctic National Wildlife Refuge (ANWR), such sales have also been targeted by proposed spending restrictions.[66] Drilling in the refuge, previously banned, was authorized as part of the December 2017 Trump Administration tax overhaul. As part of the tax reform, Congress ordered the DOI to conduct two lease sales within the wildlife refuge, one within four years and the second within seven.[67] However, to date, no sales have taken place.[68]

In May 2019, DOI's Bureau of Safety and Environmental Enforcement (BSEE)[69] finalized its effort to overhaul post-Deepwater Horizon safety regulations with its final Blowout Preventer Systems and Well Control regulations (Well Control Rule) release.[70] The new regulations took effect July 15, 2019 and generally regulate well control equipment, testing, inspection and reporting requirements, and oversight requirements.[71]

In June 2019, opposition to the new Well Control Rule ensued despite Secretary Bernhardt's characterization of the final Well Control Rule as "put[ting] safety first, both public and environmental safety, in a common sense way."[72] Environmental groups filed suit against the BSEE in the U.S. District Court of the Northern District of California on June 11, 2019.[73] The plaintiffs claim the rule rollback violates due process given the BSEE's alleged failure to provide sufficient explanation concerning the rollback's safety effects.[74]

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[62] 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>.

[63] H.R. 3055, 116th Cong (2019) (*Commerce, Justice, Science, and Related Agencies Appropriations Act*, 2020).

[64] Pacific Coast. H.R. Rep. No 116-119, at 23, para 176; Atlantic and Florida Gulf coasts. H.R. Rep. No 116-119, at 19-20, paras 128 & 132.

[65] H.R. 445, 116th Cong (2019), online: <https://www.congress.gov/116/bills/hr445/BILLS-116hr445ih.pdf>.

[66] Yereth Rosen, "U.S. vows first oil lease sale in Alaska Arctic refuge this year", *Reuters* (30 May 2019), online: <https://www.reuters.com/article/us-alaska-oil-refuge/u-s-vows-first-oil-lease-sale-in-alaska-arctic-refuge-this-year-idUSKCN1T1011>.

[67] Kristen Miller, "Interior spending bill holds Trump administration accountable for 2017 promises," *The Hill* (19 June 2019), online: <https://thehill.com/blogs/congress-blog/energy-environment/449247-interior-spending-bill-holds-trump-administration>.

[68] Yereth Rosen, "U.S. vows first oil lease sale in Alaska Arctic refuge this year," *Reuters* (30 May 2019), online: <https://www.reuters.com/article/us-alaska-oil-refuge/u-s-vows-first-oil-lease-sale-in-alaska-arctic-refuge-this-year-idUSKCN1T1011>.

[69] The BSEE was created following the *Deepwater Horizon* tragedy to separate regulatory responsibility from leasing responsibility, see online: <https://www.bsee.gov/who-we-are/history>. It is "the lead federal agency charged with improving safety and ensuring environmental protection related to the offshore energy industry on the OCS", see online: <https://www.bsee.gov/who-we-are/about-us>.

[70] U.S. Department of the Interior, Press Release, "BSEE Finalizes Improved Blowout Preventer and Well Control Regulations" (2 May 2019), online: <https://www.doi.gov/pressreleases/bsee-finalizes-improved-blowout-preventer-and-well-control-regulations>.

[71] Final Rule, Oil and Gas Sulfur Operations in the Outer Continental Shelf-Blowout Preventer Systems and Well Control Revisions, 84 Fed. Reg. 21908 (15 May 2019).

[72] U.S. Department of the Interior, Press Release, "BSEE Finalizes Improved Blowout Preventer and Well Control Regulations" (2 May 2019), online: <https://www.doi.gov/pressreleases/bsee-finalizes-improved-blowout-preventer-and-well-control-regulations>.

[73] Complaint, *Sierra Club v Scott Angelle.*, Case No. 3:19-cv-03263.

[74] *Ibid* at 6-8.

(B) Fracking, Drilling, and Permitting

Federal Developments

In June 2019, California filed a motion for summary judgment in its litigation challenging the U.S. Department of Interior Bureau of Land Management's (BLM) roll-back of Obama-era fracking regulations.[75] The Obama-era regulations[76] sought to regulate hydraulic fracturing (fracking) activities on federal and tribal lands out of concern for water contamination, well integrity and containment and recovery of hydraulic fluids, but never took effect due to a stay pursuant to a decision from the U.S. District Court for the District of Wyoming, and the subsequent BLM rollback at issue in the current litigation.[77] The summary judgment motion hearing is set for December 5, 2019 — any decision will likely be appealed to the Ninth Circuit.[78] California's challenge is not alone, as a coalition of environmental groups have filed a related suit challenging the BLM's roll-back with a pending summary judgment motion currently before the court.[79]

In May 2019, the Tenth Circuit ruled the BLM violated *NEPA* in failing to consider the increased volume of water needed for horizontal wells and fracking operations in issuing drilling permits for new oil and gas wells in the Mancos Shale area of New Mexico (Mancos Shale).[80] At issue, the BLM had published a "reasonably foreseeable development scenario" (RFDS) in 2014 (2014 RFDS), which estimated that 3,960 new oil and gas wells (2014 RFDS Wells) could be drilled on federal lands in the Mancos Shale in the event of full-field development.[81] The parties disagreed as to whether the possibility of the 2014 RFDS Wells, as represented in the RFDS, made it reasonably foreseeable that the 2014 RFDS Wells would be drilled, thus requiring a *NEPA* Environmental Analysis (EA) in consideration of the thousands of 2014 RFDS Wells for the mere hundreds[82] of permits at issue. Finding the BLM had itself relied on RFDSs in its own past cumulative impact analyses to define the scope of "reasonably foreseeable" actions, the court ruled the 2014 RFDS made the drilling of the 2014 RFDS Wells "reasonably foreseeable," thus requiring consideration under *NEPA* of the cumulative impacts thereof in the EAs the BLM conducted for the subsequent Mancos Shale well permit applications.[83]

Only six of the permits at issue were addressed on the merits — of which the court remanded five to the district court with instructions to vacate the drilling permits and remand their respective EAs to the BLM for proper *NEPA* analysis.[84] The court affirmed the district court's ruling of validity for the other 300+ due to a "dramatic insufficiency of the record" which prevented the court from reviewing them on the merits.[85]

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[75] *State of California. v Bureau of Land Management*, Case No. 18-cv-00521-HSG (N.D. Cal.); U.S. Bureau of Land Management, Press Release, "BLM Rescinds Rule on Hydraulic Fracturing" (28 December 2017), online: <https://www.blm.gov/press-release/blm-rescinds-rule-hydraulic-fracturing>.

[76] 43 C.F.R. § 3160 (2015).

[77] Order on Petitions for Review of Final Agency Action, *Wyoming v Jewell*, Case No 2:15-cv-00043-SWS, (ECF No 219) (D. Wyo.); Final Rule, 80 Fed. Reg. 16,128 (26 March 2015); Chris Mooney, "To round out a year of rollbacks, the Trump administration just repealed key regulations on fracking", *The 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>.

[78] Amended Scheduling Order, *State of California. v Bureau of Land Management*, Case No. 18-cv-00521-HSG (ECF No. 113) (N.D. Cal.).

[79] *Sierra Club v Bernhardt*, Case No. 4:18-cv-00524-HSG (N.D. Ca.).

[80] *Diné Citizens Against Ruining Our Environment. v. Zinke*, Case No. 18-2089 (7 May 2019) (10th Cir. 2019).

[81] *Ibid* at 4-6.

[82] The total number of wells at issue on appeal was unclear to the court for various reasons, however, the range is between 330 and 362. *Ibid* at 7 n.2.

[83] The court also rejected an Intervenor's argument that the cumulative effect of the 2014 RFDS wells need not be considered when "'no operator [had] proposed to drill' all the [2014 RFDS Wells]" (citing 40 C.F.R. § 1508.7 ("Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.")) *Ibid* at 39.

[84] The sixth permit at issue was upheld because it was issued before the BLM issued the 2014 RFDS, which served as the entire basis of the Appellant's argument. *Ibid* at 37, n 14.

[85] *Ibid* at 20.

State Developments

In May and June of 2019 we saw the latest statewide bans on fracking. The state of Washington enacted a permanent ban[86], and Oregon enacted a five-year moratorium effective as of June 17, 2019.[87] Vermont, New York and Maryland have bans in place; Washington and Oregon are the fourth and fifth states to enact a statewide fracking ban. Similar to Vermont's fracking ban however, the Oregon and Washington bans are mostly symbolic given the lack of oil and gas development in these states.[88] On the other hand, although Florida and New Mexico had partial support for statewide fracking bans, proposed bans in both states failed to pass in their latest legislative session.[89]

In January 2019, New Jersey Governor Phil Murphy wrote a letter to the Delaware River Basin Commission (DRBC) pushing to renew efforts to ban fracking in the Delaware River Basin (DRB).[90] The DRBC is comprised of Commissioners consisting of the governors of Delaware, New Jersey, Pennsylvania and New York, and a commander of the U.S. Army Corps of Engineers representing federal interests. The DRBC regulates the DRB territory spanning across the four states, and began contemplating a DRB fracking ban in 2017.[91] However, Commissioner Murphy's latest renewed effort extends beyond a mere fracking ban — calling for prohibitions on the storage, treatment and disposal of waste from fracking operations and on exporting water from the watershed to abet drilling operations elsewhere.[92] The proposed ban has significant ramifications for natural gas exploration in Pennsylvania, as the location of the Marcellus Shale formation there has led to significant fracking activity throughout the state — including the state's northeastern counties abutting the Delaware River Basin.[93]

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[86] S.B. 5145, 66th Leg., Reg. Sess. (Wa. 2019), online: <http://lawfilesext.leg.wa.gov/biennium/2019-20/Pdf/Bills/Senate%20Passed%20Legislature/5145.PL.pdf>.

[87] H.B. 2623, 80th Leg. Assemb., Reg. Sess. (Or. 2019), online: <https://olis.leg.state.or.us/liz/2019R1/Measures/Overview/HB2623>.

[88] U.S. EIA, *State Profile and Energy Estimates* (Washington, 2018), online: <https://www.eia.gov/state/analysis.php?sid=WA>; U.S. EIA, *State Profile and Energy Estimates* (Vermont, 2018), online: <https://www.eia.gov/state/analysis.php?sid=VT>; U.S. EIA, *State Profile and Energy Estimates* (Oregon, 2018), online: <https://www.eia.gov/state/analysis.php?sid=OR>; U.S. EIA, *State Profile and Energy Estimates* (New York, 2019), online: <https://www.eia.gov/state/analysis.php?sid=NY (at its peak in 2006, New York produced nearly 56 billion cubic feet of natural gas)>; U.S. EIA, *State Profile and Energy Estimates* (Maryland, 2018), online: <https://www.eia.gov/state/analysis.php?sid=MD> (in 2018, Maryland produced less than 50 million cubic feet).

[89] S.B. 7064 died in Environment and Natural Resources Comm. of Florida Senate, online: <https://www.flsenate.gov/Session/Bill/2019/7064/ByCategory/?Tab=BillHistory>; S.B. 459 was indefinitely postponed by the New Mexico Legislature, online: <https://www.nmlegis.gov/Legislation/Legislation?chamber=S&legtype=B&legno=459&year=19>.

[90] Tom Johnson, "New Jersey governor: Ban fracking, all related activities in Delaware River Basin", NPR StateImpact (31 January 2019), online: <https://stateimpact.npr.org/pennsylvania/2019/01/31/new-jersey-governor-phil-murphy-fracking-ban-delaware-river-basin>. New Jersey does not currently regulate fracking in its own territory, as there are no economically viable oil & gas reserves in the state. Its concern lies in the fracking of neighboring states in the Marcellus Shale portions of the DRB, which is a source of drinking water for New Jersey. See also U.S. EIA, *State Profile and Energy Estimates* (New Jersey, 2018), online: <https://www.eia.gov/state/analysis.php?sid=NJ>.

[91] The member states entered into the Delaware River Basin Compact in 1961 — giving the DRBC authority to regulate activities related to the DRB in all four member states. See 53 Del. Laws, Chapter 71 (1961); 1961 N.Y. Laws, Chapter 148, Article 6; 1961 N. J. Laws, Chapter 13; 1961 Pa. Laws, Act No. 268.

[92] Tom Johnson, "New Jersey governor: Ban fracking, all related activities in Delaware River Basin", *NPR StateImpact* (31 January 2019), online: <https://stateimpact.npr.org/pennsylvania/2019/01/31/new-jersey-governor-phil-murphy-fracking-ban-delaware-river-basin>.

[93] 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>.

The amount of the Marcellus Shale formation potentially impacted by such a ban in the DRB is relatively small at approximately 5.4%. "Explore Shale," *Penn State Public Broadcasting* (August 2014), online: <http://exploreshale.org> (the size of the Marcellus Shale is approximately 90,000 sq. mi.); "About DRBC: Frequently Asked Questions", *Delaware River Basin Comm'n* (3 March 2019), online: <https://www.nj.gov/drbc/about/faq> (the DRB is approximately 13,500 sq. mi.) ; "Programs: Natural Gas Drilling Index Page", *Delaware River Basin Comm'n* (3 July 2018), online: <https://www.state.nj.us/drbc/programs/natural> (the Marcellus Shale formation underlies about 36 percent of the Delaware River Basin).

Pennsylvania Governor Tom Wolf and Delaware Governor John Carney also support a full ban on hydraulic fracturing in the watershed, as well as a ban on any water transfers associated with drilling operation.[94] Each Commissioner has one vote of equal power, with a majority vote needed to decide most issues.[95] With support for a full ban from three of the five members, a final vote on the issue may be drawing near, though no definitive timeline has been set by the DRBC.[96] Given the amount of oil and gas production in Pennsylvania, Governor Wolf's stance is of concern to the industry. However, he appears to limit his support of a fracking ban to the DRB, and the Pennsylvania portion of the DRB is not an area where substantial fracking takes place or would be likely to take place in the future.[97]

While some states have enacted bans at the state level of government, others have opposed the practice at the county level. As of December 2018, six California counties — Monterey, San Benito, Santa Cruz, Mendocino, Alameda and Butte — have banned fracking.[98] Unlike the other five counties in California with fracking bans, Monterey County has a significant oil and gas industry.[99] Its passage by ballot initiative drew national attention and heavy opposition from the oil and gas industry. The ban currently remains in place, however, there is an ongoing appeal challenging the fracking ban in the county.[100] Similar to Monterey County, San Luis Obispo County has significant oil and gas operations.[101] However, unlike Monterey County, the voters of San Louis Obispo rejected a proposal to ban fracking in the county in November 2018.[102]

In January 2019, California elected Governor Gavin Newsom. He made his stance against the oil and gas industry clear in his refusal to take its offered campaign donations and his support of a statewide fracking ban.[103] However, at this point, he has not released any concrete plans to do so, and the State of California is not a party in any of the ongoing county-ban litigation. The use of fracking to stimulate production has been practiced in California for over 30 years, without causing any reported damage to the environment.[104]

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[94] Kyle Bagentose, "Gov. Wolf says he supports full fracking ban in Delaware River basin", *The Intelligence*, online: <https://www.theintell.com/news/20190516/gov-wolf-says-he-supports-full-fracking-ban-in-delaware-river-basin>.

[95] "About DRBC: Frequently Asked Questions," *Delaware River Basin Comm'n* (3 March 2019), online: <https://www.nj.gov/drbc/about/faq>.

[96] Joe Hernandez, "Environmentalists call for full fracking ban in the Delaware River watershed", *NPR StateImpact* (13 June 2019), online: <https://stateimpact.npr.org/pennsylvania/2019/06/13/environmentalists-call-for-full-fracking-ban-in-the-delaware-river-watershed>. Notably, rules adopted by the DRBC need only be published in each state's register — there is no ratification requirement for the state's respective legislatures. See generally: 53 Del. Laws, Chapter 71 (1961); 1961 N.Y. Laws, Chapter 148, Article 6; 1961 N. J. Laws, Chapter 13; 1961 Pa. Laws, Act No 268.

[97] "The closest thing to a ban on fracking was Wolf's decision to join New York and Delaware, under the Delaware River Basin Commission, to ban the drilling practice in the river valley that only comprises part of southeastern Pennsylvania, where the bulk of fracking activity does not, and likely would not, occur. New York has banned fracking in the entire state, with Maryland later following suit. Wolf has also placed a moratorium on issuing leases to energy companies across its state parks, but his administration is very careful to explain that a moratorium is not a ban." See John Siciliano, "Wolf staves off green howling to dominate race in fracking state", *Washington Examiner* (4 November 2018), online: <https://www.washingtonexaminer.com/policy/energy/tom-wolf-staves-off-green-howling-to-dominate-race-in-fracking-state>.

[98] Peter Arcuni, "Measure G: San Luis Obispo Voters Reject a Ban on Fracking and New Oil Drilling", *KQED Science* (6 November 2018), online: <https://www.kqed.org/science/1933923/measure-g-san-luis-obispo-green-groups-push-for-ban-on-new-drilling> [Arcuni].

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

[100] Docket (Register of Actions), Case No. H045791, online: <https://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=6&doc_id=2250893&doc_no=H045791&request_token=NiIwLSIkTkw5W1BJSCNdUEhJUFQ7UCxbJyNOWzNTICAgCg%3D%3D>.

[101] David Middlecamp, "Black gold: SLO Country oil production was a 'boom-or-bust industry' even in the 1980s", *The Tribune* (12 Oct. 2018), online: <https://www.sanluisobispo.com/news/local/news-columns-blogs/photos-from-the-vault/article219825615.html> (in 2017, San Luis Obispo County produced 604,308 barrels of oil from 493 wells, according to Don Drysdale with the California Department of Conservation).

[102] Arcuni, *supra* note 99.

[103] Bill Whalen, "Earth (Day) To Governor Newsom: Why Didn't You Ban Fracking?", *Hoover Institution* (25 Apr. 2019), online: <https://www.hoover.org/research/earth-day-governor-newsom-why-didnt-you-ban-fracking>.

[104] California Department of Conservation, *Hydraulic Fracturing in California*, online: <https://www.conservation.ca.gov/dog/general_information/Pages/HydraulicFracturing.aspx>.

However, it only recently started regulating the practice in September 2013.[105]

Fracking related tort litigation continues to find its way into courtrooms in producing states. While the alleged induced seismicity (earthquakes) at the center of such lawsuits is generally associated with injection wells, the mass increase of produced wastewater associated with fracked wells is seen as a possible contributing factor.[106] There were seven lawsuits filed against energy exploration companies in 2018 concerning induced seismicity — the same number filed in 2017.[107] Of the 2018 reported lawsuits, four were filed in Oklahoma, two in Ohio, and one in Texas and West Virginia. Four of the claims filed in 2018 are still pending before courts in Oklahoma and Texas while two others settled for undisclosed amounts and one other (an insurer's claim) was dismissed because its insured had already filed a lawsuit essentially mirroring the same allegations.[108] The state of Oklahoma currently regulates the speed and volume of wastewater disposal due to induced seismicity concerns.[109] Kansas developed similar temporary regulations in an attempt to curb and study the regulatory effects on the increasing number of earthquakes it observed, and found a decrease in seismic activity thereafter.[110] In the context of a dramatic increase of seismic activity in the Permian Basin, similar regulatory discussions in Texas surfaced in the fall of 2018.[111] While there have been no recent developments on this issue at the Texas Railroad Commission, the topic is notable in that any increased regulatory restrictions on the Texas oil and gas industry would be of substantial import given the state's status as one of the largest producing territories in the world.[112]

In April 2019, Colorado Governor Jared Polis signed Senate Bill 19-181, drastically altering the oil and gas regulatory framework in the state and makes three important changes to prior law: it (1) increases local government control; (2) elevates health and safety considerations in permitting decisions; and (3) alters pooling, drilling, and permitting requirements.[113] This new language clarifies that local governments have powers to regulate siting, land and surface impacts, and all nuisance-type issues related to the industry, and arguably now permits local

[105] S.B. 4 Oil and Gas: Well Stimulation, (California, 2013-2014), online: <https://leginfo.legislature.ca.gov/faces/billVersionsCompareClient.xhtml?bill_id=201320140SB4>.

[106] "Induced Earthquakes Myths and Misconceptions", *United States Geological Survey*, online: <https://earthquake.usgs.gov/research/induced/myths.php>.

[107] Four of the 2017 cases are still pending in court: *Pawnee Nation of Oklahoma v Eagle Road Oil LLC*, Case No. 4:18-cy-00263) (N.D. Okla.), *Bryant v Eagle Road Oil LLC*, Case No. CJ-17-18 (Okla. Dist. Ct., Pawnee Cty. Ct.), *Griggs v New Dominion LLC*, Case No. 5:17-cv-00942 (W.D. Okla.), and *Berlanga v Barnett Gathering LLC*, Case No. DC-17-10197 (Tex. Dist. Ct., Dallas Cty.).

[108] The four pending 2018 claims include: (1) toxic chemical exposure from natural gas development; (2) waste-water injection has induced earthquakes that have caused damage; (3) damages for individuals affected by a 5.8 magnitude earthquake allegedly caused by the operation of wastewater disposal wells; and (4) damages for permanent nerve damage after a 5.8 magnitude earthquake allegedly caused the plaintiff to fall down a set of stairs.

[109] 35 Ok. Reg. 973 (25 June 2019), online: <http://okrules.elaws.us/oac/165:10-3-17>; Ryan Collins & David Wethe, "Earthquakes in Heart of Texas Oil Country Spur Water Crackdown", *Bloomberg* (5 December 2018), online: <https://www.bloomberg.com/news/articles/2018-12-05/earthquakes-in-heart-of-texas-oil-country-spur-water-crackdown>.

[110] "In the two years since the Kansas Corporation Commission (KCC) issued its first order limiting saltwater injections in parts of the state, seismic activity has dropped from 1,967 earthquakes March 2015 through August 2015, to 668 earthquakes September 2016 through February 2017, a reduction of 66%. Kansas Corporation Staff filed these findings in a report published in March 2017." See "Induced Seismicity", *Kansas Corporation Comm'n*, online: <http://www.kcc.state.ks.us/oil-gas/induced-seismicity>.

[111] For example, see: Ryan Collins & David Wethe, "Earthquakes in Heart of Texas Oil Country Spur Water Crackdown", *Bloomberg* (5 December 2018), online: <https://www.bloomberg.com/news/articles/2018-12-05/earthquakes-in-heart-of-texas-oil-country-spur-water-crackdown> ("[t]he Texas Oil & Gas Association continues to be supportive of research and actions that are rooted in sound methodology, which is essential to understanding natural and induced seismicity and to inform science-based policy," Todd Staples, Texas Oil & Gas Association).

[112] Texas has addressed the issue of induced seismicity in various ways. In a statement on the Texas Railroad Commission (TRC) website concerning the relationship between disposal wells and earthquakes, the Commission stated that it had hired a seismologist to strengthen the Commission's ability to understand and evaluate new research, as well as to coordinate the exchanging of information with the research community regarding seismic activity that may be related to oil and gas activities. Railroad Commission of Texas, Injection and Disposal Wells, online: https://www.rrc.texas.gov/about-us/resource-center/faqs/oil-gas-faqs/faq-injection-and-disposal-wells/#collapse-54177.

[113] COLO. REV. STAT. §29-20-104 (2019).

governments to regulate, or ban altogether, fracking within their jurisdictions. Notably, the bill also modified the *Oil and Gas Conservation Act* to now require that the Colorado Oil and Gas Conservation Commission (COGCC) "[r]egulate the development and production of the natural resources of oil and gas…in a manner that protects public health, safety, and welfare."[114] Previously, the Act simply provided that the legislature "declared [it] to be in the public interest to foster the responsible, balanced development and production of the natural resources of oil and gas…in a manner consistent with protection of public health, safety, and welfare."[115] This revision seems to prevent the COGCC from recognizing that the public's interest is met by "foster[ing] the responsible, balanced development…of oil and gas," to instead declaring that the public's interest is met by requiring the Commission to actively "regulate" this development, arguably providing greater regulatory power to the COGCC.[116] Amongst various other changes, the bill also alters the makeup of the COGCC by reducing the number of "oil and gas industry" members required to be on the Commission.[117]

In January 2018, the Colorado House introduced a bill which, if passed, would have mandated that mineral interest owners (and/or other affected parties) be paid "for the value of the mineral interest" lost and for any expenses or damages resulting from a local government's decision to outlaw hydraulic fracturing or "enact[] a moratorium on oil and gas activities."[118] However, the bill failed.

III. REGULATORY SUBSIDIZATION OF NUCLEAR AND COAL FACILITIES

State and federal efforts to subsidize nuclear and coal facilities continue apace. Several states have continued the trend of subsidizing nuclear facilities for their zero-air-emissions attributes, while others have sought to preserve or support local coal-fired facilities and the jobs they create. Still others, along with the federal government, have sought to improve grid resilience or energy security by supporting generation sources that can store long-term fuel supplies on-site.

Selective non-renewable support programs came to the fore in 2016 when states like New York and Illinois moved to provide payments to nuclear generators that were otherwise at risk of shutdown due to low electricity prices in wholesale power markets, particularly when loss of the facilities would jeopardize state-level greenhouse-gas emission or climate policies, air quality targets, or other environment goals. Such programs typically function through the use of zero emission credits or certificates ZECs created for each megawatt-hour of power generated by nuclear facilities, and, in some cases, certain renewables. The movement toward supporting nuclear or coal generators without an express tie to environmental attributes is newer, and has found a strong backing from the Trump Administration. Despite few federal successes, expansions have occurred at on the state level.

(A) State Developments

The U.S. Court of Appeals for the Second Circuit, in a September 27, 2018 decision, determined that New York's ZEC program passed constitutional muster.[119] The court contrasted New York's program — which initially bases ZEC prices on the social cost of carbon, subject to modification in subsequent years based on forecasts of wholesale energy prices — with the contract-for-differences scheme litigated in *Hughes v Talen Energy Marketing LLC* (*Hughes*).[120] The court observed

[114] COLO. REV. STAT. §34-60-102 (2019).

[115] COLO. REV. STAT. §34-60-102(1)(a)(I) (amended 2019).

[116] *Ibid*; COLO. REV. STAT. §34-60-102 (2019); Melissa J. Lyon & James M. Tartaglia, "Colorado Senate Bill 181 Signed by Governor Polis" (17 April 2019) The Nat'l L Rev, online: <https://www.natlawreview.com/article/colorado-senate-bill-181-signed-governor-polis>.

[117] COLO. REV. STAT. §34-60-104(2)(a)(I) (2019).

[118] COLO. House Bill 18-1150 (introduced 2018) to amend COLO. REV. STAT. §29-20-204.5 online: <https://leg.colorado.gov/bills/hb18-1150; https://leg.colorado.gov/bills/sb18-192; https://leg.colorado.gov/sites/default/files/documents/2018A/bills/2018a_1150_01.pdf>.

[119] *Coal. for Competitive Energy v Zibelman*, 906 F.3d 41 (2d Cir. 2018).

[120] *Ibid* at 51 (there is no support for Plaintiffs' contention that the "subsidy varies in almost exactly the same manner" as in *Hughes* (*Hughes v Talen Energy Marketing LLC*, U.S. 36 S. Ct. 1288 (2016))).

that New York's program, unlike that in Hughes, did not require a ZEC recipient to participate in wholesale markets subject to FERC's Federal Power Act jurisdiction.[121] And it found that any downward effects on capacity prices in federally regulated wholesale markets that result when ZEC-supported nuclear facilities continue to sell capacity (rather than shut down) are incidental and do not trigger concerns about federal preemption.[122] Plaintiffs' claims of conflict preemption were similarly unavailing for failure to identify "clear damage" to federal goals from the program in light of the dual federal-state regulatory system set forth in the *FPA*,[123] which is designed to permit state oversight of matters like electric generation. The court closed by finding that plaintiffs lacked the standing necessary to raise their Dormant Commerce Clause claims.[124] The U.S. Supreme Court denied a later petition for certiorari in April 2019.[125]

Illinois' program of ZECs likewise withstood scrutiny by the U.S. Court of Appeals for the Seventh Circuit in a September 13, 2018 decision.[126] The Seventh Circuit contrasted Illinois' program — which requires that nuclear facilities generate electricity, but does not dictate how plant output is sold — with the impermissible subsidy in *Hughes*, which required the recipient to bid into an interstate capacity auction at a price that would have caused the facility to clear the auction and therefore sell in the market.[127] The court also rejected plaintiffs' arguments regarding alleged violations of the Dormant Commerce Clause, stating that the absence of overt harm to interstate commerce from the ZEC program, combined with the Federal Power Act's express provision for state regulation of generation "defeats any constitutional challenge…"[128] The Seventh Circuit elicited FERC's views in the course of briefing; the agency explained that it viewed Illinois' program as not interfering with FERC's jurisdiction under the Federal Power Act.[129] The U.S. Supreme declined to grant *certiorari* to plaintiffs in this case as well.[130]

New Jersey enacted legislation in May 2018 that identified nuclear power as "a critical component of the State's clean energy portfolio…"[131], and observed that multiple nuclear facilities risked closure for economic reasons.[132] The legislation established a "zero emission certificate" program, to be overseen by the state's Board of Public Utilities (BPU). The law caps the number of ZECs at the equivalent of 40 per cent of the total number of megawatt-hours distributed by electric public utilities in the state in 2017.[133] State-regulated electric public utilities must purchase their *pro-rata* share of ZECs[134], with all costs recovered through a non-bypassable charge added to retail rates.[135] In an April 18, 2019 order, the BPU determined

[121] *Ibid* at 52.

[122] *Ibid* at 53 (citing *Nw. Cent. Pipeline Corp. v State Corp. Comm'n of Kan.*, 489 U.S. 493 (1989)).

[123] *Ibid* at 57.

[124] *Ibid* at 58 ("[b]ecause Plaintiffs' asserted injuries are not traceable to the alleged discrimination against out-of-state entities, but (rather) arises from their production of energy using fuels that New York disfavors, they lack Article III standing to challenge the ZEC program.")

[125] *Elec. Power Supply Ass'n v Rhodes*, 139 S.Ct. 1547 (Mem) (2019) [*Elec. Power* Mem].

[126] *Elec. Power Supply Ass'n v Star*, 904 F.3d 518 (7th Cir. 2018).

[127] *Ibid* at 524 (citing *Hughes* at 1299).

[128] *Ibid* at 524-25 (citing 16 U.S.C. § 824(b)(1), which states, in pertinent part, "[t]he Commission shall…not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy.")

[129] *Ibid* at 522.

[130] *Elec. Power* Mem, *supra* note 126.

[131] 2018 N.J. Laws Ch. 16 (SENATE 2313) § 1 a.(7).

[132] *Ibid* § 1 a.(8). The law nonetheless excludes any power plants not licensed beyond 2029, which prevents Oyster Creek Nuclear Generating Station from receiving certificates. Oyster Creek permanently shut down three months after the legislation was passed pursuant to an administrative consent order between plant owner Exelon Generation Company, LLC and the New Jersey Department of Environmental Protection.

[133] *Ibid* § 3.g.(1). This target comports with the finding at § 1.a.(7) that nuclear power provided approximately 40 percent of New Jersey's electric power needs.

[134] *Ibid* § 3.i.(2).

[135] *Ibid* § 3.j.(1).

that all three remaining nuclear units in New Jersey — PSEG Salem Generating Station Units 1 and 2 (approximately 2,300 megawatts (MW), combined) and PSEG Hope Creek Station (approximately 1,200 MW) — would be eligible for the ZEC program, despite the BPU staff's finding that none of the units were at financial risk of shutdown.[136] The BPU overrode its staff and determined that it was statutorily bound to include operational and market risks in its decision-making process, which tipped the balance in favour of the generators' eligibility.[137]

Connecticut conducted a Zero Carbon Solicitation and Procurement in 2018. The solicitation was issued in part pursuant to Public Act 17-3, in which state agencies evaluated the current and projected economic condition of nuclear generating facilities within the footprint of ISO New England Inc., and the potential impacts from the retirement of such facilities on matters including energy markets and reliability, greenhouse gas emission mandates, and the economy of the state and region.[138] As a result of this and prior evaluations, Connecticut authorities found that the 2,100 MW Millstone Power Station, Connecticut's only operating nuclear installation, was at risk of retirement after June 1, 2023.[139]

The Connecticut Department of Energy and Environmental Protection announced the winning bidders in December 2018[140], which will enter into long-term contracts with state-regulated electric distribution utilities. Millstone received the lion's share: for the first ten years of the program, it will account for approximately 77 per cent of the annual megawatt-hours procured.[141] The next-largest share was claimed by NextEra Energy-owned and nuclear-fueled Seabrook Station (located near Portsmouth, New Hampshire), which received approximately 16 per cent of the program's average annual energy allotment for a period of eight years.[142] The remaining 7 per cent was awarded to several wind, solar, and solar-plus-storage projects, each of which received a 20-year contract.[143]

Ohio passed legislation to support nuclear power, as well as selected coal-fired generators, on July 23, 2019. These subsidies, unlike the measures reviewed above, are not tied to environmental attributes.[144] The law establishes an annual $150 million "nuclear generation fund"[145], financed through charges assessed to customers of the state's electric distribution utilities[146], and disbursed to nuclear power plants operators through a "nuclear resource credit" program based on megawatt-hours generated, with a price set initially at nine dollars per megawatt-hour.[147] To qualify for the subsidy, a plant's operator must maintain a principal place of business and a "substantial presence" in Ohio.[148] In substance, the program benefits Akron, Ohio-based FirstEnergy Solutions Corp. and First Energy Nuclear Operating Company, which are currently involved in bankruptcy proceedings and which own and operate, respectively, Ohio's two operating nuclear stations, 900 MW Davis Besse and 1,200 MW

136 Order Determining the Eligibility of Hope Creek, Salem 1, and Salem 2 Nuclear Generators to Receive ZECs, Docket Nos. E018080899, *et al.* (Apr. 18, 2019), online: <https://www.state.nj.us/bpu/pdf/boardorders/2019/20190418/4-18-19-9A.pdf>.

137 *Ibid* at 14-15.

138 See Public Acts, Spec. Sess., June 2017, No. 17-3, §§ 1(b) & (c). The evaluation addresses facilities likely to face retirement prior to July 1, 2027.

139 PURA Implementation of June Special Session Public Act 17-3, Interim Decision, Docket No. 18-05-04 (Dec. 5, 2018), online: <http://www.dpuc.state.ct.us/dockcurr.nsf/8e6fc37a54110e3e852576190052b64d/7ccd55d05bce0d168525835a00699329/$FILE/180504-120518.pdf>.

140 RFP Pursuant to Section 1 of June Special Session Public Act 17-3, Notice of Final Determination (no date), online: <http://www.dpuc.state.ct.us/DEEPEnergy.nsf/c6c6d525f7cdd1168525797d0047c5bf/a928bd493eb81f668525841600679687/$FILE/Zero-Carbon-Final-Determination.pdf>.

141 *Ibid* at 16-17. The Department of Energy and Environmental Protection noted that, if Millstone were to retire, achieving statutory greenhouse-gas emission reductions would be "virtually impossible."

142 *Ibid* at 18. Unlike Millstone, Seabrook did not apply to be deemed at risk of premature closure.

143 *Ibid* at 16.

144 See 2019 Ohio Laws File 12 (Am. Sub. H.B. 6), online: <https://www.legislature.ohio.gov/legislation/legislation-documents?id=GA133-HB-6>.

145 *Ibid* § 1 (to be codified at Ohio Rev. Code § 3706.49).

146 *Ibid* (to be codified at Ohio Rev. Code § 3706.46).

147 *Ibid* (to be codified at Ohio Rev. Code § 3706.45).

148 *Ibid* (to be codified at Ohio Rev. Code § 3706.43).

Perry. The legislation also includes provisions authorizing non-bypassable charges to customers of electric distribution utilities to fund cost recovery for certain "legacy generation resources" owned by the Ohio Valley Electric Corporation (OVEC).[149] The measure will become effective on October 22, 2019.[150]

Wyoming, on March 8, 2019, approved Senate File 159[151], which requires any jurisdictional public utility to make a good-faith effort to sell a coal-fired generator before it can be retired.[152] It also binds the selling public utility to accept a reasonable offer for the facility, and to complete a sale of such facility unless reasons beyond the reasonable control of the utility prevent it from doing so.[153] In the absence of such an attempted sale process, the utility is barred from recovering any earnings on the capital costs for any replacement unit(s) in its rates.[154] State-jurisdictional electric public utilities are then obligated to purchase electricity generated by a coal-fired facility that has been sold and purchased under the process set forth in the measure.[155] The law entered into effect on July 1, 2019.

Pennsylvania's General Assembly considered, but did not pass, measures to support the Commonwealth's nuclear power plants in 2019. The measures proposed to include nuclear generation as a resource eligible for a new Tier III of Commonwealth's currently two-tiered Advanced Energy Portfolio Standard.[156] The measures would have imposed a corresponding credit-purchase requirement for the state's electric distribution utilities and electric generation suppliers.[157] The proposals failed to make it out of committee in either the House or the Senate. Shortly after the measures failed, Exelon Corporation announced plans to close the remaining unit of the Three Mile Island nuclear generating station, located southeast of Pennsylvania's capitol of Harrisburg, by September 30, 2019.[158] FirstEnergy Solutions Corp. had previously announced plans to retire its Beaver Valley Power Station, located in Shippingport, Pennsylvania.[159]

The Montana legislature took up a bill to support the purchase (by an existing utility part-owner) and continued operation of a portion of the coal-fired Colstrip power plant in spring of 2019.[160] The measure would have: (1) allowed cost recovery for prudently incurred power plant and environmental remediation costs for the purchased capacity; (2) barred retirement of coal-fired generators in the state (not just at Colstrip) before the end of their depreciations lives, unless approved by the Montana Public Service Commission; and (3) provided for acquisition of, and cost recovery for, a key interconnected electric transmission facility. The measure passed the Montana Senate, but failed in the House.[161]

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[149] *Ibid* (to be codified at Ohio Rev. Code § 4928.01). The language of the Act technically states that it applies to "all generating facilities owned directly or indirectly by a corporation that was formed prior to 1960 by investor-owned utilities for the original purpose of providing power to the federal government for use in the nation's defense or in furtherance of national interests, including the Ohio valley electric corporation [*sic*]." In practice, this provision applies solely to OVEC.

[150] The Ohio Legislature, 133rd General Assembly, "House Bill 6, History", accessed August 8, 2019, online: <https://www.legislature.ohio.gov/legislation/legislation-status?id=GA133-HB-6>.

[151] 2019 Wyo. Sess. Laws Ch. 193 (S.F. 159), online: <https://www.wyoleg.gov/Legislation/2019/SF0159>.

[152] *Ibid* §1 (to be codified at Wyo. Stat. § 37-3-116).

[153] *Ibid*.

[154] *Ibid*.

[155] *Ibid* (to be codified at Wyo. Stat. § 37-2-133).

[156] 2019 Pa. House Bill No. 11, § 1, online: <https://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2019&sessInd=0&billBody=H&billTyp=B&billNbr=0011&pn=0864>, and 2019 Pa. Senate Bill No. 510, § 1, online: <https://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2019&sessInd=0&billBody=S&billTyp=B&billNbr=0510&pn=0578>.

[157] 2019 Pa. House Bill No. 11, § 2, and 2019 Pa. Senate Bill No. 510, § 2.

[158] "Three Mile Island Unit 1 To Shut Down By September 30, 2019", (8 May 2019), *Exelon Corporation* (blog), online: <https://www.exeloncorp.com/newsroom/three-mile-island-unit-1-to-shut-down-by-september-30-2019>.

[159] FirstEnergy Solutions, "FirstEnergy Solutions Files Deactivation Notice for Three Competitive Nuclear Generating Plants in Ohio and Pennsylvania", (28 March 2018), online: <https://www.fes.com/content/dam/fes/about/files/newsreleases/deactivation-release-final-letterhead.pdf> [FirstEnergy Solutions].

[160] See 2019 Mont. Senate Bill No. 331, online: <https://leg.mt.gov/bills/2019/billpdf/SB0331.pdf>.

[161] See Montana Legislature, "Detailed Bill Information, Bill No. S.B. 311", accessed August 8, 2019, online: <http://laws.leg.mt.gov/legprd/LAW0203W$BSRV.ActionQuery?P_SESS=20191&P_BLTP_BILL_TYP_CD=SB&P_BILL_NO=331&P_BILL_DFT_NO=&P_CHPT_NO=&Z_ACTION=Find&P_ENTY_ID_SEQ2=&P_SBJT_SBJ_CD=&P_ENTY_ID_SEQ=> (stating bill in "Died in Process" and is "Probably Dead"; the Montana Legislature adjourned *sine die* on April 25, 2019).

(B) Federal Developments

On the federal level, efforts to subsidize coal and nuclear power have largely been unsuccessful. Such efforts peaked in 2018 and have since declined in frequency and intensity.

In January 2018, FERC rejected a DOE proposal to promulgate so-called "grid resiliency" rules under the seldom-used Section 403 of the *Department of Energy Organization Act*.[162] The DOE proposal stated that fuel-secure resources (defined as those facilities with 90 days or more of onsite fuel storage) were systematically undervalued in organized wholesale electric markets and, consequently, FERC must promptly act to promulgate market rules that would "fully value" the resiliency and reliability attributes of facilities with onsite fuel supplies.[163] FERC received and reviewed pleadings from hundreds of interested parties, including electric generators, mining companies, legislators, industrial energy users, state regulatory agencies, suppliers to the coal and nuclear industries, environmental groups, and others.

FERC determined that DOE's proposal and the accompanying proceeding had failed to demonstrate that existing energy market tariffs were not just and reasonable, as required by *FPA* Section 206.[164] The proceeding, according to FERC, similarly failed to establish that the DOE proposal was itself just and reasonable, and not unduly discriminatory or preferential.[165] In reaching the latter conclusion, FERC observed that the 90-day onsite fuel requirement appeared "to permit only certain resources to be eligible…excluding other resources that may have resilience attributes."[166] In the same order, FERC initiated a new proceeding (in Docket No. AD18-7-000) to review the actions already taken by regional transmission organizations and independent system operators to improve the resilience of their respective systems. Multiple parties requested rehearing of FERC's January 8, 2018 order; those requests remain pending. Meanwhile, FERC amassed a substantial record in Docket No. AD18-7-000 regarding RTO and ISO efforts to enhance resilience, but has not, to date, initiated any proceedings to impose new or modified requirements in response.

In a separate, but related, development, in March 2018, FirstEnergy Solutions Corp. requested that DOE issue an emergency order pursuant to Section 202(c) of the *Federal Power Act*, to require the PJM Interconnection, L.L.C. (PJM) to enter into contracts with at-risk nuclear and coal facilities and thereby "maintain stability of the electric grid", compensating such resources for the "full benefits" they provide.[167] The request came one day after FirstEnergy Solutions Corp. announced plans to retire its three nuclear power plants.[168] The DOE has not, as of this writing, acted upon FirstEnergy Solutions Corp.'s request and appears unlikely to do so. The request was an unprecedented invocation of Section 202(c), which has historically been used for temporary, reliability-related requests to continue operating power plants slated to retire (particularly otherwise-operable facilities retiring for environmental reasons)[169], or to temporarily

[162] See *Grid Reliability and Resilience Pricing*, 162 FERC ¶ 61,012 (2018). Section 403 of the Department of Energy Organization Act is codified at 42 U.S.C. § 7173 and allows the Secretary of Energy to submit rulemaking proposals for "final action" by FERC.

[163] See "Secretary of Energy's Direction that the Federal Energy Regulatory Commission Issue Grid Resiliency Rules Pursuant to the Secretary's Authority Under Section 403 of the Department of Energy Organization Act", FERC Docket No. RM18-1-000, at 11 (Sept. 28, 2017), online: <https://www.energy.gov/sites/prod/files/2017/09/f37/Secretary%20Rick%20Perry%27s%20Letter%20to%20the%20Federal%20Energy%20Regulatory%20Commission.pdf>.

[164] *Grid Reliability and Resilience Pricing*, 162 FERC ¶ 61,012 at P 15 (2018) ("[w]hile some commenters allege grid resilience or reliability issues due to potential retirements of particular resources, we find that these assertions do not demonstrate the unjustness or unreasonableness of the existing RTO/ISO tariffs. In addition, the extensive comments submitted by the RTOs/ISOs do not point to any past or planned generator retirements that may be a threat to grid resilience.")

[165] *Ibid* at P 16.

[166] *Ibid*.

[167] Request for Emergency Order Pursuant to *Federal Power Act Section* 202(c), FirstEnergy Solutions Corp. (29 March 2018), online: <https://statepowerproject.files.wordpress.com/2018/03/fes-202c-application.pdf>.

[168] FirstEnergy Solutions, *supra* note 160.

[169] See *e.g.* Order No. 202-17-1 (Apr. 14, 2017) (granting a request from the Grand River Dam Authority to temporarily maintain operations at its Grand River Energy Center, Unit 1 for relief during low-load, high-voltage events while other units were unavailable; unit 1 was otherwise required to cease operations because it did not comply with air emissions regulations, despite two one-year compliance extensions), online: <https://www.energy.gov/sites/prod/files/2017/04/f34/Oklahoma.pdf>.

interconnect transmission and/or distribution systems in case of an emergency, such as after a hurricane.[170] Days after submitting its 202(c) request, FirstEnergy Solutions Corp., its subsidiaries, and FirstEnergy Nuclear Operations Company filed for bankruptcy protection.[171]

The Trump Administration's efforts to bolster coal and nuclear generation seemed to have reached a high point in mid-2018, when what was reportedly a draft memorandum proposing a "Strategic Electric Generation Reserve" leaked from the DOE and revealed possible plans to use emergency authority under the *Defense Production Act* of 1950 to issue orders to grid operators requiring them to give preferences to facilities with onsite fuel supplies, as well as to facilities essential to defense installations and critical infrastructure.[172] The draft memo reportedly also considered use of Section 202(c) authority.[173] The draft memorandum has not yet resulted in obvious programmatic changes at DOE, nor has it led to creation of the Strategic Electric Generation Reserve. The strategy reserve concept surfaced again, however, in the March 2019 *Economic Report of the President*, albeit only in passing.[174] More recent statements from Energy Secretary Rick Perry suggest that Administration's thinking has shifting on this topic. In June 2019, he told a gathering of energy industry participants and observers that administration efforts have advanced little since mid-2018, and that future action to this end must come from FERC or the states.[175]

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

Over the course of 2018 and early 2019, the Trump Administration has continued its efforts to unwind the Obama-era Climate Action Plan[176] and has taken significant steps toward implementing the changes announced in President Trump's Executive Order 13783,[177] which was aimed at eliminating regulatory requirements on domestic energy development.

(A) Clean Power Plan Repeal and Replacement with the ACE Rule

The EPA finalized three separate rulemakings in June 2019. First, the EPA repealed the Obama-era Clean Power Plan (CPP), potentially rendering the litigation challenging the CPP moot. Numerous states and industry litigants moved to dismiss their challenges in the D.C. Circuit, a move with which the EPA concurred. The court has yet to rule on the pending motions and it is unclear whether any parties will oppose.

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[170] See e.g. Order No. 202-08-1 (Sept. 14, 2008) (granting a request to allow CenterPoint Energy to temporarily connect its distribution and transmission system to restore power to Entergy Gulf States, Inc. and electric cooperatives and municipal customers in Texas after Hurricane Ike), online: <https://www.energy.gov/sites/prod/files/202%28c%29%20order%20202-08-1%20September%2014%2C%202008%20-%20CenterPoint%20Energy.pdf>.

[171] FirstEnergy Solutions, "FirstEnergy Solutions and FirstEnergy Nuclear Operating Company File Voluntary Petitions for Chapter 11 Restructuring", (31 March 2018), online: <https://www.fes.com/content/dam/fes/about/files/newsreleases/1-press-release-final.pdf>.

[172] Jennifer A. Dlouhy, "Trump Prepares Lifeline for Money-Losing Coal Plants", *Bloomberg* (1 June 2018), online: <https://www.bloomberg.com/news/articles/2018-06-01/trump-said-to-grant-lifeline-to-money-losing-coal-power-plants-jhv94ghl>.

[173] *Ibid.*

[174] ECONOMIC REPORT OF THE PRESIDENT, TOGETHER WITH THE ANNUAL REPORT OF THE COUNCIL OF ECONOMIC ADVISERS, at 282 (2019), online: < https://www.whitehouse.gov/wp-content/uploads/2019/03/ERP-2019.pdf>. The report states:

The strategic need for an electricity generation reserve to promote the grid's resilience is a challenge that is analogous to many other economic problems. The entire portfolio of generation assets in the United States could be eligible to be part of a reserve, with different strategic weights placed on various types of generation — for example, nuclear or coal-fired generation might provide greater resilience benefits and therefore be preferentially selected into the reserve.

[175] Catherine Morehouse, "DOE has no 'Regulatory or Statutory Ability' to Create Coal, Nuclear Bailout, Says Perry", *UTILITY DIVE* (12 June 2019) online: < https://www.utilitydive.com/news/doe-has-no-regulatory-or-statutory-ability-to-create-coal-nuclear-bailou/556687>.

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

[177] Executive Order 13783 — Promoting Energy Independence and Economic Growth (Mar. 28, 2017), online: <https://www.federalregister.gov/documents/2017/03/31/2017-06576/promoting-energy-independence-and-economic-growth>.

Second, the EPA finalized the Affordable Clean Energy (ACE) rule as a replacement to the CPP. The ACE rule demonstrates EPA's current, more limited view on its authority to regulate emissions from existing sources. The ACE rule provides more regulatory flexibility, shifting greater responsibility to the states to develop and implement performance standards for existing electric generating units (EGUs). EPA concluded that heat rate improvement measures are the Best System of Emission Reduction (BSER) for coal fired EGUs; the ACE rule provides a list of improvements that states must evaluate in order to develop a plan including unit-specific standards for regulated sources in the state. While the new rule is unlikely to reduce CO_2 emissions to the same extent anticipated by the CPP, some regulated entities may have additional compliance requirements because the rule requires that emission reduction measures be implemented at the source itself and precludes averaging or trading across sectors to meet a set overall emissions reduction goal.

Third, EPA revised its regulations implementing Section 111(d) of the *Clean Air Act*[178] addressing performance standards guidelines for ongoing and future emissions of existing sources. The revisions largely address the process for states to seek EPA approval of their plans under the ACE rule. States now have three years to provide their plans to EPA for review.

Although EPA had originally planned to rollout revisions to its new source review regulations at the same time it took steps to repeal and replace the CPP, the agency announced that it would instead conduct a separate rulemaking to address new sources at a later date.

Numerous states and cities have already challenged the CPP repeal and the ACE rule and additional challenges can be expected, teeing up a protracted legal battle over the regulations and extending the current climate of regulatory uncertainty.

(B) *NEPA* Climate Guidance and the Social Cost of Carbon

In response to Executive Order 13783, the White House Council on Environmental Quality (CEQ) issued draft guidance to replace the 2016 Obama-era guidance to federal agencies on how to incorporate the analysis of climate change and greenhouse gas (GHG) emissions into the *National Environmental Policy Act* (*NEPA*) review process; it is soliciting public comment before making the guidance final.[179] Besides for proposing to significantly truncate the current guidance, the primary change is to clarify that agencies do not need to include analysis of the monetary cost-benefit using any Social Cost of Carbon estimates for project-level decisions.

(C) Fuel Economy Standards for Automobiles

EPA and the National Highway Traffic Safety Administration (NHTSA) announced the proposed Safer Affordable Fuel-Efficient (SAFE) Vehicles rule[180] in which the agencies proposed a range of actions, including freezing the Corporate Average Fuel Economy (CAFE) and CO_2 emissions standards for light-duty cars and trucks manufactured in model years 2021-2026 at 2020 levels. In what is likely to be seen as a controversial move, the rule proposes to rescind California's preemption waiver under the Clean Air Act for its GHG and zero emissions vehicle requirements in favour of setting a single national standard for GHG emissions. Rescission of the waiver would significantly affect California and the 13 states that have adopted its standards. The agencies' justification for the rescission is largely based on the auto industry's need to develop and market vehicles in response to consumer demand rather than regulatory requirements. Ford, Volkswagen, Honda, and BMW recently signed on to continue their efforts to reduce emissions and increase fuel economy to the Obama-era levels, despite the proposed regulatory rollback. If this portion of the proposed rule is adopted, it will inevitably be challenged.

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178 42 U.S.C § 7411(d) (standards of performance for existing sources; remaining useful life of source).

179 Draft *National Environmental Policy Act* Guidance on Consideration of Greenhouse Gas Emissions, 84 Fed. Reg. 30097 (June 26, 2019).

180 Notice of Proposed Rulemaking, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, 83 Fed. Reg. 42986 (Aug. 24, 2018).

V. ENERGY STORAGE

(A) Federal Storage Rule

On February 15, 2018, FERC issued a final rule, Order No. 841[181] (*Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*), addressing Storage resources in RTO/ISOs. This Rule largely sets up a federal framework that establishes a timeline and set of requirements for regional grid operators to establish specific rules tailored to the unique assets and needs in their jurisdictions.

Order No. 841 removes barriers for Storage resource participation in various wholesale markets, such as capacity, energy, and ancillary services. It requires the RTO/ISOs to amend their tariffs to develop a participation model that more fully incorporates Storage into the market, taking into consideration the physical and operational characteristics of Storage resources. Further, Order No. 841 defines electric storage resources as "a resource capable of receiving energy from the grid and storing it for later injection of electric energy back to the grid."[182] In addition, Order No. 841 mandates that Storage resources should pay the wholesale locational marginal price (LMP) for electric energy that the resource buys from the RTO/ISO that is then resold back into the RTO/ISO market.

Order No. 841 mandates the RTO/ISO tariff revisions to include the following:

- Ensure that Storage resources using the RTO/ISO's participation model is eligible to provide all capacity, energy, and ancillary services that the resource is technically capable of providing;
- Ensure that Storage resources under the participation model can be dispatched and set the wholesale market clearing price as both a wholesale seller and a wholesale buyer;
- Account for Storage resources' physical and operational characteristics through either bidding parameters or other means; and
- Set a minimum size requirement for Storage resources' participation in the RTO/ISO markets not to exceed 100 kW.[183]

This Order is currently being appealed to the U.S. Circuit Court of Appeals D.C. Circuit.[184] The appellants are seeking review of FERC's authority to manage energy storage resources connected at the distribution level or on site behind the retail meter. The appellants largely advocate that FERC has exceeded its authority under the *FPA* by intruding into the energy storage market at the local electrical distribution level, which has been seen exclusively as a state issue.

Order No. 841 required that all RTO/ISOs file a compliance tariff no later than December 3, 2018 with an effective date of December 3, 2019, which incorporated the mandated changes.[185] All of the RTO/ISOs subject to FERC jurisdiction have filed their proposed amended tariffs and are awaiting FERC approval.

(B) State Developments

Several states have taken an active approach towards the utilization of Storage resources. In addition to solar+storage and wind+storage, some states are exploring development of a Clean Peak Standard (CPS), a policy tool designed to increase the delivery of kilowatt-hour sales from clean peak resources during system peak demand periods. Below are some recent highlights at the state level.

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[181] *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, 162 FERC ¶ 61,127 (2018) [*Electric Storage* 162]; 167 FERC ¶ 61,154 (2019) (2019), Order No. 841-A (denying the hearing for requests and affirming its determinations in Order No. 841) [Order No. 841].

[182] Order No. 841, *supra* note 182 at 5.

[183] *Ibid* at 8-9.

[184] *Supra* note 182.

[185] Several entities filed requests for rehearing and clarification of Order No. 841. On May 16, 2019, FERC issued an order denying the rehearing requests, and denying in part and granting in part the clarification requests. See Order No. 841-A.

Colorado

In March 2018, Colorado passed a new law that required the Colorado Public Utilities Commission to begin developing rules to allow for the installation, interconnection, and use of Storage systems by utility customers. This new law stated that electric customers have a right to install, interconnect, and use Storage systems without unnecessary restrictions or regulations, and without discriminatory rates or fees. In addition, a second recent law directs the CPUC to develop rules for integrating Storage resources into the planning process. This rule was adopted in October 2018 and the final rule was published in December 2018.[186] During the pendency of the rulemaking, the law authorized utilities to apply for rate-based Storage projects with a maximum capacity of 15 MW.

Massachusetts

In August 2018, Massachusetts became the first state to pass a CPS. It requires the delivery of a minimum percentage of kilowatt-hour sales to come from clean peak resources during system peak demand.[187] The Massachusetts Department of Energy Resources (DOER) is currently working on regulations to implement this new standard. Responses to questions posed by the DOER were due on February 5, 2019. The DOER released its straw proposal on April 2, 2019 with initial comments due on April 12, 2019. No final rules have been released.

New Jersey

In May 2018, New Jersey became the first state within PJM to set a Storage target, which is non-binding but motivating for utilities within the state. New Jersey set a goal of 600 MW of Storage by 2021 and 2,000 MW by 2030, making it one of the most aggressive goals in the United States.[188] The new law requires the New Jersey Board of Public Utilities (BPU) to conduct an analysis of how Storage resources can benefit ratepayers and prepare a report within one year. The analysis must also consider the need for integrating distributed energy resources into the distribution grid.

New Mexico

In 2015, New Mexico released a new, comprehensive energy plan, which recommended, among other things, "promot[ing] New Mexico as 'the' place to develop and test energy storage technologies" and "pursu[ing] energy storage technology development and demonstration projects such as advanced batteries and flywheel/hydraulic energy storage systems."[189] Then, in February 2017, on its own motion, the New Mexico Public Regulation Commission initiated a rulemaking on including Storage in Integrated Resource Plans. Most recently, in March 2019, the New Mexico legislature passed a bill that, if it becomes law, will require all publicly regulated utilities to produce 100 per cent of their electricity from carbon-free sources by 2045. To achieve that goal, it is estimated that New Mexico would need to increase its renewable generation capacity five-fold, which will require accompanying storage capacity.

North Carolina

Energy Intelligence Partners (EIP) has developed a CPS that focuses on leveraging Storage resources in North Carolina. While North Carolina has yet to adopt EIP's proposed CPS, the energy storage-centric CPS would apply to the three major electricity retailers and proposes to satisfy 5 per cent of their system peak load by 2025 and 10 per cent of their system peak load by 2028.

Texas

In February 2018, the Public Utility Commission of Texas (PUCT) initiated a rulemaking proceeding entitled "Rulemaking to Address the Use of Non-Traditional Technologies in Electric Delivery Service."[190] The purpose

[186] 4 Code of Colorado Reg 723-3, online: <https://www.sos.state.co.us/CCR/GenerateRulePdf.do?ruleVersionId=5738&fileName=4%20CCR%20723-3>.

[187] Chapter 227 of the Acts of 2018, "An Act to Advance Clean Energy", online: <https://malegislature.gov/Laws/SessionLaws/Acts/2018/Chapter227>.

[188] A-3723 - Renewable Energy Bill, online: <https://legiscan.com/NJ/text/A3723/2018>.

[189] New Mexico Energy Policy & Implementation Plan 2015, online: <http://www.emnrd.state.nm.us/EnergyPolicy/documents/EMNRD_EnergyPolicy.pdf>.

[190] Public Utility Commission of Texas, Docket No. 48023 (Filed Feb. 5, 2018), online: <https://interchange.puc.texas.gov/Search/Filings?ControlNumber=48023>.

of this rulemaking is to consider whether transmission and distribution companies in Texas can own Storage resources. Under Texas law, transmission and distribution companies remain fully regulated by the PUCT and are not allowed to own or operate generation resources. Due to the dual nature of Storage facilities as both a consumer and generator of energy, the PUCT opened the rulemaking to solicit public comment and further study how Storage resources may be utilized. This proceeding is still ongoing with public comments submitted in November 2018 and no clear timetable for a decision from the PUCT. As a demonstration of the complexity of this issue, the comments filed in the rulemaking were split as to whether or not a transmission and distribution company in Texas may own Storage resources.

In January 2019, as part of its Competition in Electric Markets report to the Texas legislature[191], the PUCT asked for help in clarifying whether investor owned transmission and distribution companies in Texas may own Storage resources. The 2019 legislative session closed without clarification by the Texas legislature.

VI. CAPACITY MARKETS

One of the most difficult challenges facing FERC over the past few years has been managing the tension between, at the Federal level, procuring generation resources through competitive wholesale markets while, at the State level, decisions are being made to subsidize some of those resources, but not others. Because those State subsidies — *e.g.*, renewable energy credits ("RECs") for renewable resources, and ZECs for nuclear generators — provide additional revenue streams for electricity production, the resources receiving them are able to lower their offers in the wholesale markets, and thereby have a competitive advantage over unsubsidized resources. FERC and certain RTOs and ISOs have been engaged in multiple high-profile efforts to address that issue.

In 2018, ISO New England, Inc. (ISO-NE) filed a proposal to redesign its capacity market to accommodate the market entry of State-subsidized resources, while also mitigating the concerns related to competition and impacts on unsubsidized resources. That proposal, referred to as Competitive Auctions with Sponsored Policy Resources (CASPR), involved splitting ISO-NE's forward capacity auctions into two stages.[192] In the first stage, ISO-NE would apply a minimum offer price rule (MOPR) to new capacity resources seeking to enter the market, requiring them to offer at or above a price floor determined by resource type.[193] In the second stage, existing resources that cleared the first stage can submit a permanent retirement bid, to see if a state-subsidized resource that did not clear the first stage is willing to buy out the existing resource's capacity supply obligation, thereby allowing the state-subsidized resource to successfully enter the forward capacity market.[194] FERC accepted ISO-NE's CASPR proposal on March 9, 2018, in a contentious 3-2 vote that saw three of the five Commissioners issue concurring or dissenting statements.[195] Multiple parties sought rehearing of the Commission's order and, at the time of this writing, FERC has not yet acted on those rehearing requests.

One month after FERC's CASPR order, PJM submitted its own filing to address the impact of state-subsidized resources in the PJM capacity market. PJM's filing presented two mutually exclusive alternative proposals to FERC. The first proposal involved a two-stage auction design in which the first stage would be used to determine which resources would receive capacity supply obligations and the second stage would set the capacity price for the selected resources after making an adjustment to the offers submitted by state-subsidized resources.[196] The second of PJM's two proposals involved an expansion of PJM's existing MOPR to apply a price floor to some, but not all, state-subsidized resources.[197]

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[191] Scope of Competition in Electric Markets in Texas, Report to the 86th Legislature, 15 Jan. 2019, online: <https://www.puc.texas.gov/industry/electric/reports/scope/2019/2019scope_elec.pdf>

[192] *ISO New England Inc.*, 162 FERC ¶ 61,205, at P 1 (2018).

[193] *Ibid* at P 3.

[194] *Ibid* at P 7.

[195] See *ibid* at PP 20-27. See also *ibid* LaFleur, Comm'r (*concurring in part*), Powelson, Comm'r (*dissenting*), Glick, Comm'r (*dissenting in part and concurring in part*).

[196] See *Calpine Corp. v PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236, at P 23 (2018).

[197] *Ibid*.

On June 29, 2018, FERC rejected both of PJM's proposals, finding that PJM failed to demonstrate that either of proposal was just and reasonable.[198] However, in so doing, FERC consolidated the proceeding with a separate, pending complaint, which alleged that the impact of state-subsidized resources had rendered PJM's capacity market rules unjust and unreasonable.[199] FERC granted, in part, that complaint, finding the PJM tariff to be unjust and unreasonable.[200] FERC established a paper hearing on FERC's proposed replacement rate, which involved: (1) expanding PJM's MOPR to apply to new and existing resources that receive out-of-market payments, regardless of resource type; and (2) allow such resources to remain online by "choos[ing] to be removed from the PJM capacity market, along with a commensurate amount of load, for some period of time."[201]

Shortly after FERC issued that order, one of the three Commissioners that supported the order resigned his seat, leaving the Commission split 2-2 on how to manage the proceeding going forward. Because of that deadlock, the 2019 PJM capacity auction has been delayed multiple times. Most recently, PJM filed a motion at FERC requesting permission to conduct the 2019 capacity auction in August 2019 under the tariff rules that FERC found to be unjust and unreasonable, due to the lack of a replacement rate.[202] On July 25, 2019, FERC denied that motion and ordered PJM to postpone the 2019 auction until FERC establishes a just and reasonable replacement rate. As a result, at the time of this writing, significant uncertainty continues to loom over the PJM capacity market.

VII. RENEWABLE ENERGY RESOURCES

(A) State Renewable Portfolio Standards

Since our last report, many states have continued their march toward a cleaner generation fleet, with several states recently accelerating their pace. According to the U.S. Energy Information Administration, by the end of 2018, 29 states have adopted renewable portfolio standards (RPS) or other policies that require electricity to be procured from certain types of renewable resources.[203] Numerous states increased their RPS targets in 2018 and 2019, with several seeking to procure 100 per cent of their power from renewable resources. Those updated RPS targets, in chronological order, are as follows:

- Connecticut: 48 per cent by 2030.[204]
- New Jersey: 50 per cent by 2030.[205]
- Massachusetts: 35 per cent by 2030, increasing by 1 per cent per year thereafter.[206]
- California: 60 per cent by 2030 and 100 per cent by 2045.[207]
- District of Columbia: 100 per cent by 2032.[208]
- New Mexico: 100 per cent by 2045.[209]
- Nevada: 50 per cent by 2030 and 100 per cent by 2050.[210]

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198 *Ibid* at P 7.

199 *Ibid* at PP 6-8.

200 *Ibid* at P 6.

201 *Ibid* at P 8.

202 *Calpine Corp. v PJM Interconnection, L.L.C.*, 168 FERC ¶ 61,051 (2019).

203 U.S. Energy Information Administration, *Four states updated their renewable portfolio standards in the first half of 2019* (24 June 2019), online: <https://www.eia.gov/todayinenergy/detail.php?id=39953 (last accessed August 2, 2019) [*Four states portfolio*].

204 U.S. Energy Information Administration, *Updated renewable portfolio standards will lead to more renewable electricity generation* (27 February 2019), online: <https://www.eia.gov/todayinenergy/detail.php?id=38492> (last accessed August 2, 2019).

205 *Ibid*.

206 *Ibid*.

207 *Ibid*.

208 *Ibid*.

209 *Four states portfolio, supra* note 203.

210 *Ibid*.

- Washington: 100 per cent by 2050.[211]
- Maryland: 50 per cent by 2030.[212]
- Maine: 100 per cent by 2050.[213]
- New York: increased its target to 70 per cent by 2030 and 100 per cent by 2040.[214]

There are now nine jurisdictions that have adopted mandates to procure 100 per cent of their power from renewable resources by mid-century: California, Colorado, District of Columbia; Maine; Nevada; New Mexico; New York; Puerto Rico; and Washington.[215]

(B) Offshore Wind

Closely related to the recent expansion of state RPS programs, multiple states on the East coast took major steps in 2019 to facilitate the development of offshore wind resources. In particular, Massachusetts concluded its first offshore wind RFP by approving contracts for 800 MW of offshore wind capacity, and commenced its second RFP for an additional 800 MW.[216] Similarly, New Jersey approved a contract for a 1.1 GW project, the first to be approved in New Jersey's pursuit of 3.5 GW of offshore wind by 2030.[217] In July 2019, New York announced the largest commitment to date when it awarded two contracts in an RFP process that commenced in 2018: one contract for an 816 MW project and the other for an 880 MW project.[218] Connecticut also made progress in 2019. Following its approval of a 200 MW offshore wind contract in 2018, Connecticut passing legislation in June 2019 that requires the procurement of 2 GW of offshore wind capacity by 2026.[219] These projects will also require approval from the federal government.

(C) Generator Interconnection

In April 2018, FERC issued Order No. 845, reforming the rules governing the interconnection of large generators, *i.e.* those with capacity greater than 20 MW, to the transmission system.[220] That rulemaking updated the standardized interconnection process for such generators that FERC adopted in 2003.[221] FERC's 2003 order specifically

[211] *Ibid*.

[212] *Ibid*.

[213] Maine.gov, Press Release, "Governor Mills Signs Major Renewable Energy and Climate Change Bills Into Law" (26 June 2019), online: <https://www.maine.gov/governor/mills/news/governor-mills-signs-major-renewable-energy-and-climate-change-bills-law-2019-06-26> (last accessed August 2, 2019).

[214] See "New York Enacts 100% Clean Energy Law, Secures 1.7 GW of Offshore Wind", (19 July 2019), online : <https://www.powermag.com/new-york-enacts-100-clean-energy-law-secures-1-7-gw-of-offshore-wind> (last accessed August 20, 2019); US, New York State, *Renewable Portfolio Standard*, online : <https://www.nyserda.ny.gov/All-Programs/Programs/Clean-Energy-Standard/Renewable-Portfolio-Standard> (last accessed August 20, 2019).

[215] See *Four states updated their renewable portfolio standards in the first half of 2019*, U.S. Energy Information Administration (24 June 2019), online: <https://www.eia.gov/todayinenergy/detail.php?id=39953> (last accessed 2 Aug. 2019).

[216] See "Massachusetts approves state's first offshore wind contracts for 800 MW", (24 April 2019) *Utility Dive* (blog), online: <https://www.utilitydive.com/news/massachusetts-approves-states-first-offshore-wind-contracts-for-800-mw/553353> (last accessed August 20, 2019); "Massachusetts Starts Second Offshore Wind Solicitation Round", (24 May 2019) *offshoreWIND* (blog), online : <https://www.offshorewind.biz/2019/05/24/massachusetts-starts-second-offshore-wind-solicitation-round> (last accessed August 20, 2019).

[217] See "New Jersey taps Orsted's 1.1 GW offshore wind project in country's largest procurement to date", (24 June 2019) *UtilityDive* (blog), online: < https://www.utilitydive.com/news/new-jersey-taps-rsteds-11-gw-offshore-wind-project-in-countrys-largest/557443> (last accessed August 20, 2019).

[218] See "New York awards record 1,700 MW offshore wind contracts", (19 July 2019) *UtilityDive* (blog), online: <https://www.utilitydive.com/news/new-york-awards-record-1700-mw-offshore-wind-contracts/559091> (last accessed August 20, 2019).

[219] See "Connecticut issues draft RFP for 2 GW offshore wind", (8 July 2018) *UtilityDive* (blog), online: <https://www.utilitydive.com/news/connecticut-issues-draft-rfp-for-2-gw-offshore-wind/558238> (last accessed August 20, 2019).

[220] *Reform of Generator Interconnection Procedures and Agreements*, Order No. 845, 163 FERC ¶ 61,043 (2018).

[221] See *ibid* at PP 11 (summarizing S*tandardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146 (2003)).

established *pro forma* Large Generator Interconnection Procedures and a *pro forma* Large Generator Interconnection Agreement, to ensure that the rates, terms, and conditions of service for interconnecting large generating facilities were just and reasonable and not unduly discriminatory.[222] In Order No. 845, FERC acknowledged that the industry had experienced significant changes since 2003, and the generator interconnection process was not serving the industry as well as it could.[223]

Following a nearly three-year process that included a Notice of Petition for Rulemaking, a technical conference, and a Notice of Proposed Rulemaking, FERC's Order No. 845 concluded that, absent reforms, the current interconnection process could "hinder timely development of new generation, stifle competition, result in uncertainty and inaccurate information, or potentially unduly discriminate against new technologies."[224] FERC therefore adopted numerous reforms to improve the interconnection process. The reforms were intended to benefit all interconnection customers, by providing better information and optionality, and transmission providers, by allowing them to focus on the interconnection requests that are most likely to reach commercial operation.[225]

Although Order No. 845 was intended to improve the interconnection rules for all large generators, regardless of fuel type, several of the reforms had noteworthy benefits for renewable energy resources and electric storage resources. As a general matter, the reforms are expected to help address the significant backlog of renewable energy projects in the various RTO/ISO interconnection queues, which is in part what necessitated Order No. 845.[226] Specifically with regard to electric storage resources, Order No. 845: (1) revised the definition of "Generating Facility" to include electric storage resources;[227] and (2) allowed transmission customers to use surplus interconnection service, which "should remove economic barriers to the development of complementary technologies such as electric storage resources that may be able to easily tailor their use of interconnection service to adhere to the limitations of the surplus interconnection service that may exist."[228]

VIII. CLIMATE CHANGE

(A) Wildfires and PG&E Bankruptcy

Pacific Gas & Electric (PG&E) filed for bankruptcy protection in January 2019[229] resulting in part from the billions in liability from catastrophic wildfires believed to have been started by faulty PG&E equipment. The bankruptcy filing may pave the way for PG&E to shed billions in power purchase agreements (PPA) for renewable energy that were executed at a time when renewable energy was priced significantly higher. The bankruptcy court's recent decision that the court — not the Federal Energy Regulatory Commission (FERC) — will determine the fate of the PPAs under the less stringent standard for determining whether a contract can be rejected,[230] has been appealed by direct petition to the U.S. 9th Circuit Court of Appeals. PG&E is the largest offtaker of renewable energy in California and renewable companies may be left with limited options and likely seeking to negotiate for contracts with the other utilities and power marketers in the state.

In a related development, on July 12, 2019, California enacted Assembly Bill (AB) 1054[231], which introduces major changes to the way

[222] *Ibid* at P 11.

[223] *Ibid* at PP 23-25.

[224] *Ibid* at P 37.

[225] *Ibid* at P 2.

[226] See e.g. *ibid* at PP 15-16 (explaining that the proceeding stemmed, in part, from a petition for rulemaking filed by the American Wind Energy Association); See also *ibid* at P 516, n.902 (identifying 4,000 MW backlog of primarily wind generation in Maine).

[227] *Ibid* at PP 275, 278-79.

[228] *Ibid* at P 467.

[229] PG&E Files for Reorganization Under Ch 11, online: <https://www.pge.com/en/about/newsroom/newsdetails/index.page?title=20190129_pge_files_for_reorganization_under_chapter_11>.

[230] Memorandum Decision on Action for Declaratory and Injunctive Relief, *In re PG&E Corporation*, No. 19-30088-DM (Bankr. N.D. Cal. 2019) online: <https://www.courthousenews.com/wp-content/uploads/2019/06/pge-ferc-ruling.pdf>.

[231] 2019 CA AB-1054 Public utilities: wildfires and employee protection (11 July 2019), online: <https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB1054>.

California addresses wildfires in an emergency effort to financially stabilize the State's electric utilities following catastrophic losses from wildfires in 2017 and 2018. The legislation creates a new fund to facilitate payment of wildfire-related liabilities, overhauls the cost recovery review for electric utilities before the CPUC, and establishes safety certification protocols that electric utilities must meet to participate in such funds. AB 1054 is effective immediately.

(B) Methane Emissions

Continuing its efforts to rollback Obama-era regulations, the BLM finalized the replacement for the methane and waste prevention rule.[232] The new rule aimed to reduce regulatory requirements and reduce the cost of compliance. Key restrictions on natural gas venting and flaring were rescinded and BLM will not impose any requirements on producers to capture gas, instead looking to states for any regulation of venting and flaring. BLM also rescinded the rule's leak detection requirements. Litigants filed suit within hours of the rule being finalized; the climate of regulatory uncertainty is likely to continue through a protracted legal battle.

In addition, EPA announced that it is revisiting the amended new source performance standards for new oil and gas operations on private lands through limitations on methane and volatile organic compounds.[233] In response to industry pushback, EPA granted reconsideration to address requirements for fugitive emissions, standards for well site pneumatic pump, and certifications for closed vent systems. The rulemaking efforts are ongoing.

(C) Carbon Markets Trading

Over the past year, a number of states advanced efforts to impose a price on carbon or implement carbon trading markets with mixed results. While New Jersey plans to rejoin the northeast's Regional Greenhouse Gas Initiative (RGGI) after having left in 2011, Virginia's attempt to join was stymied when its General Assembly passed a budget containing a provision delaying the state from joining the collective. In response, Virginia's Governor directed the state's environmental agency to seek alternative ways to achieve emission reduction goals.

The newly formed Transportation and Climate Initiative (TCI) is a collaboration of 12 states and the District of Columbia in the Mid-Atlantic and Northeast seeking to institute a regional cap-and-invest program to achieve emission reductions in the transportation sector through their state and district agencies.[234] This fledgling collaboration is still developing the details of its planned market, but will be interesting to watch given the significant role the transportation sector has in GHG emissions.

Voters in Washington State rejected a proposed tax on GHG emissions through Ballot Initiative 1631 that would have imposed the tax on carbon economy-wide and invested the revenue in measures to combat the effects of climate change.

IX. GREEN NEW DEAL

On February 7, 2019, Representative Alexandria Ocasio-Cortez, a Democrat from New York, and Senator Ed Markey, a Democrat from Massachusetts, introduced a congressional resolution calling for a Green New Deal, a set of policy goals to address climate change and economic inequality in the U.S.[235] The Green New Deal envisions a ten-year national mobilization to completely transition the U.S. economy to clean, renewable and zero-emission energy sources.[236]

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232 Final Rule, 83 Fed. Reg. 49184 (September 28, 2018), online: <https://www.federalregister.gov/documents/2018/09/28/2018-20689/waste-prevention-production-subject-to-royalties-and-resource-conservation-rescission-or-revision-of>.

233 Proposed Rule, 83 Fed. Reg. 52056 (October 15, 2018), online: <https://www.federalregister.gov/documents/2018/10/15/2018-20961/oil-and-natural-gas-sector-emission-standards-for-new-reconstructed-and-modified-sources.https://www.federalregister.gov/documents/2018/10/29/2018-23570/oil-and-natural-gas-sector-emission-standards-for-new-reconstructed-and-modified-sources>.

234 Transportation & Climate Initiative, Transportation & Climate Initiative Statement (December 18, 2018), online: <https://www.georgetownclimate.org/files/Final_TCI-statement_20181218_formatted.pdf>.

235 Press Release, "Senator Ed Markey and Representative Ocasio-Cortez Introduce Green New Deal Resolution" (7 February 2019) online: <https://www.markey.senate.gov/news/press-releases/senator-markey-and-rep-ocasio-cortez-introduce-green-new-deal-resolution>.

236 H.R. Res. 109, 116th Cong. (2019), online: <https://www.congress.gov/bill/116th-congress/house-resolution/109>.

On March 26, 2019, lawmakers in the Senate voted 57-0 against advancing the resolution, with most Senate Democrats voting "present" in protest of the vote (arguing that Republican Senate Majority leader McConnell scheduled the vote without hearings and testimonies).[237] Although the resolution failed to advance, six of the Democratic presidential candidates have co-sponsored the resolution,[238] and it continues to be a controversial topic of discussion.

The Green New Deal's name is derived from U.S. President Franklin D. Roosevelt's 1930s New Deal program — economic and social policies implemented during the Great Depression, when the U.S. federal government expanded its role to facilitate economic recovery. Like the New Deal, the Green New Deal sets forth goals to create millions of jobs in the U.S. and achieve economic security, with the federal government assuming an active role in achieving its progressive plans.

The term "Green New Deal" to address climate change is not that new. In 2007, political commentator Thomas Friedman wrote an op-ed in *The New York Times* calling for a "Green New Deal" to combat climate change by developing a clean power industry.[239] During the Obama Administration, elements of this vision were included in the *American Recovery and Reinvestment Act of 2009*, an economic stimulus package that provided, among other things, $90 billion to promote clean energy, including renewable energy and smart grid technology.[240]

While the concept of a "Green New Deal" is not new, the Green New Deal resolution is designed to spur a far-reaching legislative effort in the U.S. to garner support for combating climate change and facilitating economic growth.

Part of the impetus for the Green New Deal resolution was an October 2018 report issued by the United Nations Intergovernmental Panel on Climate Change (IPCC), finding that momentous changes will be required to combat climate change, including reducing carbon emissions by half by 2020 and reaching net-zero global emissions by 2050.[241]

The resolution sets forth the following goals: achieve net-zero greenhouse gas emissions; create millions of good, high-wage jobs and ensure prosperity and economic security for all people of the United States; invest in the infrastructure and industry of the U.S. to sustainably meet the challenges of the 21st century; secure a healthy and sustainable environment for all people of the U.S.; and promote justice and equity by ending historic oppression of "frontline and vulnerable communities" including indigenous people.[242]

To meet these goals, the Green New Deal resolution enumerates additional goals, which include: meeting 100 per cent of the power demand in the U.S. through clean, renewable and zero-emission energy sources, including by dramatically expanding and upgrading renewable power sources, and deploying new capacity; and building or upgrading to energy-efficient, distributed and "smart" power grids.[243]

The Green New Deal resolution also provides requirements to meet its goals including: providing public financing and assistance to communities and governments working on the Green New Deal; ensuring that the federal government factors the Green New Deal into its policies; making public investments in the research and development of clean and renewable energy; and prioritizing high-quality job creation in communities that may otherwise struggle with a transition away from carbon intensive industries.[244]

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237 Matthew Daly, "Senate Shuns Green New Deal Amid Claims of Bad Faith", *Associated Press* (26 March 2019) online: <https://www.apnews.com/d2eab3de3be140ba8c78d853a4323307>.

238 *Supra* note 1.

239 Thomas L. Friedman, "A Warning from the Garden", *N.Y. Times* (19 January 2007), online: <https://www.nytimes.com/2007/ 01/19/opinion/19friedman.html?module=inline>.

240 *American Recovery and Reinvestment Act of 2009*, Pub. L. No. 111-5, 123 Stat 115, online: <https://www.govinfo.gov/app/details/PLAW-111publ5>.

241 *Supra* note 2.

242 *Ibid*.

243 *Ibid*.

244 *Ibid*.

While the Green New Deal resolution is aspirational, the Green New Deal goals have begun to influence policy-making and public discourse in the U.S. and could potentially shape the course of future legislation.

X. FERC ENFORCEMENT

FERC v. Coaltrain Energy, L.P.

In March, 2018, the United States District Court for the Southern District of Ohio denied Coaltrain Energy, L.P. (Coaltrain) and the individual defendants' motion to dismiss FERC's action to enforce civil penalties of $42 million for alleged market manipulation.[245] FERC alleged that defendants' trades of Up-To Congestion (UTC) financial contracts in the PJM day-ahead market violated the *FPA*'s anti-manipulation provision and FERC's anti-manipulation rule because they were designed solely or primarily to generate Marginal Loss Surplus Allocation (MLSA) payments while incurring no market risk of loss.[246]

The Court upheld FERC's position on multiple issues, including that such trades could be a deceptive practice even though FERC did not allege that the defendants made any material misrepresentations or omissions. The Court's holding relied on a securities fraud case law holding that "trades made without 'any legitimate economic reason[]…can constitute market manipulation.'"[247] For the same reason, the Court rejected Coaltrain's argument that its trades could not be manipulative because FERC had expressly authorized traders to collect such payments on UTC trades that used paid transmission reservations.

ETRACOM LLC and Michael Rosenberg

In April 2018, FERC approved a Stipulation and Consent Agreement between Enforcement and ETRACOM LLC (ETRACOM) and Michael Rosenberg resolving all claims for violations of *FPA* Section 222 and FERC's Anti-Manipulation Rule, as well as the related federal lawsuit in the Eastern District of California filed by FERC to enforce such alleged violations.[248] FERC previously had determined that ETRACOM and Michael Rosenberg violated the *FPA* and FERC's anti-manipulation Rule by engaging in virtual transactions at the CAISO /New Melones intertie to affect power prices and benefit ETRACOM's Congestion Revenue Rights. After mediation, ETRACOM agreed to pay about $1.9 million, consisting of a civil penalty of about $1.5 million and disgorgement of about $315,000 plus interest, with the disgorgement and interest to be paid to CAISO to distribute to impacted market participants. In the settlement, no sanctions were assessed against Michael Rosenberg personally.

XI. CONCLUSION

The energy sector in the United States is undergoing a foundational shift as industry participants and state and federal policymakers seek to balance environmental constraints and plentiful energy resources. The many regulatory developments covered in this report show how those changes continue apace, and may have even quickened, over the past 18 months. As the Trump Administration has gained momentum on various energy policies mid-term, many states have enacted their own measures, sometimes in support of and other times running counter to the federal initiatives. These federal and state initiatives have created a complicated regulatory environment for the electric, natural gas, and oil sectors. We expect these policy currents, and the attendant regulatory challenges, to persist in the near future. ■

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[245] Opinion and Order, *FERC v Coaltrain Energy, L.P.*, No. 2:16-cv-732-MHW, (ECF No. 45) (S.D. Ohio Mar. 30, 2018).

[246] *Ibid*. at 21.

[247] *Ibid* at 35 (citing SEC v. Masri, 523 F. Supp. 2d 361, 372 (S.D.N.Y 2007)).

[248] Joint Report Regarding Settlement, *FERC v ETRACOM, LLC*, No. 2:16 cv-1945-SB (ECF No. 33) (E.D. Cal. filed Aug. 17, 2016); ETRACOM LLC & Michael Rosenberg, 163 F.E.R.C. ¶ 61,022 (2018).

CHAIRS INTERVIEWS' SERIES

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

INTRODUCTION

In this issue of *Energy Regulation Quarterly* (*ERQ*), we are pleased to introduce a series of interviews with the chairs of Canada's public utility tribunals. There are no fewer than 14 such provincial, territorial and federal tribunals. While their mandates are diverse, they face many similar challenges. *ERQ*'s purpose in making these interviews available is to share the perspectives of regulators from across the country on how to meet today's challenges.

Some interviews are being conducted by way of written responses to a series of questions. These written responses will be published periodically in *ERQ*. Others will originate as podcasts, with links posted to the *ERQ* website as they become available.

The first of the written responses in this series is from Mark Kolesar, Chair of the Alberta Utilities Commission. Podcast interviews with Peter Gurnham, Chair of the Nova Scotia Utility and Review Board, and Robert Gabor, Chair of the Manitoba Public Utilities Board, were conducted by Francis Bradley, President and CEO of the Canadian Electricity Association, and Tim Egan, President and CEO of the Canadian Gas Association, in conjunction with the 2019 Annual Meeting of Canadian Association of Members of Public Utility Tribunals (CAMPUT) in Calgary in May.[1]

What quickly becomes apparent from these three interviews is the wide range of mandates and responsibilities of Canada's public utility tribunals (the Nova Scotia Board has responsibilities under 38 statutes; the Manitoba Board at one time fixed the price of beer!), while, at the same time, they face a number of similar current challenges, such as the implications of rapidly advancing technological innovation and the treatment of greenhouse gas emissions in regulatory decision-making. ■

[1] These podcasts can be accessed online at <https://podcast.rss.com/fluxcapacitor/?name=2019-05-29_ep6.mp3>.

AN INTERVIEW WITH THE CHAIR OF THE ALBERTA UTILITIES COMMISSION (AUC)

Mark Kolesar

STANDARD QUESTIONS

1. Tell us about the organization you lead, its current structure/composition, size, key initiatives and range of work?

Answer: The AUC regulates investor-owned electric, natural gas and water utilities, and certain municipally owned electric utilities. The AUC is also responsible for making timely decisions on the need, siting, construction, alteration, operation and decommissioning of natural gas and electric transmission facilities. The AUC regulates power plants in a similar fashion except the need for new power plants is determined by market forces. The AUC develops and amends rules that support the orderly operation of the retail natural gas and electricity markets.

In carrying out its adjudicative functions, the Commission is a quasi-judicial tribunal. It makes its decisions after hearing an application. It may also hear from affected customers, landowners or market participants. Its decisions are binding and are reviewable only by the Court of Appeal of Alberta on questions of law or jurisdiction. The AUC is also responsible for adjudication of Alberta Electric System Operator (AESO) rule-enforcement matters, and must review AESO rules to ensure they are in the public interest, support a fair, efficient and openly competitive market, and market participants were adequately involved in their development. In addition to adjudicating objections and complaints to new or existing independent system operator [AESO] rules, the AUC is charged with adjudicating objections and complaints to reliability standards. The AUC is also charged with adjudicating cases brought by the Market Surveillance Administrator for contraventions of reliability standards, legislation, regulations and AUC decisions.

The AUC's governance structure is based on a unitary model delivered through a committee approach. Relevant committees include the audit and finance committee, the executive advisory committee, the risk and opportunity committee and the chair's management committee Consistent with a unitary model, the Commission, through the chair's management committee, and the executive work together to set strategic direction, operational plans and the budget. Day-to-day operational management resides with the executive.

AUC Commission members are full-time appointees. The Commission's adjudicative function is delivered through individual panels assigned by the chair.

The AUC has 125 employees split between Calgary and Edmonton offices.

A few key initiatives include having:

- Introduced performance-based regulation to apply competitive, market-like pressures to the distribution companies, replacing cost-of-service regulation, which provides little or no incentive to reduce costs.

- Launched a distribution system inquiry in order to understand the technology-induced changes confronting Alberta's electricity and natural gas distribution systems, and the potential regulatory implications.

- Established a technology and innovation group within the AUC's rates division to focus more attention on technology in our work; to better understand technologies that are being advanced and proposed for deployment, together with the market and rate implications of their deployment.

- Adopted new focus within the AUC's facilities division to strengthen and enhance the economic analysis of facility projects using non-market valuation and other economics-based assessment tools.

- Established a capacity market group to bring together experts in economics, markets and law to support the Commission's new role in the implementation of the capacity market, transitioning from an energy-only market.

2. Though similar in their roles the many energy regulatory boards and tribunals across Canada have particular mandates and responsibilities. What do you see as the unique elements of your Organization/Board/Tribunal's mission/legislative mandate and circumstances?

Answer: The origin of a unique and enduring element of the AUC's mandate dates back to 1948 when Albertans were asked, by means of a provincial plebiscite, whether utilities should be publicly or privately owned and operated. By the narrowest of margins Albertans voted for utilities to remain privately operated.

Alberta has consistently embraced private-sector investment and involvement in the delivery of public utility service, and this approach has shaped the evolution of the AUC's predecessors as well as the AUC today. Alberta's utilities sector is largely private sector, and is influenced by market forces perhaps more than in many other jurisdictions. The AUC's foundational vision refers to its mandate to protect the interests of Alberta, specifically where competitive market forces do not.

Not surprisingly perhaps, the AUC has a specific legislative mandate in market oversight, FEOC (fair, efficient and openly competitive) market considerations and the legislative mandate to back up enforcement in these areas, such as the recent fine of about $56 million imposed on a violator of market rules.

The impact of market considerations is also apparent in recent AUC initiatives, such as its recently launched distribution inquiry, where a key consideration arising from the potential impacts of rapidly advancing technologies will be which of the new technologies and services should be competitively provided and what functionality of incumbent monopoly providers should be made available to new entrants.

Private sector aspects and considerations such as emerging competition also make it imperative that the AUC develop unique expertise to address such challenges. Assessing the impact of technology on utility business models and rate structures will require new skills, such as the potential adoption of non-market valuations and other economics-based assessment tools. We are moving quickly to expand our knowledge and expertise in these areas.

3. Economic regulation of energy is at the centre of various public policy considerations (economic, environment, social, political). Where do you see the biggest regulatory and legislative challenges for your organization over the coming decade?

Answer: For the Alberta Utilities Commission, the largest regulatory and legislative challenges over the next decade will almost certainly result from the emerging market changes that are being fueled by technological innovation, shifting and evolving consumer tastes, and societal expectations around the impact and delivery of public utility services. Alberta's utility industry is clearly changing and the AUC is already exploring how to manage those changes. In some ways, the AUC's situation is unique, in that it oversees a utility sector dominated by investor owned companies. As a result, the pace and nature of market changes occasioned by the many factors driving Alberta's utility sector may be unique, relative to other jurisdictions. In our notably dynamic public utility sector, with new consumer demands and the emergence of new services, the key questions are when is regulation necessary, and what form should it take.

QUESTIONS ON RECENT TRENDS

1. Focusing on environmental considerations, and specifically Greenhouse Gas Emissions, can you expand on how these factor into your regulatory approach and/or processes?

Answer: For the Alberta Utilities Commission, environmental considerations are one a of trinity of perspectives the Commission must by law consider in determining whether a project is in the public interest, along with assessing economic and social impacts. So in a broad sense, environmental considerations have been at the centre of how we examine applications for generation and transmission infrastructure.

Specific to greenhouse gasses such as carbon dioxide, the AUC's regulatory authority, rules and project scrutiny dovetails with other provincial legislative requirements, such as the *Specified Gas Emitters Regulation of the Climate Change and Emissions Management Act* (that act was Canada's first carbon dioxide reduction legislation put in place in 2007 and strengthened in 2017). For example, under *AUC Rule 007*, applications for thermal (essentially coal- or natural gas-fired) generating plants must include applications to Alberta Environment and Parks under the *Environmental Protection and Enhancement Act* (also, wildlife protection and management measures), and reporting on the results including proposed mitigation measures. The rule also requires, separately, that applicants provide an environmental evaluation, that *must* include air quality. If the plant requires a federal or provincial approval, that approval must be included. And lastly it requires a statement of emission rates, whether those rates meet the Alberta *Air Emission Standards for Electricity Generation* and any other applicable standards or guidelines, and whether the plant will comply with the Alberta *Ambient Air Quality Objectives and Guidelines* (AAQOG). In addition, for natural gas pipeline projects, applicants must demonstrate they meet the AAQOG.

With these requirements, it is essential to have the adequate institutional expertise to develop, apply and maintain or upgrade the existing standards, but also to understand the science and engineering. So at both the Commission level and among AUC staff, our personnel include environmental and engineering specialists up to and including the doctoral level. In our facilities division, we have a dedicated group focused on technical assessment including environment, engineering, economics, and noise.

2. We see movement by various economic regulatory bodies, aimed at modernizing regulatory tests/formulas and remuneration models (one such move has been to equalize the treatment of capex and opex in terms of investments in cloud services). What are your views on existing economic regulation as it pertains to new and emerging technologies, innovation, and investment models?

Answer: Great question. Very timely, and very relevant to the Alberta Utilities Commission. One of the key underlying principles in how the AUC approaches regulation is to deliver innovative and efficient regulatory solutions for Alberta. Another is that we regulate to protect social, economic and environmental interests of Alberta where competitive market forces do not. So, institutionally the AUC has a goal of constant modernization and, where possible, a desire for economically efficient regulation.

Over the past 10 years there have been several examples of where the AUC has modernized its economic tests, formulas and approaches. Not long after it was launched in 2008, the Commission chose to move away from the legacy formula-based approach to setting the cost of capital for utilities. It was uncertain economic times and the change allowed greater breadth and depth of scrutiny. Going forward, the AUC is considering returning to a formula-based model, reflecting a steadier economic outlook, and to both simplify and reduce the cost of the process. It would reduce regulatory burden, which is ultimately borne by ratepayers. For Alberta's distribution utilities, starting in 2013 the AUC put in place formula-based or performance-based regulation as an alternative to cost of service. The AUC's approach has been sharpened since, to improve regulatory efficiency and enhance the utility cost-control benefits. In our view, it is important to adjust along the way.

In terms of applying existing economic regulation in the face of new and emerging technologies, innovations and investment models, regulatory history shows that changes in the regulatory environment may demand or require changes to the regulatory approach, in order to best serve the public interest. This understanding is a central part of the rationale for the AUC's current distribution inquiry, which includes both electricity and natural gas. Among the questions it seeks to answer are:

- Where alternative approaches to providing electrical service develop, how will the incumbent electric distribution utilities be expected to respond and what services should be subject to regulation?

- How should the rate structures of the electric distribution facility owners be modified to ensure that price signals encourage electric distribution facility owners, consumers, producers, prosumers and alternative technology providers to use the grid and related resources in an efficient and cost-effective way?

3. Is there an opportunity for utilities, now and in the future, to work collaboratively to respond to market needs/demands (e.g., natural gas utility partnering with electric system operators on power to gas to balance renewable electricity using the gas grid as storage)?

Answer: Yes. If there are adequate returns to be made or likely to be made, it is almost inevitable that utilities (old and new) will move towards those kinds of opportunities. Collaborative models may be preferred to mitigate both development risk and project risk. One would certainly hope and expect that utilities and potentially new market entrants would develop offerings to respond to market demands, either individually or collaboratively.

A central focus of the Alberta Utilities Commission's self-initiated distribution inquiry, launched in December 2018, is the dynamics and implications – for companies, regulators and consumers - of unfolding shifts in the utility space fueled by technological change and changing societal tastes and expectations. "Understanding how this transition plays out, and ensuring effective management of change and its effects are central to the public interest mandate of the Alberta Utilities Commission," AUC Chair Mark Kolesar said in launching the inquiry.

From a potential collaboration standpoint, in Alberta we have certainly seen collaboration among existing utilities partnering with other firms for certain projects, such as proposed large transmission projects. We have also seen a legacy firm joint venture with an emerging technology company and then move to control the profitable new business once it was established. Obviously, there are and would almost certainly be regulatory implications. In Alberta's privately-owned public utility model, utility providers including generators, must get certain approvals from the AUC, which applies a public interest lens. Both new ventures from existing regulated utilities (joint ventures or otherwise) and new entrants (joint venture or otherwise) would likely attract or demand under Alberta law the scrutiny of the regulator. What that scrutiny should be and how it would be applied is also among the topics being explored in the AUC Distribution Inquiry.

4. Ratepayers bear the cost of regulation. What controls do you use to ensure the ratepayer is receiving value commensurate with the costs incurred? Do you use any performance metrics or otherwise participate in any processes (e.g. benchmarking) to evaluate regulator performance?

Answer: Pursuing efficiency in its own operations and encouraging efficiency in the utilities it regulates is a central goal of the Alberta Utilities Commission. Given this focus, since its inception in 2008 it has reduced the average regulatory cost per Alberta ratepayer by more than 20 per cent.

Efficiency, in the narrow internal sense, means the AUC continually examines processes to ensure waste, cycle time and duplication are minimized, that decision-making processes are clear and designed to eliminate unnecessary applications and delays. Information required is limited to what the AUC requires to carry out its legislated responsibilities. Efficiency also requires staff to have the requisite expertise and technical knowledge.

Very briefly some measures of AUC regulatory efficiency are:

- Average number of days to process a case, application or complaint.

  The AUC introduced shorter application cycles and reduced regulatory burden through the elimination of routine, low-risk applications. As a result, 50 per cent of facility applications are processed within 20 days, and 76 per cent within 60 days. The AUC has streamlined or eliminated numerous routine, low-risk applications, and worked with the Alberta Electric System Operator and industry to exempt certain types of needs identification documents for new transmission facilities.

- Frequency of cases successfully appealed.

  Since 2008, the AUC has issued more than 6,600 decisions, which by law can be appealed to the Court of Appeal of Alberta. The Court of Appeal of Alberta has upheld all AUC decisions brought before it as reasonable, fair and within the AUC's competence to decide. Appeals to the Supreme Court of Canada asking to overturn court of appeal decisions have all been equally unsuccessful.

- Cost of regulation objectively measured and tracked.

  Despite significant increases in the value of the sector the AUC regulates, the number of AUC proceedings, consumer sites, oral hearing days, and Alberta inflation, the cost of regulation to the average ratepayer has declined by more than 20 per cent since 2008 and the AUC budget is slightly less today than in its first year of operation.

- A financially healthy utilities sector, with strong credit ratings that minimize utility debt costs, resulting in lower ratepayer costs.

  The value of the sector regulated by the AUC is close to $31 billion (rate base plus wholesale electricity market transaction value) with an annual cumulative revenue requirement of more than $5 billion, and it serves close to three million consumer sites. All of these figures have shown steady growth. All of the utilities enjoy strong credit ratings and good profitability, largely without significant rate increases.

  Lack of duplication or overlap with other government agencies and departments.

  The AUC has worked with other departments and agencies to coordinate and streamline its processes in situations where applications to the AUC also require approvals from other agencies and departments.

The AUC conducts an annual stakeholder review of the utility industry, industry and consumer groups, government, and regulatory lawyers to rate us on a number of areas, related to how it interacts with them, on processes and the quality of AUC decisions. It also conducts more specific surveys of landowners at information sessions shortly after facility applications are made, and a follow up survey immediately after the hearing. The AUC uses this information to improve its own processes and often identifies specific utility concerns, addresses them formally and makes changes before the next year's survey. Eight in 10 respondents feel the AUC runs efficient processes. ■

"REGULATORY SETTLEMENTS": WHEN DO PRIVATE AGREEMENTS SERVE THE PUBLIC INTEREST?

Scott Hempling

> It is the policy of this commission to encourage settlements.
>
> – *Multiple sources*

> Settlements seem somehow to reach the lowest common denominator in many instances, and often end up defying the public interest. They are often used to tie commissioners' hands, not to help them resolve vexing problems.
>
> – *Former state commission chair*

* * *

State commissions are seeing more filings: rate cases, requests for pre-approvals, corporate restructurings. Commissions also are instigating proceedings themselves: carbon reduction options, transmission construction, and renewable energy. Staff sizes are dropping due to retirements and hiring freezes.

The resulting workload-resource squeeze makes settlements attractive as work reducers. But settlements are double-edged swords: they have positive value if they solve public-interest challenges, negative value if they edge the commission out of its statutory role. This distinction is not always easy to discern.

Is "settlement" a misnomer? First, a clarification of terms. A regulated utility may conduct no commerce — provide no service, charge no rates — absent commission approval based on filed documents. This "filed rate doctrine" distinguishes utility regulation from ordinary commerce. In regulation, a settlement settles nothing substantive; it is only the parties' proposal.

BENEFITS OF SETTLEMENTS

Informality: Settlement processes involve informal exchange. Informal exchange enhances understanding of each entity's technical problems and private goals. Both effects spiral upwards. As technical fluency grows, commissions defer to the parties' solutions, encouraging more informal exchange, more technical understanding, and more commission deference. Mutual exposure to parties' private goals spurs settlement solutions that align private interest with public interest — if the commission has established public-interest parameters first.

Expedition: Settlements can save decision makers time. Two caveats: first, the parties' time matters too. When unguided settlement processes combine with resource differentials, large parties can grind down the small, making "settlement" a euphemism for "take it or leave it." Litigation, when disciplined and efficient, can make resource differences less relevant. Second, saving decision makers' time is not an end in itself; success is measured in high-quality decisions, not per year dispositions.

RISKS OF REGULATION-BY-SETTLEMENT

A settlement culture can induce regulatory passivity: the less they get into the parties' business, the less they (a) engage mentally, (b) learn about the regulated businesses, (c) gain confidence, and (d) lead objectively. A stance of "let's see what the parties say" leads to "let's see what the parties want" and, ultimately, "who are we to stand in the way of their deal?" There is a risk of atrophy: muscles unused become muscles less able. This spiral points downward: as the commission becomes less engaged and less alert, it becomes less respected and less relied upon, leading to more settlements and more atrophy.

FAVOURING SETTLEMENT IN THE ABSTRACT CONFUSES COMMISSIONS WITH COURTS

A court's jurisdiction is limited to a case or controversy initiated by a plaintiff. A settlement eliminates the controversy. "Plaintiff vs. Defendant" becomes "plaintiff and defendant", the parties agreeing that they no longer need the judge. The court has no general "public interest" power independent of the dispute as defined by the parties. (Caution: In disputes with a large public-interest component, a court could reject a plaintiff defendant motion to withdraw, especially if interveners remain dissatisfied. The court's powers still are bounded, however, by the original complaint.)

But a commission is not a court.[1] A commission's powers are defined not by the case as filed, but by substantive enabling law. The commission's baseload duty — to ensure reliable service at reasonable prices — does not vary with parties' private decisions to initiate or "settle" disputes. The regulatory purpose is not inter-party peace but public-interest advancement.

SO WHEN ARE SETTLEMENTS APPROPRIATE?

Settlements are appropriate when they help a commission carry out its public-interest obligations. Favourable conditions include: (1) the settlement subject demands technical proficiency, (2) the parties' proficiency exceeds the commission's, and (3) the parties' private interests are aligned with the long term public interest.

But beware of gaps — in the settlement process and the outcome. If the settlement process is missing segments of the public-interest spectrum, such as future generations, workforce quality, environmental responsibility, management efficiency, and technological innovation, the settlement's claim on the public interest is incomplete. And the mere presence of these segments does not necessarily mean effective presence. The mantra that "settlements are more efficient than litigation" has holes when there are resource differentials. Undisciplined settlement processes favour large parties: they can attend more meetings, produce more studies, bring more staff, pay more lawyers to talk longer and louder. In contrast, strong judges using efficient litigation procedures can make resource differentials diminish. Abstract preferences for settlement ignore these points.

WHAT EVIDENTIARY SUPPORT?

A commission order makes policy. A settlement approving order is no different. Credible policies require credible evidence. A settlement therefore needs testimony supporting the signatories' public-interest assertions — testimony having the same rigour and comprehensiveness as litigation testimony. "We negotiated hard and this is our agreement" is not public-interest evidence.

The record should not only contain evidence that supports the settlement; it should retain the evidence that preceded the settlement. Settlements often require each signatory to withdraw its initial testimony, mainly because that testimony contradicts the settlement outcome. A party now asserting that "the settlement ROE of 12.5 per cent is sufficient" prefers no reminder of his witness's prior statement that "anything below 14 per cent will cripple the company." No party wishes to be heard saying: "As my chances of victory vary, so does my view of the truth." Testimony is a statement under oath; it is not mere choreography, to revise as the music changes. Credibility is the coin of the regulatory realm. Respect for the realm diminishes if the commission abets testimonial hide and seek. Leaning in the other direction — recording all filed testimony, pre and post-settlement — disciplines parties to take public-interest positions to begin with. It also ensures transparency, a factor essential to earning the public's trust.

RECOMMENDATIONS FOR REGULATORS

Regulatory settlements are joint proposals for commission action. They advance the public interest when the "jointness" arises not from short term baby-splitting, not from one party dominance masked as compromise, but from expert idea sharing. (Settlements also work for

[1] See Scott Hempling, "COMMISSIONS ARE NOT COURTS; REGULATORS ARE NOT JUDGES" (January 2008), *Scott Hempling - Attorney at Law LLC Effective Regulation of Public Utilities* (blog), online: < https://www.scotthemplinglaw.com/essays/commissions-r-not-courts>.

compromises of private commercial matters that do not affect non-parties, present or future.) The likelihood of public-interest results rises, therefore, if the commission focuses not on an abstract preference for harmony, but on two criteria:

1. A settlement proposal must be backed by principles and evidence aligned with commission priorities.

2. The resources, expertise, and alternatives available to each party must be roughly equivalent. Under these conditions, no one party's view of "the public interest" prevails for reasons other than merit. ■

CANADA'S EXISTENTIAL CRISIS OVER CLIMATE CHANGE REGULATION: TEMPEST IN A TEAPOT?

*Lisa (Elisabeth) DeMarco and Jonathan McGillivray**

Canada and its provinces are once again going through growing pains that necessitate final resolution by the Supreme Court of Canada. The subject matter is climate change regulation and the federal government's constitutional authority to set minimum standards for provincial carbon pricing through its *Greenhouse Gas Pollution Pricing Act* (*the Act*).[1] Four provinces (Saskatchewan, Ontario, Manitoba, and Alberta) have launched formal constitutional challenges, which are supported by New Brunswick and opposed by British Columbia. Manitoba has sought a judicial review of both the constitutionality and the applicability of *the Act* by the Federal Court of Canada. Two Courts of Appeal (Saskatchewan and Ontario) have ruled on their respective province's constitutional references, both upholding the constitutionality of *the Act*, but with at least one dissenting opinion. Both of Saskatchewan and Ontario have appealed their respective Court of Appeal decisions to the Supreme Court of Canada, with many provinces confirming their intent to intervene in the proceeding, currently scheduled to be heard in January, 2020. Alberta's constitutional reference is proceeding rapidly and anticipated to be heard and decided upon by the Alberta Court of Appeal in the late fall of 2019. Saskatchewan has brought a motion to delay the Supreme Court's hearing of its appeal until the Alberta Court of Appeal has rendered its decision. It is likely that all of the Alberta, Ontario, and Saskatchewan Court of Appeal decisions will be appealed and heard together in the winter of 2020.

This plethora of constitutional challenges would reasonably lead to the conclusion that Canada is deeply divided over climate change regulation and carbon pricing. However, a closer examination of the evidence in all of the proceedings tells a very different story — a story of nation-wide consensus on the urgency of climate change and the necessity of addressing it, in part through carbon pricing.

Each and all of the provinces challenging *the Act* strongly support the evidence that climate change is real, the result of anthropogenic activity, and requires urgent action. There is Canada-wide consensus on this — in stark contrast to many other countries, including the United States. Similarly, each of the challenging provinces has a form of regulated carbon pricing as part of their overall climate strategy. Each and all of Ontario, Canada, Saskatchewan, British Columbia, Alberta, and New Brunswick appear to be proposing or using some form of carbon pricing in their legislative and regulatory responses to climate change.[2]

* Both of DeMarco Allan LLP.

[1] *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12.

[2] Ministry of the Environment, Conservation and Parks, *Preserving and Protecting our Environment for Future Generations: A Made-in-Ontario Environment Plan*, (29 November 2018) at 26 ; Government of Ontario, *Making Polluters Accountable: Industrial Emission Performance Standards*, Regulatory Proposal, (February 2019); *The Management and Reduction of Greenhouse Gases Act*, SS, c M- 2.01, ss 16.1, 21; *Carbon Tax Act*, SBC 2008, c40, ss 8-13.1; *Climate Change Act*, SNB 2018, c 11, s 6; *Gasoline and Motive Fuel Tax Act*, RSNB 1973, c G-3, ss 3(1), 6(1); Government of Alberta, "Technology Innovation and Emission Reduction Program", online : <https://www.alberta.ca/technology-innovation-and-emissions-reduction-engagement.aspx>.

In summary, the evidence before the Courts of Appeal begs the question: is carbon pricing truly a national existential crisis, or are the many provincial constitutional challenges more about the implementation of *the Act* and the application of its stringency test? Does carbon pricing truly cause a Canadian federal-provincial constitutional crisis, or is this really a tempest in a teapot?

In order to facilitate the ongoing consideration of this deeper question, we examine: (i) the two recent decisions of the Saskatchewan and Ontario Courts of Appeal, both of which are being appealed to the Supreme Court of Canada and (ii) the current status of the Alberta Court of Appeal reference and Manitoba's judicial review.

OVERVIEW OF THE DECISIONS

The Ontario and Saskatchewan Courts of Appeal have upheld the constitutionality of the federal carbon pricing regime under *the Act* in decisions released on May 3, 2019 (Saskatchewan's decision)[3] and June 28, 2019 (Ontario's decision)[4] (the Decisions). The Decisions are significant both nationally and internationally as they set out a strong factual record relating to the pressing nature of climate change, and the Canadian constitutional grounds for valid national legislative action in relation to it.

Saskatchewan Court of Appeal

A 3-2 majority of the Saskatchewan Court of Appeal (SKCA) concluded that *the Act* is not unconstitutional either in whole or in part. The SKCA rejected aspects of each of the Attorney General of Saskatchewan's and the Attorney General of Canada's arguments to reach that decision.

Specifically, Chief Justice Richards writing for the majority of the SKCA found that:

- The subject "matter" of *the Act* is "the establishment of minimum national standards of price stringency for GHG emissions" (largely following submissions of the Attorney General of British Columbia, and consistent with the submissions of the International Emissions Trading Association) — and not the broader matter of "GHG emissions" or "cumulative GHG emissions" as advocated by the Attorney General of Canada.[5]
- The "cumulative dimensions" of GHG emissions approach "must be rejected because it would allow Parliament to intrude so deeply into areas of provincial authority that the balance of federalism would be upset." Further, the SKCA found, it would "hamper and limit provincial efforts to deal with GHG emissions."[6]
- In contrast, the narrowly construed matter of "minimum national standards of price stringency for GHG emissions" was constitutionally valid under Parliament's Peace Order and Good Government (POGG) power (national concern branch).[7]
- Once found to be valid under the POGG power, the narrow matter of "minimum national standards of price stringency for GHG emissions" becomes one of exclusive federal jurisdiction, settling the outstanding question of whether a province can act on a class of subject that has been upheld under POGG.[8]
- Part 1 of *the Act* (the backstop carbon price on fuels) was held to be a valid regulatory charge and not an invalid tax.
- Part 2 of *the Act* (the output based pricing system, OBPS) was also held to be a valid regulatory charge and not an invalid tax.
- The Attorney General of Saskatchewan argued that the principle of federalism was determinative in favour of the

[3] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40 [SK Decision].

[4] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 [ON Decision].

[5] *Ibid*.

[6] *Ibid* at para 10.

[7] *Ibid* at para 11.

[8] This question lingered following the Supreme Court Decision in *R v Crown Zellerbach Canada Ltd.*, [1988] 1 SCR 401 and was argued by the parties in each of the constitutional references.

provinces. The SKCA found that the principle of federalism is an interpretive tool in the division of powers constitutional analysis — and not a freestanding constitutional imperative that somehow independently trumps the federal/provincial division of powers.

- The SKCA also found that there is a distinction between the applicability of *the Act* to provincial Crown corporations (SaskPower and SaskEnergy) and its constitutional validity, a point that is likely to be relevant in the forthcoming judicial review of *the Act* by Manitoba.[9]

The minority of the SKCA differed in both its reasoning and outcome. Justices Ottenbreit and Caldwell found that:

- The characterization of the "matter", construed broadly, was "GHG emissions" and the narrower approach of the majority was simply a "clever" and "suspect" and "sanitized and unduly-narrow" attempt to regulate provincial GHGs.[10]
- The matter construed as such, is best characterized as a tax.
- Part 1 of *the Act* (the backstop carbon price on fuels) was a tax, and not a regulatory charge, and was not constitutionally valid given its broad application to matters of provincial jurisdiction.
- Part 2 of *the Act* (the OBPS) was, in contrast, a valid regulatory charge.[11]

The Attorney General of Saskatchewan has appealed the SKCA's decision to the Supreme Court of Canada.[12] Nearly all provincial Attorneys General have intervened in that Supreme Court challenge and virtually all provinces are anticipated to participate. The Supreme Court is tentatively set to hear the matter on January 14, 2019, however Saskatchewan has recently brought a motion to delay the hearing of its appeal until the Alberta Court of Appeal has rendered its decision.

Ontario Court of Appeal

Similarly, a 4-1 majority of the Ontario Court of Appeal (ONCA) concluded that *the Act* is constitutional under Parliament's power over matters of national concern for the peace, order, and good government of Canada. Chief Justice Strathy (with whom Justice MacPherson and Justice Sharpe agreed) rejected both Canada's and Ontario's broad characterization of 'the matter' of *the Act*, and adopted the narrower view that *the Act* relates to "establishing minimum national standards to reduce greenhouse gas emissions."[13] In doing so, the ONCA allowed greater scope for both the provincial and federal governments to implement meaningful climate change legislation. The ONCA upheld the entire *Act* including both the OBPS and the fuel levies, the latter of which it found to be a valid regulatory charge and not a tax.

This ONCA characterization of the matter is broader than that adopted by the SKCA. Associate Chief Justice Hoy — concurring on the outcome of the majority, but differing on the characterization — found that purpose and effect of *the Act* is closer to the SKCA's characterization. She characterized 'the matter' as "establishing minimum national [GHG] emissions pricing standards to reduce [GHG] emissions."[14] All four of the majority judges allowed for *the Act*, as narrowly characterized, to be upheld under the national concern branch of the POGG power.

Justice Huscroft — in dissent on both the outcome and reasoning — found that the Act is unconstitutional under the POGG power, but that the federal Parliament has other powers under which to enact valid GHG pricing legislation. He found that *the Act* should not be characterized on the basis of the means to implement *the Act* instead of its dominant purpose, which he views is "regulating GHG emissions".[15]

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[9] SK Decision, *supra* note 3.
[10] *Ibid* at paras 432, 437.
[11] *Ibid*, SK Decision.
[12] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40, appeal as of right to the SCC.
[13] ON Decision, *supra* note 4 at para 77.
[14] *Ibid* at para 166.
[15] *Ibid* at para 213.

Both Associate Chief Justice Hoy and Justice Huscroft are aligned on the view that classifying a matter under the POGG national concern branch gives the federal Parliament "exclusive jurisdiction of a plenary nature to legislate in relation to that matter, including its intra-provincial aspects".[16] Narrow characterization is therefore necessary to ensure that a new and permanent area of federal jurisdiction does not impinge on the balance of federal and provincial powers set out in the Constitution.

Key elements of the decision include the ONCA's findings that:

- Climate change broadly is a matter of national and international concern.

- *The Act* puts a price on carbon pollution in order to reduce GHG emissions and to encourage innovation and the use of clean technologies in two ways. First, it places a "regulatory charge on carbon-based fuels." Second, it establishes a "regulatory trading system applicable to large industrial emitters of GHGs" or the OBPS. It includes limits on emissions, a "credit" to those who operate within their limit, and a "charge" on those who exceed it.[17]

- Neither Ontario's nor Canada's proposed characterization of the matter of the Act was persuasive. Ontario's description was found to be too broad, and Canada's characterization as "cumulative GHG emissions" was too vague.[18]

- *The Act* does not appear to be in conflict with any existing Ontario or other provincial legislation, or measures that provinces may take to reduce GHG emissions and mitigate climate change. *The Act* leaves generous room for provincial jurisdiction in relation to climate change and simply implements minimum national standards for greenhouse gas emissions, which the provinces are constitutionally unable to do.[19]

Ontario has announced its intention to appeal the ONCA Decision, but at the time of writing had yet to file its Notice of Appeal, which is due on or before August 28, 2019.

CURRENT STATUS OF ALBERTA REFERENCE AND MANITOBA JUDICIAL REVIEW

Alberta Court of Appeal

Alberta has launched its own constitutional challenge of *the Act* in the Alberta Court of Appeal[20] and is expediting its consideration of the case in an effort to enable the Supreme Court of Canada to have the benefit of three opinions of provincial courts of appeal when it hears the case. Justice Slatter is currently undertaking a number of case management hearings in order to expedite procedures and have the matter decided before the end of 2019.

Manitoba Judicial Review

Manitoba has also challenged the constitutionality and the application of *the Act*, through an application for judicial review by the Federal Court of Canada. The Federal Court of Canada is likely to hear the matter on the "applicability" of *the Act*, but it is unclear if and how the constitutionality of *the Act* will be considered in this proceeding in light of the pending Supreme Court hearing. Currently, the Manitoba judicial review is scheduled for a case management conference on January 15, 2020.

CONCLUSION

There is clearly a significant amount of jurisprudence and judicial consideration of Canada's approach to carbon pricing. Similarly, there is clearly a political dimension of the characterization of the various federal and provincial carbon pricing activities as a "carbon tax". However a deeper consideration of the evidence and the various federal and provincial approaches to climate change regulation and carbon pricing clearly demonstrates a striking amount of consensus within Canada. The ongoing hearing of the appeals by the Supreme

[16] *Ibid* at para 203, 227.
[17] *Ibid* at para 34.
[18] *Ibid* at para 74.
[19] *Ibid* at para 137.
[20] OC 112/2019, (2019), online: <http://www.qp.alberta.ca/documents/Orders/Orders_in_Council/2019/2019_112.pdf>.

Court of Canada should therefore include the consideration of the overall consistency of the federal and various provincial approaches to carbon pricing and focus more on the implementation of *the Act* and the application of its stringency test. Canadian carbon pricing is, in fact, the subject of national consistency that is reflected in provincial specificity. This demonstrates the respective sovereignty and jurisdiction of each of Canada and the provinces, and ultimately, the success of cooperative federalism. ■