ENERGY REGULATION QUARTERLY

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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 role of the ERQ is to provide analysis and context that go beyond day-to-day developments. It strives to be balanced in its treatment of issues.

Authors are drawn from a roster of individuals with diverse backgrounds who are acknowledged leaders in the field of energy regulation. Other authors are invited by the managing editors to submit contributions from time to time.

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 managing editors have exclusive responsibility for selecting items for publication.

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. Other individuals may also be invited by the managing editors to author articles on particular topics.

The substantive content of individual articles is the sole responsibility of the respective contributors. Where contributors have represented or otherwise been associated with parties to a case that is the subject of their contribution to ERQ, notification to that effect will be included in a footnote.

In addition to the regular quarterly publication of Issues of ERQ, comments or links to current developments may be posted to the website from time to time, particularly where timeliness is a consideration.

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 ERQ website (www.energyregulationquarterly.ca).

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2020: The Energy Regulation Year in Review

Managing Editors

Rowland J. Harrison Q.C. and Gordon E. Kaiser

Few of us have experienced a year like 2020. For the energy sector it was a brutal combination of low oil prices, a national coronavirus lockdown, and a severe economic downturn. It was also a signature year in terms of the shift in rhetoric and investment dollars away from conventional fuels and technologies to emerging ones.

A National Climate Policy

In terms of energy law and policy, the year 2020 ended with a bang. On December 11, 2020 the Government of Canada enacted legislation to accelerate climate change initiatives throughout the country. What first caught people's attention was the proposal to increase the Canadian carbon tax from $50 per ton in 2022 to $170 per ton in 2030. That would increase the price of gasoline by almost 40 cents a liter, and double the heating costs for many homes, although the government claimed consumers would get it back in the form of a tax rebate. The plan also included 64 different programs to cut pollution and build a clean economy at a cost of $15 billion.

The investments included $2.5 billion for clean power projects over three years, $1.5 billion to develop low carbon fuels, $287 million over two years to promote zero emission vehicles, $3billion over five years to decarbonize large-scale emitters, $2.6 billion over seven years to improve home energy efficiency, and $3 billion over 10 years to plant 2 billion trees.

The Electric Vehicle Revolution

At the provincial level, the focus was on electric vehicles. Québec announced it would abandon the sales of new gas-powered cars starting in 2035. BC said it would follow suit in 2040. This followed an earlier California law that would ban the sales of gas-powered cars and trucks by 2035 and the announcement by Britain in November 2020 that it would ban the sale of new gas and diesel cars starting in 2030.

Car manufacturers around the world watched these developments closely. They were also watching Tesla. In 2020, that company reached a market capitalization of $880 billion more than Toyota, Volkswagen, Daimler, General Motors, BMW, Honda, Hyundai, and Ford combined.

In Canada, Ford announced it would spend $1.8 billion to produce electric vehicles at its Oakville plant in Ontario. General Motors responded by saying it would phase out gas-powered vehicles entirely by 2035 and invest $1 billion to produce electric commercial vans in Ingersoll, Ontario. Chrysler said it would spend $1.5 billion to produce electric vehicles in Windsor, Ontario.

New Charging Networks

Electric vehicles require electric charging. During 2020 electric vehicle charging networks became a reality in Canada. Tesla led the pack with 584 locations and 1400 chargers across Canada. In January 2020, Canadian Tire announced a plan to construct a network of 240 fast chargers at 90 Canadian Tire retail locations across Canada.

The electric utilities were also active. By the end of 2020, BC Hydro had expanded its network to 85 locations across BC while the partnership of Ontario Power Generation and Hydro One agreed to install 160 fast chargers in Ontario by the end of 2021. The importance of this new network became apparent in September

2020 when the US electric vehicle charging network company, ChargePoint, went public at a valuation of $2.4 billion. The investors included Chevron, BMW, Siemens, and the Canada Pension Plan Investment Board.

Sustainable Investment

The year 2020 also saw a dramatic shift in financial markets. Renewable energy now dominates capital markets in both Canada and the United States. Next Era Energy, the world's largest supplier of wind power, replaced Exxon Mobil and Chevron Corporation to become the world's most valuable energy company. In August 2020, Exxon Mobil disappeared from the Dow Jones industrial average. It had been a member since the company was Standard Oil of New Jersey in 1928.

Increasingly companies are now required to disclose their climate impact now called their ESG (environmental social and governance) value. Carbon-based companies are also being blacklisted by pension funds. ESG investment has doubled over the past four years. Price Waterhouse now estimates that 60 per cent of mutual fund assets will be ESG by 2025. Reporting and transparency with respect to ESG values is driving both capital markets and climate change initiatives.

The tide has changed. Everyone saw this coming. The zero-carbon revolution has been creeping forward over the past decade. The year 2020, however, was the fork in the road. The energy sector will be very different going forward. Energy regulation will also be very different. The following review of the decisions by Canadian energy regulators over the past year highlights some of these changes.

THE PIPELINES

In the last five years, four major Canadian pipeline projects, potentially representing a $50 billion investment, have either been cancelled or threatened by regulatory challenges.[1] The four projects are the TransCanada Energy East pipeline, the Enbridge Northern Gateway pipeline, the Kinder Morgan Trans Mountain Expansion and, last but not least, Keystone XL. Last year we examined the first three. Below we consider Keystone XL, which was terminated recently.

Keystone XL

The Keystone XL pipeline was a $20 billion project that TransCanada proposed in 2008 to transport 800,000 barrels of oil per day from Alberta to Nebraska and then into an existing pipeline that would carry the oil to the Gulf Coast. The border crossing between the US and Canada was completed last year, along with 90 miles of pipeline within Canada.

The U.S. Department of State reviewed the pipeline for nearly seven years. The Canadian portion of the line obtained NEB approval in 2010.[2] In May 2012, TransCanada filed an application for a Presidential Permit with the U.S. Department of State. This permit is required from the US President whenever a pipeline crosses an international boundary. That permit was held up by ongoing litigation in the Nebraska courts. In November 2014, the U.S. House of Representatives approved Keystone XL for the ninth time. However, President Obama then exercised his veto to defeat the project.[3]

TransCanada challenged the Obama veto with a constitutional claim[4] and a North American Free Trade Agreement (NAFTA) claim of $15 billon.[5] Before either case could be heard, President Trump was elected. One of President Trump's first decisions in office was to approve Keystone XL.

TransCanada was not in the clear once President Trump issued the permit to allow the pipe to cross the Canada-US border in 2015. The November

[1] $15.7 billion for Energy East, $7.9 billion for Enbridge Northern Gateway, $7.4 billion for Trans Mountain expansion, and $20.6 billion for Keystone XL.

[2] *Re TransCanada Keystone XL Pipeline* (March 2010), OH-1-2009, online: National Energy Board <docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/418396/550305/604643/604441/A24669-1_NEB_-_Reasons_for_Decision_-_TransCanada_Keystone_XL_Pipeline_-_OH-1-2009.pdf?nodeid=604637&vernum=-2>.

[3] US, The White House, *Message from the President of the United States returning without my approval S. 1, The Keystone XL Pipeline Approval Act* (S Doc no 114-2) (Washington, DC: US Government Publishing Office).

[4] *TransCanada Keystone Pipeline LP v Kerry*, 4:16-cv-00036 (SD Tex 2016).

[5] *TransCanada Corp. & TransCanada Pipelines Ltd. v United States of America* (*Canada v United States*) (2016), online: *State Department* <www.state.gov/transcanada-corp-transcanada-pipelines-ltd-v-united-states-of-america/>.

2020 presidential election in the United States saw a new president elected. President Biden was sworn in on January 20, 2021. The next day he cancelled the presidential permit President Trump had granted.

Alberta had invested $1.5 billion in equity in Keystone and guaranteed a $6 billion project loan in 2020. The pipeline is backed by shippers as well as by TransCanada. Cenovus Energy is responsible for $100 million and Suncor Energy for $142 million. No doubt others are involved as well.

The decision by President Biden did not come as a great surprise. The Biden campaign was based on supporting climate change initiatives including the cancellation of Keystone XL.

To complicate matters, NAFTA came to an end on July 1, 2020. It was replaced by a new agreement, the United States- Mexico-Canada Agreement (USMCA). The USMCA does not contain the investor state arbitration remedy available under NAFTA. There are transition provisions for legacy claims and a three-year period to file those claims but the incident on which the claim is based would have to have taken place prior to July 1, 2020. There is also a state-to-state claim under Chapter 20 of the new USMCA but TransCanada and/or the Alberta government would have to convince the Canadian government to bring the claim. That may not be that easy.

That is not the end of the difficulties. Arguably TransCanada knew and understood the ground rules. The presidential permit contained an express condition that the permit could be terminated or revoked or amended at any time at the sole discretion of the President. This term is designed to limit NAFTA liability. A NAFTA claim could result in long and uncertain litigation.

Four projects are still moving forward. They are the Trans Mountain Expansion project (TMX), Coastal GasLink, Enbridge Line 3, and Enbridge Line 5. The status of those projects is set out below.

Trans Mountain Expansion

In 2018, the federal government purchased the Trans Mountain Expansion from Kinder Morgan for $4.5 billion. On February 22, 2019, the NEB released its reconsideration report on the project, recommending again that it proceed. The federal cabinet accepted that recommendation and approved the project. Construction of the project officially began on December 3, 2019. Shortly thereafter, on January 16, 2020, the Supreme Court of Canada unanimously dismissed the BC attempt to claim jurisdiction over this project[6] upholding an earlier decision by the B.C. Court of Appeal.[7]

On February 4, 2020, a unanimous Federal Court of Appeal dismissed the most recent legal challenge to the project.[8] The court made it clear that Indigenous groups have no veto and that courts should defer to the governments that make the initial decision on whether the duty to consult has been met.

In May 2020, the Province of British Columbia issued an amended environmental assessment certificate (EAC) in the response to the B.C. Court of Appeal's decision in September 2019. In July 2020, the Supreme Court of Canada (SCC) denied leave to three First Nation groups seeking to appeal the Federal Court of Appeal's February 2020 decision. The most recent decision by the SCC to deny leave to appeal to the three First Nation groups means there are no more outstanding legal challenges to the project.

Coastal GasLink

The Coastal GasLink pipeline project is owned and operated by TC Energy. The $6.6 billion project starts near Dawson Creek and, if completed, would run approximately 420 miles southwest to a liquefaction plant near Kitimat. The pipeline, as planned, would pass through the traditional territories of several First Nation groups. It has long been opposed by multiple hereditary chiefs, although a number of First Nations groups support the project and have an ownership interest. In December 2018, the Supreme Court of British Columbia granted an injunction preventing blockades of the pipeline.[9]

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[6] *Reference re Environmental Management Act*, 2020 SCC 1 [*Reference EMA*].

[7] *Reference re Environmental Management Act (British Columbia)*, 2019 BCCA 181.

[8] *Coldwater First Nation v Canada (Attorney General)*, 2020 FCA 34.

[9] *Coastal GasLink Pipeline Ltd. v Huson*, 2018 BCSC 2343.

One element of good news came in July 2019, when the NEB released its decision ruling that the pipeline — including the export terminal in Kitimat — was under provincial not federal jurisdiction.[10] The NEB concluded that the pipeline would transport natural gas within BC, although it would also facilitate international exports, providing some clarity to the earlier Supreme Court of Canada decision in *West Coast Energy* on provinces' right to control works and undertakings within their boundaries.[11]

In December 2019, the Alberta Investment Management Corp. — the Alberta public pension manager — teamed up with one of the largest American investment companies to acquire a majority stake in the Coastal GasLink.

Enbridge Line 3

The Enbridge Line 3 runs from Hardisty, Alberta to Superior, Wisconsin, and has been operating since 1968. Over the years, it became apparent that part of the pipeline had to be replaced if Enbridge wished to restore it to its historical capacity and move 800,000 barrels per day. The necessary authorization was obtained from regulatory bodies in Canada,[12] North Dakota, and Wisconsin. However, the $3 billion project ran into problems in Minnesota where environmentalists and First Nation groups opposed the project.

In June 2018, the Minnesota Public Utilities Commission approved the route and granted the necessary permits.[13] However, a year later that decision was overturned by the Minnesota Court of Appeal that found that the environmental impact statement placed before the Commission was inadequate.[14] On February 3, 2020, the Minnesota regulators approved a revised environmental review removing the last regulatory hurdle for the project.

The US portion of the Line 3 project involves replacing 364 miles of pipeline. Most of the work lies in Minnesota, with 27 miles located in North Dakota and Wisconsin. The replacement project is connected to an existing 1097-mile crude oil pipeline installed in the 1960s that runs from central Canada to Wisconsin. Enbridge now estimates that the capital cost of the Line 3 replacement project, including the Canadian segment already in service, will end up at $9.3 billion compared to the original estimate of $8.2 billion. Enbridge now estimates that Line 3 will be in service by the fourth quarter of 2021.

Enbridge Line 5

Enbridge is currently replacing Line 5 which runs from Superior, Wisconsin to Sarnia, Ontario. The state of Michigan is opposing the underwater segment which runs under the Straits of Mackinac in the Great Lakes. The concern relates to environmental damage that could result from a leak in the pipe that currently sits on the lake bed. The project was approved by the former governor of Michigan but his successor, Gov. Whitmer, challenged the constitutional validity of the project in 2018.

The Michigan District Court ruled the legislation constitutional in October 2019 and that decision was upheld by the Michigan Court of Appeal in January 2020. In January 2021, the Governor of Michigan ordered Enbridge to cease operating the segment the pipeline under the Straits of Mackinac by May 2021. Enbridge argues that the 645-mile pipeline has been operating safely for 65 years. However, to address the concerns, Enbridge is now proposing to place the pipe in a tunnel underneath the lake bed at a cost of $500 million.

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[10] *Re Jurisdiction over the Coastal GasLink Pipeline Project* (26 July 2019), MH-053-2018, online: National Energy Board <docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90550/90715/3615343/3715570/3809973/C00715-1_NEB_%E2%80%93_Letter_Decision_%E2%80%93_Coastal_GasLink_%E2%80%93_MH-053-2018_-_A6W4A5.pdf?nodeid=3809655&vernum=-2>.

[11] *Ibid* (citing *Westcoast Energy Inc. v Canada (National Energy Board)*, [1998] 1 SCR 322, 156 DLR (4th) 456).

[12] *Re Enbridge Pipelines Inc., Application dated 5 November 2014 for the Line 3 Replacement Project* (April 2016), OH-002-2015, online: National Energy Board <docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/92263/2404881/2545522/2955931/2949686/A76575-1_NEB_-_Report_-_Enbridge_-_Line_3_Replacement_decisions_and_recommendations_-_OH-002-2015.pdf?nodeid=2949922&vernum=-2>.

[13] Minnesota Public Utilities Commission, "Line 3 Review Process", online: <mn.gov/puc/line3/process/>.

[14] *In re Applications of Enbridge Energy, LP*, 930 NW 2d 12 (Ct App Minn 2019).

Line 5 part is part of the Enbridge mainline system that transports crude from Alberta and Saskatchewan to refineries in the Michigan, Ohio, Pennsylvania, Ontario, and Québec. Enbridge has argued that those refineries will see their capacity drop by 45 per cent if Line 5 does not continue in service. On January 29, 2021, the Michigan Department of Environment Great Lakes and Energy (EGLE) approved the Enbridge application for the permits required to build the utility tunnel under the Straits of Mackinac. However, permits from the Michigan Public Service Commission and the US Army Corps of Engineers are still required.

NGTL 2021 System Expansion

Late in the year, the federal cabinet gave final approval to TC Energy's $2.3 billion NGTL 2021 System Expansion Project, from near Grande Prairie to north of Calgary. The Commission of the Canada Energy Regulator (CER) had recommended approval of the Project to the Governor in Council in its report dated February 19, 2020.[15] Cabinet, however, considered a further report prepared after the CER Commission report had been submitted.[16] Cabinet concluded that several of the conditions recommended by the CER Commission should be "strengthened" and that a further condition, which had initially been proposed by a dissenting CER commissioner, should be added.[17] NGTL was apparently not provided an opportunity to comment on the amendments or the additional condition, in apparent breach of an admonition from the Federal Court of Appeal in *Gitxaala Nation v Canada*[18] that "[i]t goes without saying that as a matter of procedural fairness, all affected parties must have an opportunity to comment on any new recommendations that the coordinating Minister proposes to make to the Governor in Council." The delays before cabinet have resulted in a delay of a year for the Project, which is now scheduled for completion in the second quarter of 2022.

Enbridge Contract Carriage Proceeding

The proceeding to consider Enbridge's application to allow shippers to sign long-term contracts for priority access to 90 per cent of its Canadian Mainline capacity continued before the CER Commission throughout the year. Currently, and historically, the Mainline has operated as a common carrier, with capacity allocated on an uncommitted basis using a monthly nomination system. The current service and tolling settlement is due to expire on June 30, 2021. The CER Commission will hold oral cross-examination in May 2021.[19] The application is controversial and has pitted various producer, market and refiner interest against one another. The outcome will no doubt be a focus of our review of 2021 developments.

REGULATORY REFORM

Net Metering

During 2020 regulators in both Canada and the United States looked at reforming net metering.

Essentially the goal was to determine if net metering could be expanded from a single customer to a group of customers. Net metering has been around for almost 10 years but in Canada it caught on in only Ontario and British Columbia. The political attraction was that net metering could promote renewable energy and

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[15] *Re NOVA Gas Transmission Ltd., Application dated 20 June 2018 for the 2021 NGTL System Expansion Project* (February 2020), GH-003-2018, online: Canada Energy Regulator <docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90550/554112/3422050/3575553/3575989/3905746/C04761-1_Canada_Energy_Regulator_Report_-_NOVA_Gas_Transmission_Ltd._GH-003-2018_-_A7D5G0.pdf?nodeid=3905626&vernum=-2>.

[16] Natural Resources Canada, "Crown Consultation and Accommodation Report for the NOVA Gas Transmission Ltd. 2021 System Expansion Project (GH-003-2018)" (October 2020), online: <mpmo.gc.ca/measures/nova-gas-transmission-ltd-2021-ngtl-2021/nova-gas-transmission-ltd-2021-report/321>.

[17] Natural Resources Canada, News release, "Government of Canada Approves the NOVA Gas Transmission Ltd. 2021 System Expansion Project" (20 October 2020), online: <www.canada.ca/en/natural-resources-canada/news/2020/10/government-of-canada-approves-the-nova-gas-transmission-ltd-2021-system-expansion-project.html>.

[18] 2016 FCA 187 at para 337 (Emphasis added).

[19] Canada Energy Regulator, "Enbridge Pipelines Inc. (Enbridge), Canadian Mainline Contracting Application, Hearing Order RH-001-2020, Procedural Update No. 1 – Oral Hearing Preliminary Information" (23 February 2021), online: <docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90465/92835/155829/3773831/3890507/4038614/4049665/C11628-1_Commission_%E2%80%93_PU_No._1_-_Enbridge_%E2%80%93_Canadian_Mainline_Contracting_%E2%80%93_Hearing_Timetable_and_Preliminary_Cross_Estimates_-_A7R4K7.pdf?nodeid=4049666&vernum=-2>.

potentially reduce the cost of electricity to the ratepayers. The opposition came from utilities that were not eager to lose demand or customers.

The most ambitious program took place in British Columbia. On April 20, 2019, BC Hydro submitted an application to the British Columbia Utilities Commission (BCUC) to amend its net metering program. This resulted in interventions by 14 parties, over 200 letters of comment, and a 52-page final decision a year later in June 2020.[20] The most contentious part from the preceding was BC Hydro's request to limit the size of the generation facility to the customers' annual load.

Utilities throughout North America have long argued that customers engaging in net metering should not be able to generate a profit. The basic concept was that customer should be able to offset the cost of electricity they bought from the utility with the revenue they received from selling electricity to the utility. The BC evidence was that some customers were making a significant profit, but it was a small percentage of the total. In the end, the BCUC rejected the BC Hydro proposal and refused to adopt a maximum generation volume.

The Ontario regulatory initiative was more aggressive. In October 2020, the Ontario Minister of Energy established a consultation to determine the viability of community net metering. Garden-variety net metering consisted of an individual customer exchanging electricity with the utility. Community net metering on the other hand involves groups of customers acting together as a community or organization. The government asked interested parties to make submissions by November 22, 2020, addressing such questions as: what constitutes a community, how should the credits be structured, and how should utilities recover any costs incurred? To date no report has been issued by the government or the Ontario Energy Board.

In the United States, many states have adopted some form of net metering. The most aggressive state is California which recently adopted changes to its net metering program. In California, net metering is driven by solar generation established by households. To dampen the impact, the total amount of net metering has been restricted so that it cannot exceed 5 per cent of total solar generation. More recent changes in California may have implications for future changes in both Ontario and British Columbia.

The first California change was a requirement that net metering customers switch to time of use (TOU) pricing. The highest rates are charged in times of peak demand which is late afternoon or early evening. The lowest rates are charged at off-peak times which is late at night and early in the morning when electricity usage is low. The implication for net metering is that the value of the credit for energy sold to the grid varies based on the TOU rate. This means that to get the highest net metering credits consumers need to sell the maximum energy to the grid during peak demand time.

The other change, which is relevant to Canada, is the implementation of a new component of electricity rates known as non-bypass charges or NBC. This is a small charge of $0.02–$0.03 per kilowatt hour which is added to energy charges. This amount is not credited to consumers which means that consumers earn a bit less then they pay for electricity. This has not limited the demand for net metering because the NBC makes up a small portion of the overall bill. In addition, customers with generation systems under 1 MWh have to pay a one-time interconnection fee to connect their systems to the grid. This cost is generally between $75 and $150.

It will be interesting to see where Ontario goes with community net metering. This has implications for customer owned generation throughout Canada. Increasingly, there is a demand by large industrial customers to be able to sell their excess electricity to other customers in what are essentially private power purchase agreements. This continues to be a major issue before the Alberta Energy Regulator which we discussed in last year's issue. A detailed report on that issue is now before the Alberta government.

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[20] *Re British Columbia Hydro and Power Authority Application to Amend Net Metering Service under Rate Schedule 1289* (23 June 2020), online: British Columbia Utilities Commission <www.bcuc.com/Documents/Decisions/2020/DOC_58477_Decision-with-Order-G-168-20-BCH-Net-Metering-RS1289.pdf>.

Pipeline Construction Reform

It is not often that we hear governments proposing some form of the deregulation in the energy sector particularly when it comes to pipelines. However, on January 20, 2021 the Ontario Minister of Energy proposed such a possibility. Section 90 of the *Ontario Energy Board Act* (*OEBA*) requires that anyone constructing a pipeline in Ontario requires a leave to construct (LTC) order from the Ontario Energy Board if the pipeline:

- is more than 20 km in length
- will cost more than $2 million
- has a pipe size of 12 inches or more
- has an operating pressure of 2000 kilopascals or more

The Ontario government is proposing to change O.Reg 328/03 under the *OEBA* to increase the cost threshold from $2 million to $10 million. However, an OEB LTC will still be required for any pipeline that does not meet any of the other requirements outlined in section 90 of the *OEBA*. In addition, any party constructing a pipeline will still be required to obtain the existing authorizations from government Ministries or Municipalities. In addition, any reduction to the existing requirements would not apply to the construction of pipelines crossing an Ontario border which are regulated by the Canadian Energy Regulator or an addition to a pipeline that is part of an existing interprovincial pipeline.

The government estimates that the increase of the threshold from $2 million to $10 million would, based on the OEB LTC applications received between 2017 and 2020, reduce the number of projects requiring a LTC from the Board by 24 per cent. This could result in a significant reduction in regulatory costs which are ultimately borne by the ratepayers. Submissions regarding the government proposal are due by April 29, 2021.

Small Utility Regulation

Ontario is different than most Canadian jurisdictions when it comes electricity regulation. Canada is dominated by large government owned utilities that provide generation, transmission, and distribution. In Ontario, most of the distribution has traditionally been done by municipally owned distributors. Recently there has been a high degree of consolidation but there are still 31 small distributors each with less than 20,000 customers. In 2020, the OEB announced the new Ontario initiative to streamline the regulatory process for these small distributors. It started with the with a stakeholder meeting on January 28, 2021 and will conclude with a report in time to set the 2023 rates.

Green Industrial Rates

As 2020 came to an end, the British Columbia government announced new Green Energy Incentive Rates for industrial customers in the province. There are two new rate plans. The first was the Clean Industry and Innovation Rate. The second was the Fuel Switching Rate. Both rates are available until March 31, 2030 and customers can enjoy these discounted rates for seven years. The discount is 20 per cent for the first five years, 13 per cent in the sixth year and 7 per cent in the seventh year.

Under the Clean Industry and Innovation Rate, power costs are lowered for eligible industrial customers involved in carbon sequestration, hydrogen production, synthetic fuel production and carbon capture and storage. In addition, industrial customers setting up data centers with over 70 GWh a year of electricity demand are eligible to benefit from these lower rates.

The Fuel Switching Rate is available to existing and new industrial customer switching from fossil fuels to electricity to power their operations. To qualify, a customer must demonstrate that the electrification will reduce greenhouse gas emissions. The discounted rate applies only to the fuel switching portion of the electric load. The Fuel Switching Rate is not available to oil pipelines, oil refineries, methanol production or natural gas liquefaction facilities. There is also minimum energy demand requirement. The increase in electricity demand from fuel switching must be at least 20 GWh a year.

In addition to the new BC Hydro rates, the province of British Columbia has allocated $84 million to federal green infrastructure funding to establish an electrification fund for qualifying industrial customers including those in the oil and gas sector. BC Hydro will provide funding up to 50 per cent of the eligible costs to maximum of $15 million per project with the customer responsible for the balance of the cost.

To qualify, projects must satisfy the following conditions. They must switch from carbon-based fuel to use electricity, support public infrastructure and the interconnection. The work must also be completed by spring 2027.

The mild little switch from philosophy of electricity must meet certain minimum thresholds based on customer type. For industrial customers, 5 MW with a minimum interconnection cost of $5 million. For transportation of bulk environmental customers 2 MW with the minimal interconnects cost of $2 million. The applications will be reviewed on a first-come first-served basis.

New Capacity Auctions

Ontario was slow to recognize the benefits of competitive bidding. That concept was ignored in the years of FIT contracts which were based on the concept of first come first serve. That was met with all kinds of complaints about illegal preferences leading to a number of lawsuits and international arbitrations — some of which are still proceeding.

Good news arrived on December 10, 2020, when the Independent Electricity System Operator (IESO) announced the results of a new capacity auction under which 1000 MW of capacity was secured at a price which was 26 per cent below the price in the 2019 demand response auction.

The total number of bidders was not announced but over 1700 MW of resources enrolled in the auction. The auction also included storage assets which was particularly welcome given the regulatory struggles to determine where storage fits into the Ontario marketplace. That issue still before the Ontario Energy Board.

Participants have committed to provide capacity for summer 2021 to help manage peak seasonal loads. The next capacity auction is scheduled for December 2021. The IESO states it intends to explore additional enhancements to enable additional resources to compete.

KEY REGULATORY DECISIONS

Energy Storage

The development of energy storage in terms of regulation has been moving slowly in Canada compared to the United States. In January 2020, the OEB issued the Toronto Hydro rate case decision[21] rejecting an application to include storage in the utilities rate base stating that the applicant should pursue a policy change in the Board's ongoing consultation on distributed energy resources. However, in August 2020, a Board Staff report suggested that Ontario local distribution companies may operate behind the meter energy storage and treat it as part of regulated operations if the purpose is to remediate poor service reliability. There is still some confusion regarding the status of what appears to be a new policy instrument.

In the United States, the storage market is moving more quickly. Readers will recall that in 2018 FERC issued a final rule, Order No. 841[22] which was designed to incorporate storage more fully into the market-place. There were a number of appeals and challenges to this Order but in the end the situation moved forward with FERC in August 2020 accepting a proposal from MISO to allow cost recovery for energy storage projects that address transmission system needs.[23] Interestingly, the OEB Staff Report was released at the same time. Other US RTO/ISO agencies are now developing proposals to promote the integration of energy storage solution to address different transmission issues.

The August 10 FERC approval in *MISO* allowed, for the first time under certain circumstances, electric storage facilities to qualify as transmission only assets eligible for full cost of service rates. At the same time merchant energy storage is developing in both Canada and the United States using battery energy storage systems. Broad Reach Power has begun construction of two separate 100 MW facilities in Texas while WCSB Power is developing a 20 MW facility in Alberta.

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[21] *Re Toronto Hydro-Electric System Limited* (19 December 2019), EB-2018-0165, online: Ontario Energy Board <www.rds.oeb.ca/CMWebDrawer/Record/663131/File/document>.

[22] *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, 162 FREC ¶ 61,127 (2018), online: FERC <www.ferc.gov/sites/default/files/2020-12/Order-No-841.pdf>.

[23] *Midcontinent Independent System Operator, Inc.*, 170 FERC ¶ 61,186 (2020), online: FERC <cms.ferc.gov/sites/default/files/2020-05/20200310135710-ER20-588-000.pdf>.

Innovation Funding

In the past Canadian energy regulators have been reluctant to fund through rates projects that were considered to be experimental or research in nature. For example, applications to both the Ontario and Nova Scotia regulators to fund EV charging were declined.[24] Things have changed. The year 2020 saw energy regulators in British Columbia, Ontario, and Nova Scotia take dramatic steps in funding new technology through ratepayer dollars. We turn first to British Columbia.

In June 2020, the BCUC issued a decision in response to an application by FortisBC to establish a Clean Growth Innovation Fund.[25] The utility actually proposed two funds, one for a gas utility and one for an electricity utility. The application by the electricity utility failed but the one by the gas utility succeeded.

The utility proposed a charge of $0.30 per customer per month for the electric utility and $0.40 per customer per month for the gas utility. The anticipated annual funding based on the number of forecasted customers was $4.9 million for the gas utility and $0.5 million for the electric utility.

The BCUC approved the innovation fund for the gas utility because there was a "demonstrated need to accelerate natural gas innovation activity to meet the climate change targets set by the Province of British Columbia which had legislated a 40% reduction GHG emissions over the next decade."

The decision represents a key milestone for innovation funding. Previous applications were directed at specific projects. This application however, created a fund for projects that would be considered from time to time. The application also proposed a governance model to ensure that the funds were applied to innovations that would benefit customers. The decision also addressed accountability and annual reporting by the utility.

The starting point in the Board's analysis was a determination of the demand for funding. The Commission relied on the evidence from the utility that pointed to Canada's commitment to reduce GHG emissions by 30 per cent between 2005 and 2030 and BC's commitment to reduce emissions by 40 per cent by 2030 and 80 per cent by 2050. To this were added commitments by the City of Vancouver. The panel concluded that the utility had demonstrated the need to accelerate its innovation activities in light of governmental climate policies with respect to decarbonization and electrification.

The Commission faced a major hurdle when one of the interveners argued that the Commission did not have jurisdiction to set the rate increases proposed by the utility. This is not a unique argument. In the past Canadian energy regulators have faced continual objections regarding rates for special classes including most recently indigenous customers[26] and previously rates for low-income consumers[27].

In this case, the BCUC found that the innovation fund did not offend cost of service principles relying on section 59 of the *Utilities Commission Act* that gave the BCUC broad discretion to use any mechanism or method for setting a rate that it considered advisable. The Commission concluded that a fixed rate adder to support the innovation fund was one such mechanism. This decision will be closely watched by regulators throughout Canada.

Smart Grid Pilots

The British Columbia regulator was not alone in financing new technology in 2020. In December 2019, Nova Scotia Power submitted an application to the Nova Scotia Utility and Review Board to approve a $7 million capital expenditures on a smart grid pilot. The purpose of the pilot was to determine if new software

[24] *Re Toronto Hydro-Electric System Limited* (22 February 2012), EB-2010-0142, online: Ontario Energy Board <www.rds.oeb.ca/CMWebDrawer/Record/329716/File/document>; *Re Nova Scotia Power Incorporated* (4 January 2018), 2018 NSUARB 1, online: Nova Scotia Utility and Review Board <www.canlii.org/en/ns/nsuarb/doc/2018/2018nsuarb1/2018nsuarb1.html>.

[25] *Re FortisBC Energy Inc. and FortisBC Inc.* (22 June 2020), G-165-20, G-166-20, online: British Columbia Utilities Commission <www.bcuc.com/Documents/Decisions/2020/DOC_58466_2020-06-22-FortisBC-MRP-2020-2024-Decision.pdf>.

[26] *Manitoba Hydro Electric Board v Manitoba Public Utilities Board*, 2020 MBCA 60 [*Manitoba Hydro*].

[27] *Dalhousie Legal Aid Service v Nova Scotia Power*, 2006 NSCA 74.

developed by Siemens could monitor and manage distributed energy resources (DERs) in a fashion that would increase grid reliability and reduce costs.

The project was driven by the growing importance of distributed energy resources in the operations of Canadian electricity utilities. The DERs used in this project were solar generation, battery storage, and electric vehicle charging.

The overall cost of the pilot project was $19 million but of that amount nearly $12 million was external funding leaving one third to be funded by Nova Scotia Power customers. The criteria the Board applied in determining whether this capital investment was justified was called the Innovation Justification Criteria (ITC). The ITC test was: can the project be reasonably expected to produce valuable data and learning to develop a business case prior to full-scale development?

One of the issues the Board had to contend with was a concern by interveners about the lack of competitive bidding in putting the project together. In particular, there was a significant reliance on Siemens with respect to software. This was discounted when it was explained that Siemens was largely responsible for obtaining the federal funding which was supporting the project. There was also some concern about potential cost overruns. The Board made it clear that its decision approving the pilot project was limited to the expenditure of $7 million and recovery of any cost overruns would require Board approval.

This decision by the Nova Scotia Board[28] is a rare but important example of ratepayer funding of new technology. The Board's decision was clearly influenced by the significant funding from outside sources such that only one third of the total capital cost was being borne by ratepayer as was the condition that the utility was at risk for any cost over runs. The Board also established a meaningful compliance and reporting structure that will be instructive to other regulators examining similar ventures. The extensive evidence from independent outside experts also provides some useful lessons for future applicants.

Hydrogen Blending Pilots

On October 30, 2020, the Ontario Energy Board issued a decision[29]approving an application from Enbridge Gas to construct a pilot project which blends hydrogen into conventional natural gas to be distributed in an area north of Toronto. The Board approved the application and allowed Enbridge to construct the necessary facilities and set rates related to the project. The rates were designed to ensure that the ratepayers that receive blended gas did not pay more than other Enbridge Gas customers.

The objective of the pilot is to reduce the GHG emissions relating to the sale of natural gas. Hydrogen has no carbon emissions when it is burned. As a result, combining hydrogen with natural gas reduces the overall carbon footprint.

In this pilot, 2 per cent of the total product will be hydrogen. Because hydrogen has a lower heating value than conventional natural gas it takes a greater volume of hydrogen to provide the same energy content. The result is that customers receiving blended gas must consume a higher volume than customers receiving conventional natural gas. This requires a price adjustment which the Board approved to compensate customers in the blended gas district for the cost of the extra gas.

The pilot project will deliver blended gas to approximately 3600 customers in the blended gas area over five years. At the end of that period Enbridge is required to file a detailed report to the regulator that will assess the costs and benefits of the project. Enbridge has indicated that it plans to apply for similar projects in other gas markets it is currently serving in Canada.

[28] *Re Nova Scotia Power Incorporated* (7 May 2020), 2020 NSUARB 63, online: Nova Scotia Utility and Review Board <www.canlii.org/en/ns/nsuarb/doc/2020/2020nsuarb63/2020nsuarb63.html>.

[29] *Re Enbridge Gas Inc.* (29 October 2020), EB-2019-0294, online: Ontario Energy Board <www.rds.oeb.ca/CMWebDrawer/Record/691859/File/document>.

Demand Control Tariffs

In March 2020, the Nova Scotia Utility and Review Board released its decision[30] with respect to a unique demand control tariff for the Nova Scotia Power's largest customer, Port Hawkesbury Paper. The main feature of this new tariff is that the customer gives control of its load to the utility. That means that Nova Scotia Power can increase or decrease the load depending on system conditions. The ability to make those changes can lead to significant savings to the Nova Scotia Power system and ultimately to ratepayers.

Under the tariff, the cost savings are divided between the utility and the customer with 25 per cent of the savings going to the customer in the form of a load shifting credit. The remaining 75 per cent is credited to Nova Scotia Power customers. The new tariff however must provide a minimum of four dollars per megawatt hour towards the fixed costs of Nova Scotia Power.

It is estimated that the total benefit to Nova Scotia Power customers will range between $6 million and $13 million annually over the three-year tariff period for an average of $10 million. Detailed reporting by Nova Scotia Power to the regulator is required on both a quarterly and monthly basis.

IN THE COURTS

Constitutional Issues

The year 2020 started out with two constitutional decision. The first took place on January 16, 2020, when the Supreme Court of Canada dismissed British Columbia's attempt to regulate the transportation of heavy oil through the province.[31] The nine-member panel delivered a rare decision from the bench stating that it agreed with the British Columbia Court of Appeal's decision.

The BC government was attempting to block the Trans Mountain Expansion pipeline that it believed would significantly increase the flow of heavy oil from Alberta to the British Columbia coast. To do this, BC proposed to change its *Environmental Management Act* in April 2018. Those changes would prohibit the possession and transportation of heavy oil without a provincial permit. In response to political controversy the British Columbia Premier referred the matter to the B.C. Court of Appeal. That court unanimously held that the amendments were outside the scope of provincial jurisdiction given that they primarily focused on a federal interprovincial undertaking.

The next decision occurred in February 2020 when the Alberta Court of Appeal held that the federal carbon tax was unconstitutional.[32] A few months earlier the Saskatchewan and Ontario Courts of Appeal held that this legislation was within federal jurisdiction.[33]

The Alberta Court of Appeal claimed the carbon tax was an unconstitutional "Trojan Horse" that would forever alter the constitutional balance between the provinces and territories. In considering the proposed regulation of GHG emissions the Alberta court interpreted the peace order and good government provision more narrowly than Saskatchewan and Ontario courts although both of those decisions also had a dissent. The Alberta court held that this arm of federal jurisdiction was not the grand entrance hall into every head of provincial power. In the end, the Alberta court clearly stated that the new legislation would allow the federal government to limit the provinces exclusive jurisdiction over property and civil rights.

The three decisions have been appealed to the Supreme Court of Canada where they were heard in September 2020.

Intervenor Standing

There was a time when many Canadian energy regulators interpreted standing on a relatively narrow basis. Over time, most energy regulators clarified their standing rules. Standing was generally allowed if the potential intervenor could show that it was "directly affected" by the application.

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[30] *Re Nova Scotia Power Incorporated* (26 March 2020), 2020 NSUARB 44, online: Nova Scotia Utility and Review Board <www.canlii.org/en/ns/nsuarb/doc/2020/2020nsuarb44/2020nsuarb44.html >.

[31] *Reference EMA*, *supra* note 6.

[32] *Reference re Greenhouse Gas Pollution Price Act*, 2020 ABCA 74.

[33] 2019 SKCA 40, 2019 ONCA 544.

In December 2020, the Alberta Court of Appeal issued its decision in *Normtek Radiation*[34] which broadens the standing rule beyond the narrow directly affected concept.

Normtek Radiation was in the business of transporting radioactive material. It opposed an approval to amend a landfill contact opposed in a decision of the Alberta Environmental Appeals Board. The Board had approved the disposal of concentrated radioactive material in a manner Normtek believed was contrary to industry and government standards. Normtek was not directly affected by this ruling but was concerned that failure to follow industry standards would damage the entire industry including Normtek.

Normtek's request for standing was rejected. Because Normtek operated outside the area of environmental impact, the Board ruled that Normtek was not directly affected. Normtek then appealed the Board decision to the Alberta Court of Appeal. The court reversed stating that it was not necessary that there be an adverse impact in order for the appellant to be directly affected. The Alberta Court of Appeal held that the general economic impact of the approval was sufficient. In short, the court held that Board's interpretation of "directly affected" was too narrow. This decision may open the door to a broader interpretation of standing.

The Importance of Reasons

The court in *Vavilov*[35] emphasized the necessity of providing reasons Not only were reasons important, the court stated they required justification, transparency, and intelligibility. Decisions must be justified, not just justifiable.

The court went on to identify two fundamental flaws that were to be avoided. First, a decision must have internally coherent reasons and will not be considered reasonable where the decision reached does not follow from the analysis undertaken. The second fundamental flaw relates to the requirement that the decision must be justified in light of the legal and factual constraints that bear on it. Finally, decisions must avoid persistently discordant or contradictory legal interpretations and departures from long-standing practices or established internal authority without satisfactory explanations for the departure. Without a credible explanation of its failure to follow precedence, a decision will be considered unreasonable.

In October 2020, the Ontario Divisional Court in *Halton Hills Hydro*[36] had an opportunity to decide the first case under *Vavilov*. The applicant utility claimed that the Board had erred in its decision on three grounds. First, the Board had failed to set rates that were just and reasonable. Second, the Board had arbitrarily not followed past practices. And third, the reasons for the decision were not sufficient.

The Court rejected all three arguments. The decision, with respect to reasons, was particularly interesting. In rejecting this ground, the Court stated as follows:

> [33] The reasons on this issue are brief but sufficient. The Board did not need to state the history of this issue in the Board's jurisprudence in the way that I have done in these reasons. A specialized tribunal providing reasons to experienced participants in the Board's processes need not explain things that are well known to the parties. Reasons are instrumental, and these reasons conveyed to the parties the basis of the Board's decision.
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> [35] This is not a case where the court has "no idea what prompted the decision". To paraphrase from the Court of Appeal: "[t]he… reasons … need not be lengthy. They need not be complex. But, as the Divisional Court observed, they must at least answer the question "Why?". The OEB's decision answers the question "why". The reasons are sufficient.

In May 2020, the Ontario Divisional court struck down a decision of the Ontario Ministry

[34] *Normtek Radiation Services v Alberta Environmental Appeal Board*, 2020 ABCA 456.

[35] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65

[36] *Halton Hills Hydro Inc. v Ontario Energy Board*, 2020 ONSC 6085.

of the Environment in *Nation Rise Wind Farm*.[37] The Ministry had issued a permit for the windfarm that was reversed by the Minister on the basis that the project was not in the public interest. The wind farm operator appealed the decision to the Divisional court. The court found that the Minister's decision was unreasonable because the process by which the Minister made the decision was procedurally unfair. Relying on the Supreme Court of Canada decision in *Vavilov* the court found that there was a denial of procedural fairness when the Minister failed to grant the operator with an opportunity to address a remedy after the decision was made. The court also found that the failure to advise the operator that a new issue relating to bat colonies was being considered in the appeal and was instrumental in determining that the project was not in the public interest.

A different result was reached by the Yukon Court of Appeal in *Yukon Energy Corporation*.[38] There, the utility appealed the decision of the Yukon Utilities Board on the basis that the Board failed to consider certain aspects of Yukon Energy evidence and had considered irrelevant evidence in concluding that certain costs incurred were not prudent. The court rejected the application stating that the hearing panel was entitled to exercise its discretion when it declined to approve the cost submitted by Yukon Energy, that the hearing panel did not take into account irrelevant factors in exercising its discretion and accordingly did not commit any error of law.

Cross Border Disputes

Earlier in this editorial we outlined in some detail disputes underway with respect to pipeline construction. Similar disputes are taking place in electricity transmission. These disputes usually involve Hydro Québec (HQ), Canada's largest public utility. Two projects are currently facing difficulty.

The first is a $2 billion transmission line that will be laid under Lake Champlain and the Hudson River to supply New York City with renewable energy. HQ is facing difficulty in Québec over the refusal to bury the line underground although its US partner has agreed to do that on the American side.

The second project is known as New England Clean Energy Connect or NECEC. It is a 1200 MW transmission line from Québec to Massachusetts. This is an agreement to sell 9.5 TW hours of power for 20 years. Most of it will be consumed in Massachusetts but Maine has been guaranteed 500,000 MWh per year as an incentive to allow NECEC to pass through the state. This project has been underway for three years and most state and federal permits have been obtained.

In November 2020, United States Army Corps of Engineers issued a federal environmental permit for the project which paves the way for Central Main Power to begin construction. On January 15, 2021, the project received presidential approval from the U.S. Department of Energy. The project is still awaiting approvals in the US from the ISO New England. In Canada, the project has received the necessary approvals from the Régie in Montreal. However, on January 15, 2021 the U.S. Court of Appeals for the First Circuit, which sits in Boston, issued an injunction suspending work on the route.

Environmental groups have successfully challenged the project on the ground one of the federal permits was improperly issued. To complicate matters, a coalition of groups has filed a petition with the Maine Secretary of State asking the Secretary of State to hold a referendum that would retroactively require state legislature approval for any transmission lines over 50 miles. It would also prohibit any construction in the upper Kennebec region effectively closing down the NECEC project.

This is not the first time that Hydro Québec has faced this situation. In 2019, a New Hampshire Court blocked the project known as Northern Pass that would have delivered 1100 MW of power to New Hampshire.

[37] *Nation Rise Wind Farm Limited Partnership v Minister of the Environment, Conservation and Parks*, 2020 ONSC 2984 [*Nation Rise*].

[38] *Yukon Energy Corporation v Yukon (Utilities Board)*, 2021 YKCA 1 [*Yukon Energy*].

Jurisdiction Decisions

In *Planet Energy*,[39] the Ontario Energy Board had ordered Planet Energy to pay an administrative penalty of $155,000. Planet Energy objected and appealed to the Ontario divisional court on the basis that the Board had no jurisdiction to impose an administrative penalty because the Board had exceeded the time limitation in section 112 of the *Ontario Energy Board Act*.

The court rejected the appeal on the basis that Planet Energy had not raised the issue with the Board, relying on the principle that the court had the discretion to ignore arguments that were not made before the Board in the first instance as set out in the Supreme Court of Canada decision in *Alberta Teachers*.[40] The court noted that while our viewing court has the discretion to address a new issue raised on judicial review, that discretion will generally not be exercised if the issue could have been raised before the tribunal and was not.

Planet Energy was followed by a decision of the Alberta Court of Appeal in April 2020 in *Fort McKay First Nations v Prosper Petroleum Ltd.*[41] The Alberta Energy Regulator (ARE) had approved Prosper Petroleum's application to build a 10,000 barrel per day bitumen recovery project within 5 km of the Fort McKay First Nation reserve. The question before the regulator was whether or not the project was in the public interest. The panel found that the project was in the public interest but declined to consider the adequacy of consultation and the honour of the Crown. The AER stated that this was the responsibility of the Alberta government.

Fort McKay First Nations appealed to the Court of Appeal which set aside the AER decision. The court found that while AER may have been statute barred from assessing the adequacy of crown aboriginal consultation the AER was not relieved of its duty to assess the adequacy of the consultation. The Court of Appeal held that where a tribunal had the power to consider questions of law without clear indication that the Legislature intended to exclude such jurisdiction, tribunals have implied jurisdiction to consider issues of constitutional law. The court noted this is especially the case where the tribunal is assessing the public interest.

The *Fort McKay* case was followed by the Ontario Divisional court decision in May 2020 in *Nation Rise Wind Farm*.[42] There, a Director of the Ministry of the Environment had issued an authorization to Nation Rise Wind Farm permitting construction of a 100 MW windfarm near Ottawa. A group of citizens filed a notice of appeal to the Minister who was required to determine if the decision was in the public interest. The Minister found the decision was not in the public interest and revoked the permit. In so doing the Minister relied on evidence that had not been before the Director in the first instance. In addition, the Minister failed to advise Nation Rise Wind Farm that new evidence and a new issue was being considered.

The Divisional court agreed with Nation Rise Wind Farm that the Minister's decision was unreasonable and that the process by which he reached the decision was procedurally unfair. The court rules that the Minister did not have the authority under section 145 of the EPA to confirm, offer, or revoke the decision of the tribunal. The court found that section 145 requires the Minister to deal only with the matters in the appeal that were raised by the party bringing the appeal. The court found that the Minister unreasonably concluded that he had authority to add new issues on the appeal.

The next decision was the decision of the Manitoba Court of Appeal in June 2020.[43] There, the Public Utilities Board of Manitoba had ordered Manitoba Hydro to create a new customer class for aboriginals living on First Nations reserves. Manitoba Hydro appealed the Commission's directive creating a special class. The Court of Appeal held that establishing customer classes is an inherent part of setting utility rates. However, while the Board had the

[39] *Planet Energy (Ontario) Corp. v Ontario Energy Board*, 2020 ONSC 598.

[40] *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61.

[41] 2020 ABCA 163.

[42] *Nation Rise Wind Farm Limited Partnership v Minister of the Environment, Conservation and Parks*, 2020 ONSC 2984.

[43] *Manitoba Hydro*, *supra* note 26.

authority to create such classification it had to do so within the statutory limits provided by legislation.

The court held that the Board had exceeded its scope of authority in directing the creation of the class stating that the ability to consider factors such as social policy and bill affordability in approving and fixing rates it is not authority to direct the creation of customer classifications implementing broader social policy payments and poverty reduction which have the effect of redirecting Manitoba Hydro's funds and revenues to alleviate such conditions.

The next decision was the decision of the Ontario Divisional Court in *Rogers Communication*[44] in November 2020. There the Ontario Divisional court issued a decision dismissing an appeal with respect to a charge approved by the Ontario Energy Board for wireline attachments to electricity distribution poles. To arrive at a provincewide rate for pole attachment the OEB had conducted review of charges for wireline attachments and issued a final report in March 2018 setting a provincewide rate of $43.63 with annual adjustments based on a OEB inflation factor.

A group of carriers appealed to the Divisional court and asked the court to set aside the report arguing that the OEB had failed to follow the provisions of the *Ontario Energy Board Act* requiring the OEB to hold the hearing. Their position was that the Board's attachment charges were a rate for transmitting electricity or retailing electricity which required the OEB to hold a hearing.

The divisional court responded that the use of rental space on a pole by a telecommunication company had nothing to do with retailing or distribute electricity. The court further noted that previously these rates had been adjusted by amending the license of electricity distributors which contained a requirement that distributors must allow access to the poles at a specified rate which was approved by the OEB and included in the distribution license. The court concluded that the change to the attachment charge was a lawful exercise of the OEB's jurisdiction and did not require OEB hearing. The court also concluded that the process followed by the OEB was procedurally fair.

The next decision with respect to Board jurisdiction was the decision of the Ontario Energy Board in *Waterfront Toronto* in January 2021. There, Enbridge asked the Board to order Waterfront Toronto to pay $70 million to cover the cost of a new pipeline.[45] Waterfront Toronto, a consortium of three governments: the City of Toronto, the Province of Ontario, and the government of Canada. Waterfront Toronto argued that it was not requesting the pipeline and in any event the Board has no authority to order Waterfront Toronto to pay any or all of the cost of a pipeline because Waterfront Toronto was not a consumer of gas.

Waterfront Toronto relied on earlier decisions that found that the Board's authority to allocate costs for pipeline construction was within the Board's jurisdiction because it formed part of the Board's ratemaking authority. However, in this case because Waterfront Toronto was not a gas customer, no ratemaking authority was involved and accordingly the Board had no jurisdiction to order Waterfront Toronto to pay the cost. The decision has not been appealed.

The last decision on jurisdiction is the February 2021 ruling in *Yukon Energy Corporation*.[46] The Yukon Utilities Board had disallowed certain costs claimed by the utility in a rate case. Yukon Energy argued that the Board had made three errors of law. First, it failed to determined Yukon Energy rate base in accordance with requirements of the *Act*. Second, it considered the irrelevant evidence in determining that the costs were not properly incurred. Finally, the Board failed to consider Yukon's evidence in relation to the cost claim.

The Board decision was reviewed by a Review Panel of the Board which dismissed the Application on the basis that there had been no error of law.

The Yukon Court confirmed that the Board had properly exercised its discretion. The Board had made a determination that the costs incurred

[44] *Rogers Communication Canada Inc v Ontario Energy Board*, 2020 ONSC 6549.

[45] *Re Enbridge Gas Inc.* (22 January 2021), EB-2020-0198, online: Ontario Energy Board <www.rds.oeb.ca/CMWebDrawer/Record/700885/File/document>.

[46] *Yukon Energy*, *supra* note 38.

were not necessary to provide service to the public. The Board had concluded that Yukon Energy had not acted prudently by incurring these costs. In addition, the court found that the Hearing Panel did not take into account irrelevant factors in exercising its discretion and accordingly did not commit any error of law.

GOING FORWARD

In the introduction to this Annual Review we indicated that the Canadian energy sector was facing a dramatic shift in rhetoric and investment away from conventional energy driven by climate change concerns. We also indicated that this shift would have a significant impact on Canadian energy regulators. Decisions by both the regulators and the courts in the last year point to two important developments.

The first was the unusual number of challenges to the jurisdiction of Canadian energy regulators. In total there were ten challenges in 2020. Half of them succeeded. The final results will depend on some outstanding appeals. The increase in the number jurisdiction decisions is no doubt a by-product the *Vavilov* decision by the Supreme Court of Canada in December 2018. It will take a while for the impact of *Vavilov* to be fully understood.

The other trend which is equally important is the increased role of energy regulators in promoting the introduction of new technology. This new technology invariably relates directly or indirectly to climate change and carbon reduction.

The first decision took place on the Pacific coast where the BCUC allowed a gas utility to establish an innovation fund to be paid for by ratepayers at a cost of $ 24.5M over a five-year period. Next was the decision of the Ontario Energy Board on an Enbridge application to undertake a pilot project that would examine the costs and benefits of blending hydrogen into natural gas. Finally, on the Atlantic coast we saw the Nova Scotia Board approve a pilot project by Nova Scotia Power to obtain partial funding of pilot project that would evaluate new software to allow more efficient operation and management of distributed energy resources.

These three cases represent a dramatic change by Canadian energy regulators. Traditionally energy regulators have been reluctant to use ratepayer dollars to fund new and unproven technology. This caution may come from the long-standing regulatory principle that before assets can become part of the rate base they must be "used in useful." But as we said in the Introduction the times of changed.

No doubt regulators and governments will closely watch these three important decisions. They all have monitoring programs and it will be interesting to see how detailed and public the review will be. These three decisions represent a useful change in direction by Canadian energy regulators. It is interesting that the three decisions took place at the same time in three different provinces before three different regulators. That they took place in both electricity and gas is also interesting.

We will see more of these decisions going forward. Regulators can bring a unique set of skills to the problem. The problem is that new technology often requires a very significant capital investment. Regulators are in a unique position to direct and evaluate pilot projects and determine the utility of the new technology before major financial commitments are made.

The other interesting difference between these three cases is the form of financing. In the British Columbia case the ratepayers cover all of the costs. In the Nova Scotia case the ratepayers cover one third of the cost, and in the Ontario case the utility covers all of the cost. It will be important to evaluate these different funding approaches. It can be argued that in a world where there is substantial capital to fund green energy investments there should not be a need for the ratepayer to fund all of the cost. Having private capital involved, particularly if it is non-utility capital as in the Nova Scotia case, offers additional surveillance, review, and verification. ■

2020 DEVELOPMENTS IN ADMINISTRATIVE LAW RELEVANT TO ENERGY LAW AND REGULATION[1]

*David J. Mullan**

INTRODUCTION

Having shaken up the principles and methodology of Canadian judicial review of administrative action at the very end of 2019, the Supreme Court of Canada took a breather from Administrative Law throughout 2020. It is only in February of 2021 with the scheduled hearing of the appeal in *Northern Regional Health Authority v Manitoba (Human Rights Commission)*[2] that the Supreme Court will return to the fray and confront at least one item of unfinished business resulting from *Canada (Minister of Citizenship and Immigration) v Vavilov*,[3] and the two other judgments[4] associated with that seminal precedent.

As a result, this annual survey of Administrative Law as it affects energy law and regulation will not involve the unpackaging of new Supreme Court judgments. Rather, its principal focus will be on the immediate impact of *Vavilov* and its close relatives on the conduct of judicial review of and statutory appeals from the decisions of all manner of energy regulators. In no sense will this provide a comprehensive survey of the consequences of *Vavilov* across the whole range of administrative decision-making. Rather, it will be a snapshot of the impact that *Vavilov* has had in the area of regulatory law that is the subject of this Journal. What has changed for judicial scrutiny of energy regulation decisions because of *Vavilov*, and what uncertainties has *Vavilov* created or left unresolved?[5]

Among those uncertainties is *Vavilov*'s impact on the duty to consult and, where appropriate, accommodate the rights, claims and interests of Indigenous peoples. I have devoted a section to examining the question of whether *Vavilov* involves a recalibration of the standard to be applied in judicial review of energy regulators' decision-making implicating those rights, claims, and interests. In a separate section, I will also range more broadly and consider other case law relevant to the continuing evolution of the duty to consult and other elements of the honour of the Crown as they bear upon energy law and regulation. Finally, in this context, I will also speculate upon the possible ramifications for energy regulators should Bill C-15, An *Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*, be enacted.

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[1] I am grateful for interactions with Paul Daly, former Justice of Appeal, John Evans, and Justice of Appeal David Stratas each of whom provided me with insights that were critical to my writing of this article.

* David J. Mullan, Emeritus Professor, Faculty of Law, Queen's University.

[2] 2017 MBCA 98, 416 DLR (4th) 385, leave to appeal to SCC granted, [2017] SCCA 462 (QL). One of the issues in this case is whether on an appeal from judicial review, the appeal Court should apply the standards applicable in appeals from a lower court in civil case, continue to be on a *de novo* or correctness basis, or some other *sui generis* combination. It is scheduled to be argued on February 16, 2021.

[3] 2019 SCC 65 [*Valilov*].

[4] *Bell Canada v Canada (Attorney General)*, 2019 SCC 66 [*Bell*], and, delivered the following day, *Canada Post Corporation v Canadian Union of Postal Workers*, 2019 SCC 67.

[5] For another assessment, see Shaun Fluker, "*Vavilov* and the Judicial Review of Natural Resources, Energy and Environmental Decisions in Canada", (2020) 123 Resources 1, online: <ssrn.com/abstract=3702774>.

The other domain that I will examine involves discretionary considerations relevant to access to judicial review of and statutory appeals from administrative decision-makers both at the front end of such proceedings and in the awarding of remedies.

THE IMPACT OF *VAVILOV*

Review by Way of Statutory Appeal

Undoubtedly, the most important, and, for that matter, most criticized[6] change wrought by *Vavilov* is its adoption of a rule that, unless other standards are specified legislatively, where an administrative decision reaches the courts by way of statutory appeal, review will be taken place under the criteria established for appeals in civil litigation in *Housen v Nikolaisen*[7] — correctness for pure questions of law, and palpable and overriding error for questions of fact and questions of mixed law and fact from which there is no readily extricable pure question of law.

For deference adherents, this sounded alarm bells. With the movement away from presumptive reasonableness review on statutory appeals to a correctness regime, even when a decision maker was interpretating its home or a frequently encountered statute, it was said would come an abandonment of judicial deference or respect for the decisions of many of Canada's leading regulators. It was also contended that this lessening of commitment to deference would open the door to more frequent recourse to the courts from regulatory decision-making. This was seen by some as being far more to the advantage of regulated companies than to those seeking to vindicate the public interest on which regulatory regimes were predicated.[8] In contrast, others who were equally concerned saw this aspect of *Vavilov* as increasing regulatory risk for a sector already threatened by regular exposure to judicial and appellate review.[9]

At this point, it is far too early to assess whether this sea change has had those effects — an increase in the number of statutory appeals with the preponderance being brought by regulated entities as opposed to public interest groups or individually affected participants in the regulatory process. What also must be evaluated is the extent to which *Vavilov* has narrowed the scope gap between correctness and reasonableness review. Putting it another way, for deference adherents and regulatory agencies seeking to preserve respect for their expertise and, more generally, their operational autonomy and imperatives, the real question may be not so much about the impact of the reduction in deference in the domain of statutory appeals as the more general thrust of *Vavilov* in the direction of close scrutiny of all questions of law whether reaching the courts by statutory appeal **or** judicial review.

This possibility is underscored by several of the potentially relevant contextual factors that the *Vavilov* majority identified as bearing upon the conduct of reasonableness review. There was a general admonition that reasonableness is a "robust"[10] form of review. When this is linked by references to questions to which there is only one correct answer,[11] a concept of lack of authority[12] that bears remarkable resemblance to the now otherwise discredited jurisdictional category, and the imperative of following the modern approach to statutory interpretation,[13] there exists a distinct possibility that, in many instances, there will be little or no difference both in discourse and outcome as between

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[6] Starting with the excellent and still persuasive blog by Nigel Bankes, "Statutory Appeal Rights in Relation to Administrative Decision-Maker Now Attract an Appellate Standard of Review: A Possible Legislative Response", (3 January 2020), online (blog): *Ablawg* <ablawg.ca/wp-content/uploads/2020/01/Blog_NB_Vavilov.pdf>.

[7] 2002 SCC 33.

[8] See, in particular, the presentation by Cristie Ford, "*Vavilov*'s First Birthday" (5 January 2021) at 01h:21m:20s, online (video): *Youtube* <youtu.be/TPEgXuoXqqw?t=4880> (The conference was mounted on December 18, 2020 by Professor Paul Daly of the University of Ottawa Faculty of Law).

[9] See e.g. Jonathan Drance, Glenn Cameron & Rachel Hutton, "The SCC *Vavilov* Decision: Will it Increase Regulatory Risk?" (2020) 8:4 Energy Regulation Q 60, online (pdf): *ERQ* <www.energyregulationquarterly.ca/wp-content/uploads/2020/12/ERQ_Volume-8_Issue-4-2020.pdf>.

[10] *Vavilov*, *supra*, note 3 at paras 12, 13, 67, 72, 138.

[11] *Ibid* at para 124.

[12] *Ibid* at paras 65–68, 109–11.

[13] *Ibid* at paras 116–22.

correctness and reasonableness review. It is, however, in my view, too soon to assess by reference to the case law whether these fears are justified. It awaits empirical evaluation based on a broader sample than exists presently.

In the meantime, however, several of the energy law and regulation judicial reviews and statutory appeals from 2020 show how lower courts are responding to or coping with the new dispensation.

Deference or At Least Respect within Correctness Review

I have argued elsewhere[14] that the change from reasonableness to correctness review in the context of statutory appeals had an immediate impact in *Bell Canada v Canada (Attorney General)*,[15] the appeal that the Supreme Court linked with *Vavilov* in its recalibration of the principles and methodology of judicial scrutiny on substantive grounds of administrative decision-making. My contention was that, under a reasonableness standard, the Canadian Radio-television Telecommunications Commission order would have withstood scrutiny. Under correctness, it was set aside as based on an error of law.

Subsequently,[16] in an energy law context, Paul Daly made the same argument with respect to the judgment of the Manitoba Court of Appeal in *Manitoba (Hydro-Electric Board) v Manitoba (Public Utilities Board)*.[17] There, the Court, applying a correctness standard in the context of an appeal to the Court of Appeal under *The Public Utilities Board Act*,[18] set aside a directive by the regulator to Manitoba Hydro

> to create a First Nations On-Reserve Residential customer class…that was to receive a zero per cent increase.

It was held that the Public Utilities Board lacked jurisdiction to make such an order. It was contrary to a provision in the *Hydro Act*[19] requiring that the customers of the utility not be classified solely on the basis of the region of the province in which they lived or the density of the population.

This judgment has already attracted a detailed case comment in the *Quarterly* by Patrick Duffy[20] and I will refrain from further detail and analysis. However, in his case comment, Daly posits an argument in support of the legal validity of the directive and asserts that

> …had the Board's decision been reviewed on a standard of reasonableness, the result might well have been different. It is at least arguable that s. 39(2.2) can reasonably bear the Board's interpretation.[21]

Duffy is not as forthcoming but there are also hints in his analysis that the result may have hinged on the change from reasonableness to correctness review. And, doubtless, this form of speculation will continue as the change has more and more purchase in the domain of statutory appeals from administrative decision-makers.[22]

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[14] David Mullan, "Judicial Scrutiny of Administrative Decision Making: Principled Simplification or Continuing Angst?" (2020) 50 Adv Q 423 at 453.

[15] *Supra* note 4.

[16] Paul Daly, "Rates and Reserves: *Manitoba (Hydro-Electric Board) v. Manitoba (Public Utilities Board)*, 2020 MBCA 60" (13 October 2020), online (blog): *Administrative Law Matters* <www.administrativelawmatters.com/blog/2020/10/13/rates-and-reserves-manitoba-hydro-electric-board-v-manitoba-public-utilities-board-2020-mbca-60/>.

[17] 2020 MBCA 60.

[18] CCSM c P280.

[19] CCSM c H190, ss 39(2.1)-(2.2).

[20] Patrick Duffy, "*Manitoba Hydro v. Manitoba Public Utilities Board*: Reduced Rates for Indigenous Peoples Overruled" (2020) 8:3 Energy Regulation Q 47, online (pdf): *ERQ* <www.energyregulationquarterly.ca/wp-content/uploads/2020/09/ERQ_Volume-8_Issue-3-2020.pdf>.

[21] Daly, *supra* note 16.

[22] See also for another regulatory law appeal not otherwise discussed in this survey: *East Hants (Municipality) v Nova Scotia (Utility and Review Board)*, 2020 NSCA 41. It is discussed by Fluker, *supra* note 5 at 4.

However, *Planet Energy (Ontario) Corp. v Ontario Energy Board*,[23] an early 2020 judgment of the Ontario Divisional Court, delivered by Swinton J, castes some doubts on the fears that I have expressed about the extent to which correctness review on statutory appeals will undermine the deference project. It involved a statutory appeal to the Court on a question of law and jurisdiction from the Ontario Energy Board's imposition of penalties on the appellant following a finding that the appellant had contravened provisions of the *Energy Consumer Protection Act, 2010*,[24] and the Board-developed *Electricity Retailer Code of Conduct*. The appellant's principal contention was that the Board lacked jurisdiction to impose an administrative penalty as the relevant limitation period in the *Ontario Energy Board Act, 1998*,[25] had expired. For reasons that I will discuss later in this survey, Swinton J held that the appellant should have raised the limitations issue with the Board either during the hearing, while the decision was still pending, or by way of an application for reconsideration as provided for in the *Ontario Energy Board Act*. In reviewing the case law and principles relevant to whether an appellant should be allowed to raise a new issue for the first time on an appeal to the Court, Swinton J opined that correctness review did not mean that deference to expertise had no role to play at least in the context of whether an argument could be raised for the first time on appeal to a court:

> While the Court will ultimately review the interpretation of the Act on a standard of correctness, respect for the specialized function of the Board still remains important. One of the important messages in *Vavilov* is the need for the courts to respect the institutional design chosen by the Legislature when it has established an administrative tribunal (at para. 36). In the present case, the Court would be greatly assisted with its interpretive task if it had the assistance of the Board's interpretation respecting the words of the Act, the general scheme of the Act and the policy objectives behind the provision.[26]

In support of this consideration, Swinton J emphasised that it was as relevant to matters coming before the Court by way of appeal on a correctness standard as it was in the context of an application for judicial review where the standard of scrutiny would be that of reasonableness.[27] More generally, this posture speaks to the importance of courts hearing an appeal from an administrative decision on a correctness basis being attentive to the reasons provided by the agency or tribunal. Correctness review is not an excuse for ignoring or not assessing seriously the reasons on which the first instance decision was taken.

Subsequently, in *Enbridge Gas Inc. v Ontario Energy Board*,[28] Swinton J, again delivering (along with Favreau J) the judgment of the Divisional Court, did allow an argument to be raised for the first time on an appeal from the Board. However, in that instance, among the justifications for making an exception to the general principle, Swinton J noted that the matter in issue had been discussed and ruled on by the Board in "three prior decisions."[29] In concluding on this issue, she took pains to emphasise that allowing the appeal to proceed was not meant in any way to signal a departure from *Planet Energy* and its emphasis on the benefit to appellate courts in having the tribunal's conclusion on a relevant issue.[30]

The Relevance of *Vavilov* to Internal or Domestic Appeals, Reviews and Reconsiderations

Deference also surfaced in a rather different sense in the judgment of the Divisional Court

[23] 2020 ONSC 598 *Planet Energy*.

[24] SO 2010, c 8.

[25] SO 1998, c 15, s 112.5(2).

[26] *Supra* note 23 at para 31.

[27] *Ibid* at paras 26–30.

[28] 2020 ONSC 3616.

[29] *Ibid* at paras 31–33 (I return to this issue in the concluding section of this article).

[30] *Ibid* at para 33.

delivered by Ducharme J in *Hydro One Networks Inc. v Ontario Energy Board*.[31] It involved the Ontario Energy Board's ultimate decision on a typical rate-related regulatory issue: a denial of Hydro One's contention that Future Tax Savings of $2.595 billion should be allocated entirely to shareholders, and acceptance of the argument that 38 per cent of those tax savings should be allocated to Hydro One's revenue requirements for 2017 and 2018 resulting in customers paying lower rates.

At first instance, the Ontario Energy Board Hearing Panel rejected Hydro One's position. However, a Review Panel set aside that decision based on four interrelated errors. It therefore directed that the matter be reconsidered by a Rehearing Panel having regard to the Review Panel's findings and all the evidence and arguments heard by both Panels.

The Rehearing Panel consisted of two members of the Hearing Panel and one member of the Review Panel. In its decision, the Rehearing Panel did not focus on whether the Hearing Panel's final disposition could still be sustained **given** the flaws that the Review Panel had detected in its reasons. Rather, the Rehearing Panel asked whether the conclusions reached by the Hearing Panel could themselves still be justified despite the four interrelated flaws. Applying a test of reasonableness to those original conclusions, the Rehearing Panel determined that they could still be sustained and thereby upheld the original ruling. In so doing, the Rehearing Panel failed to identify any different approach or methodology that would justify such a conclusion. Hydro One appealed to the Divisional Court on a question of law and jurisdiction.

In allowing the appeal, Ducharme J, for a unanimous panel of the Divisional Court, held that, in subjecting the flawed reasons of the Hearing Panel to a reasonableness evaluation in the manner of deferential judicial review or statutory appeal,[32] the Rehearing Panel had fettered its discretion and applied an incorrect legal test.[33] It had not engaged in a full merits review of the ultimate outcome conditioned on the errors found by the Review Panel. This amounted to an error on a question of law or jurisdiction when viewed from a post-*Vavilov* correctness perspective. The further characterization of the decision as involving an improper fettering of discretion or authority was presumably based on the proposition that, when the Rehearing Panel viewed the original decision from the perspective of reasonableness, it was abstaining from more expansive correctness review.

In so holding, the Divisional Court at the very least has rejected the deployment by a Rehearing Panel of a reasonableness standard of review when a Review Panel has in effect called for a merits redetermination. However, it is also possible that Ducharme J is speaking to a more general concern about the deployment of a deferential reasonableness standard in the conduct of either a Review or a Rehearing.

In fact, such a characterization of the position taken by the Rehearing Panel finds justification in recent case law. The standard of review to be applied by internal tribunal or agency review or appellate bodies is not predicated on the methodology developed by *Dunsmuir* (and now presumably, *Vavilov*) for standard of review selection for judicial reviews and statutory appeals to the courts from administrative decisions. Rather, the appropriate standard of review should be based on an interpretation of the relevant statutory provisions[34] establishing access to an internal review or appeal, an interpretation exercise that can produce a variety of appellate or review

[31] 2020 ONSC 4331 [*Hydro One Networks*].

[32] Responsibility for this may in fact rest at least in part with the form of the Rehearing Procedural Order describing the role of the Rehearing Panel in terms of whether the Original Decision was "reasonable regarding the allocation of future tax savings between shareholders and ratepayers." Recited in Ducharme J's judgment, *ibid* at para 41.

[33] *Supra* note 31 at paras 48–51.

[34] Of course, it might be objected that the choice between correctness and reasonableness for judicial review and statutory appeal purposes is also an exercise in statutory interpretation. However, that "interpretative" exercise takes place within a constitutional guarantee of judicial review and a range of other constitutional and rule of law imperatives. It is much more generalized than a statutory interpretation exercise located within the confines of a particular statutory regime and that is not adorned with such a constitutional overlay.

standards, including but by no means confined to reasonableness review.[35]

Under such an approach, in the case of the Ontario Energy Board, the reference point becomes Part VII – Review of the Board's Rules of Practice and Procedure and, in particular, Rule 42 – Motion to Review. Rule 42(1)(a) obliges those seeking a review to

> …set out the grounds for the motion that raise a question as to the **correctness** of the order or decision…

This would suggest that, in this context, correctness, not unreasonableness will be the applicable standard.

Having regard to the fact that the appeal had been argued prior to the judgment in *Vavilov*, Ducharme J also went on to opine as to why the Rehearing Panel's decision could not, in any event, have withstood reasonableness scrutiny. The Rehearing Panel had not explained how the Hearing Panel's original decision could still be maintained despite the flaws identified by the Review Panel and that the Panel had been directed to accept as given. The reasons were not "transparent, intelligible and justified," and they lacked internal coherence and a rational chain of analysis based on the evidence.[36]

The case is also interesting from a remedial perspective in that section 33(4) of the *Ontario Energy Board Act*[37] provides that, on an appeal,

> [t]he Divisional Court shall certify its opinion to the Board and the Board shall make an order in accordance with the opinion, but the order shall not be retrospective in its effect.

Ducharme J held[38] that this provision prevailed over section 134(1) of the *Courts of Justice Act*[39] which states:

> Unless otherwise provided, a court to which an appeal is taken may, (a) make any order or decision that ought to or could have been made by the court or tribunal appealed from.

As a result, the Divisional Court was confined to responding to the outcome of the appeal by way of a certificate; it could not step directly into the shoes of the Board and make an order or render a decision in favour of Hydro One and its shareholders on the merits of the allocation issues. In contrast, however, Ducharme J rejected the Board's argument that the matter should be remitted to the Board for further consideration. Given that the Divisional Court was of the view that any allocation of the proceeds of the Future Tax Savings could not as a matter of law be allocated for the ultimate benefit of ratepayers as opposed to shareholders, it was appropriate for the Court in the certification to the Board of its opinion to frame the certificate in those terms. In general, such an in effect stepping into the shoes of the Board may be an exceptional occurrence. Nonetheless, when, on an appeal, the Court takes the position that the Board has erred with the outcome as a matter of law then being inevitable, the certification authority allows the Court to direct that the Board "reconsider" and make an order correcting the Hearing Panel's decision and directing the allocation of the tax savings.

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[35] See the lengthy analysis in *Huruglica v Canada (Citizenship and Immigration)*, 2016 FCA 93 at paras 36–104, in the context of appeals from the Immigration and Refugee Board Refugee Protection Division to the Refugee Appeal Division. And, for a post-*Vavilov* affirmation of that position, see *Mekhashishvili v Canada (Minister of Citizenship and Immigration)*, 2021 FC 65. See also *City Centre Equities Inc. v Regina (City)*, 2018 SKCA 43 at paras 37–101, with respect to property assessment appeals from the Saskatchewan Municipal Board of Revision to the Assessment Appeals Committee. Paul Daly has also written about this issue: see e.g. Paul Daly, "Unresolved Issues after Vavilov I: Internal Appeals" (4 May 2020), online (blog): *Administrative Law Matters* <www.administrativelawmatters.com/blog/2020/05/04/unresolved-issues-after-vavilov-i-internal-appeals/>.

[36] *Hydro One Networks*, *supra* note 31 at paras 52–54.

[37] *Supra* note 25.

[38] *Supra* note 31 at paras 55–60.

[39] RSO 1990, c C.43 (as amended).

Vavilov, Deference and Procedural Fairness[40]

In neither *Vavilov* nor *Bell Canada* was procedural fairness an issue on the facts. As a result, the references to procedural fairness were few. Early on, the *Vavilov* majority stated that

> …reasonableness is an approach meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and **fairness** of the administrative process [emphasis added].[41]

That hinted that reasonableness might be deployed when courts were reviewing procedural rules and rulings for fairness. However, only a few paragraphs later, at paragraph 23, the majority spoke of the presumption of reasonableness review as attaching to

> …judicial review of administrative decisions **other than a review related to a breach of natural justice and/or the duty of procedural fairness** [emphasis added].[42]

This could be read in one of two ways: the presumption did not apply to procedural rules and rulings and a decision-maker's entitlement to a reasonableness standard had to be otherwise justified, or, more generally, there was no room for reasonableness as a standard in such cases with correctness being the universal standard or, alternatively, standard of review being an alien concept in the realm of procedural fairness.

Finally, in a section of the judgment entitled "Procedural Fairness and Substantive Review,"[43] the majority explored the links between the duty to give reasons (often seen as procedural in nature) and reasonableness review. In the course of this analysis, the majority stated that

> …the specific procedural requirements that the duty imposes are determined with reference to all the circumstances.[44]

The majority then went on to endorse the five part non-exhaustive list of factors listed in *Baker v Canada (Minister of Citizenship and Immigration)*[45] that should "inform the content of the duty of procedural fairness in a particular case."[46] One of those five factors was described as "the choices of procedure made by the administrative decision maker itself."[47] Given the difficulty in bringing each of these propositions together in a coherent whole, it must be said that the majority was not sufficiently attentive as to how its new regime would affect challenges to rules and rulings on procedural grounds.

For the most part, however, Canadian courts, both before and after *Vavilov*, have treated the presumption of reasonableness review as not applying to issues of procedural fairness. *Nation Rise Wind Farm Limited Partnership v Ontario (Minister of the Environment, Conservation and Parks)*[48] provides a post-*Vavilov* example in an energy regulation setting. The Divisional Court interpreted paragraph 23 of *Vavilov* as establishing that the "presumption of reasonableness does not apply to questions of procedural fairness."[49] The judgment then

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[40] For my earlier discussion of this issue, see "Judicial Scrutiny of Administrative Decision Making: Principled Simplification or Continuing Angst?", *supra* note 14 at 434–35. Prior to *Vavilov*, I also dealt with this issue in "2014 Developments in Administrative Law Relevant to Energy Law and Regulation" (2015) 3:1 Energy Regulation Q 17 at 21–23, both generally and with particular reference to discretionary powers of the then NEB over participatory rights. The issue of agency determinations on participatory rights as an aspect of procedural fairness was also the focus of a discussion of *Delta Air Lines v Lukács*, 2018 SCC 2, in "2017 Developments in Administrative Law Relevant to Energy Law and Regulation" (2018) 6:1 Energy Regulation Q 19 at 19–24.

[41] *Supra* note 3 at para 13.

[42] *Ibid* at para 23.

[43] *Ibid* at paras 76–81.

[44] *Ibid* at para 77.

[45] [1999] 2 SCR 817 at paras 22–23, 174 DLR (4th) 193.

[46] *Vavilov*, *supra* note 3 at para 77.

[47] *Ibid*.

[48] 2020 ONSC 2984.

[49] *Ibid* at para 123.

referred to other post-*Vavilov* perpetuation of the predominant Canadian position:

> For the most part, at the Divisional Court and elsewhere, these issues are either reviewed on the correctness standard, or it is said that no standard of review applies.[50]

Subsequently, the Divisional Court gave very short shrift to the Minister's argument that his procedural choices were entitled to deference by reference to the fifth *Baker* procedural fairness intensity factor:

> However, the Minister, like other administrative decision-makers is still required to comply with common law duties of fairness, unless those rules have been ousted by express statutory language or by necessary implication (which they have not)…[51]

In *Rogers Communications Canada Inc. v Ontario Energy Board*,[52] however, the Divisional Court attempted to come to terms with the continuing uncertainty about deference to procedural rules and rulings and the role of the fifth *Baker* criterion in order to produce a workable set of principles.

At stake was a challenge by Rogers on procedural grounds to the outcome of a comprehensive policy review of, among other matters, the regime governing the conditions under which electricity utilities regulated by the Board were required to allow cable TV companies, not otherwise regulated by the Board, to attach their wires to poles owned by the utilities. This policy set the rate charged by the utilities unless otherwise varied by agreement approved by the Board. Over several years, it had become clear from the rate variations agreed to between the parties and approved by the Board that the policy's attachment rate was significantly out of line.

For the purposes of this review, the Board established a Pole Attachment Working Group ("the Group") and hired an external expert consultant to facilitate the review exercise and, in particular, the effective functioning of the Group. As described by Lederer J,[53] delivering the judgment of the Divisional Court, the Group did not include all interested parties. Rather, it was constituted by the Board based on expressions of interest, and comprised representatives of "the wireline industry, electricity distributors and consumer groups." Rogers was not part of the Group.

Later in the judgment, Lederer J outlined the process that was followed:

- Four PAWG meetings,
- Further initial consultation through a request for comments from members of the PAWG,
- A "subsequent" review by the consultant,
- Followed by a report from the consultant,
- Followed by a draft report by the Ontario Energy Board,
- Further consultation through comments by members of PAWG, and
- A Final Report by the Board.[54]

It was also relevant that the consultant's report was made available for comment not only to the Group but also to other stakeholders and the public on the Board's website.[55] The Board also invited interested persons to provide comments on its draft report and received thirty-three submissions from

> …interested stakeholders, including [owners of poles], ratepayer and consumer groups, and representatives of the [cable companies].[56]

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[50] *Ibid* at para 124.

[51] *Ibid* at para 134.

[52] 2020 ONSC 6549 [*Rogers Communications*].

[53] *Ibid* at para 14.

[54] *Ibid* at para 77.

[55] *Ibid* at para 16.

[56] *Ibid* at para 17.

The latter group included Rogers which had been complaining about the Board's process throughout.[57] In its Final Report, the Board had responded to the submissions and reduced the pole attachment charge that it had proposed in its Draft Report as well as making some other transitional adjustments and clarifying that the new standard charge would not apply to those who had entered other pricing arrangements with the approval of the Board.

Following the release of the Report, Rogers along with twelve other cable companies or carriers appealed to the Divisional Court under section 33(1) of the *Ontario Energy Board Act*[58] seeking a quashing of the Final Report and a remission of the matter to the Board for a full hearing.

The appeal raised several issues. Among them, the Board argued that, as it had not made an order but simply issued a report, the proper procedure was an application for judicial review under the *Judicial Review Procedure Act*.[59] For the cable companies or carriers, it was asserted that, as a matter of statutory interpretation, the review process engaged section 21(2) of the *Ontario Energy Board Act*[60] and its requirement of a hearing "[s]ubject to any provision to the contrary." For its part, the Board argued that the matter came within section 70(1.1) of the Act which conferred a discretion on the Board "with or without a hearing" to

> …grant an approval, consent or make a determination that may be required for any of the matters provided for in a licensee's licence.

In the alternative, the appellants argued that, even if the process did not come within section 21(2), they had greater procedural entitlements by reference to the doctrine of legitimate expectation and founded in prior practices and representations by the Board.

For present purposes, I will not dwell further on these grounds. Suffice it to say the Divisional Court held that the final report was in substance an order which meant that the appropriate way of proceeding was by an appeal under section 33(1).[61] However, section 21(2)'s mandating of a hearing was negated by reason of the matter coming within section 70(1.1) of the *Act*.[62] On the facts, there had been no triggering of a legitimate expectation that certain procedures would be followed.[63] Therefore, to succeed, the appellants had to ground their procedural claims in the common law procedural fairness threshold and intensity criteria.

In terms of the standard of review to be applied to the Board's procedural regime for its comprehensive review of the pole attachment policy, the parties had taken opposing positions. Rogers was asserting correctness review without any deference while the Board argued that its choices were entitled to "significant deference."[64]

In response, Lederer J[65] initially quoted from two judgments that had grappled with this issue, one of a differently constituted Divisional Court, and the other from the Federal Court of Appeal.

In the post-*Vavilov* decision in *Quadrexx Hedge Capital Management v Ontario Securities*

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[57] *Ibid* at para 15.

[58] *Supra* note 25.

[59] Presumably, part of the motivation for the Board taking this position was that judicial review of questions of law under the *Judicial Review Procedure Act*, RSO 1990, c J.1 would have given the Board the benefit of the presumption of reasonableness whereas on an appeal correctness would in the aftermath of *Vavilov* be the appropriate standard.

[60] *Supra* note 25.

[61] *Rogers Communications*, *supra* note 52 at paras 44–47. The Board had not issued a formal order establishing the new and higher default charge. However, Lederer J held that, irrespective of this and the Board's position, the increase in the charge brought about by the Final Report was in reality and effect an Order.

[62] Interestingly, despite the conclusion that the matter came within the scope of section 33(1) and the Divisional Court's appellate jurisdiction, Lederer J held, *ibid* at paras 32–33, *Vavilov* notwithstanding, that reasonableness was the test to be applied in the interpretation of whether this was a matter requiring a hearing by reference to section 21(2) or was a matter of discretion for the Board by reference to section 70(1.1).

[63] *Ibid* at paras 61–68. (Although I have not discussed the legitimate expectation argument in any detail, the Court's analysis of and application of the principles of legitimate expectation to the facts is instructive and an invaluable resource for the understanding of the Canadian version of this source of procedural entitlements.)

[64] *Ibid* at para 27.

[65] *Ibid* at paras 28–29.

Commission, the Divisional Court acknowledged the subjection to correctness review of procedural fairness issues, but then acknowledged that there is not

> …always a single "correct" view of the procedures to be followed.[66]

Earlier, in the pre-*Vavilov* judgment in *Maritime Broadcasting System Ltd. v Canadian Media Guild*, Stratas JA of the Federal Court of Appeal had made a strong argument for the deployment of the reasonableness standard of review to scrutiny of the procedural choices of administrative tribunals and agencies.[67]

Lederer J then[68] adopted a compromise that in effect distilled the position taken by the Divisional Court:

> It is not that a reasonableness standard applies. It is that correctness does not, in respect of procedure, perceive a single answer. The tribunal involved is best positioned to determine the appropriate process. The level of deference is determined through the application of the factors found in *Baker v. Canada*, in particular:
>
> > While this, of course, is not determinative, important weight must be given to the choice of procedures made by the agency itself and its institutional constraints.[69]

When Lederer J returns to apply this standard to procedures adopted by the Board, he commences[70] by citing an extract from the judgment of the Supreme Court of Canada in *Martineau v Matsqui Disciplinary Bd.* which identified a spectrum of decision-making for the purposes of evaluating the threshold for and the intensity of procedural fairness obligations.[71] At one end, where no procedural fairness obligations attached were "discretionary and policy-oriented" decisions that did not attract any common law obligations of procedural fairness while, at the other extreme and requiring a full panoply of procedural fairness, were judicial or adjudicative decisions. In between, were "myriad" other forms of decisions attracting a "flexible gradation of procedural fairness."

Interestingly, especially since Lederer J had located this policy review within a provision that allowed the Board to act with or without a hearing, he did not dwell on whether this process and its outcome were at the "discretionary and policy-oriented" end of the spectrum and, as such, not attracting **any** procedural fairness obligation. Rather, it was assumed that the procedural fairness threshold had been crossed and that what was at stake was the intensity of that obligation by reference to the five *Baker* factors.

Of those factors, however, Lederer J made it clear that, in this instance, the procedural choices of the Board had "particular significance."[72] He then cited two further Federal Court of Appeal judgments,[73] the second[74] of which, delivered by Evans JA,[75] adopted the position that "correctness" was the standard but that the court in making that assessment "must be respectful of the agency's choices."

As previously articulated by Lederer J, this notion of deference or respect for procedural choices as a component of correctness review is a somewhat awkward compromise. This

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[66] 2020 ONSC 4392 at para 81.

[67] 2014 FCA 59 at para 50. I noted this judgment in my 2014 survey: *supra* note 40 at 21–22.

[68] *Rogers Communications*, *supra* note 52 at para 30.

[69] *Supra* note 45 at para 27.

[70] *Supra* note 52 at para 79.

[71] [1980] 1 SCR 602 at pp 628–29, 106 DLR (3d) 385.

[72] *Supra* note 52 at para 94.

[73] *Ibid* at para 95. This was another judgment of Stratas JA, also the subject of my 2014 survey: *Forest Ethics Advocacy Association v Canada (National Energy Board)*, in which he referred to the "experience and expertise" of the National Energy Board in determining participatory rights: see 2014 FCA 245 at para 72.

[74] *Ibid* at para 96.

[75] *Re:Sound v Fitness Industry Council of Canada*, 2014 FCA 48 at para 42.

is further underscored by the incongruence of an assertion that there are no necessarily "correct" or "single" answers in the evaluation of how much procedural fairness is required notwithstanding that the formal standard of review is that of correctness. In reality, what seems to be going on is that the reviewing court is assessing whether, having regard to the first four *Baker* factors, the discretionary procedural choices made the agency, either generally or in the particular case, come within the range of procedurally fair possibilities. Albeit that this formulation does not specifically use the term "reasonable" or "reasonableness," it bears all the hallmarks of a rose by any other name.

This is further underscored by Lederer J's assessment of the procedures adopted in this instance:

> This is a case where deference is owed to the Ontario Energy Board. The process is a balance of the demands of the review and the interests of the parties. The review was required. The default charge had been unchanged for 10 years. Input from the parties involved was required and obtained through the PAWG and subsequent comments. Expert assistance was needed, and a consultant retained and utilized. Ultimately, it was the responsibility of the Ontario Energy Board to consider and develop the approach to pole attachment. A draft report was prepared. Comments sought and, only then, a final report released.[76]

He then concludes:

> Deference applies to the decision of the Ontario Energy Board as to the process it adopted to conduct the policy review. The process, as adopted, accounts for and balances the factors enunciated in *Baker v. Canada* in a reasonable and appropriate way. The process being appealed, in its particular circumstances, was procedurally fair.[77]

Doubtless, the last has not been heard of the approach to be taken for evaluating the procedural choices of tribunals for consistency with the principles of procedural fairness. What is, however, becoming clearer is that, even if the formal standard of review is that of correctness, tribunals and agencies which make reasonable procedural choices in light of the *Baker* factors are entitled to considerable deference when challenged on judicial review or statutory appeal on procedural grounds. That should be of considerable comfort to those tribunals and agencies confronted with the task of designing appropriate ways of responding to claims for participatory rights especially when the issues at stake are of a complex and policy-laden variety.

Vavilov and the Duty to Consult and Accommodate Indigenous Peoples

In a recent excellent two-part blog,[78] Howard Kislowicz and Robert Hamilton address the question of how, if at all, *Vavilov* has affected the standard of review to be applied to decision-making engaging Indigenous rights, claims, and interests. In the first part, they consider statutory appeals, and, in the second, judicial review.

In the context of statutory appeals, the new norm will apply. On questions of law "including questions of statutory interpretation and those concerning the scope of the decision maker's authority," correctness will apply just as much in cases raising duty to consult and accommodate issues as it will in other appellate settings. The same holds for the "palpable and overriding error" test for questions of fact or mixed law and fact. However, as far as that second branch of the *Housen* test is concerned, the authors suggest that, whatever ambitions the *Vavilov* majority might have had for more intrusive review when a matter comes before the courts on a statutory appeal, the irony may

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[76] *Rogers Communications*, *supra* note 52 at para 97.

[77] *Ibid* at para 100.

[78] Howard Kislowicz & Robert Hamilton "The Standard of Review and the Duty to Consult and Accommodate Indigenous Peoples: What is the Impact of *Vavilov*? Part 1" (20 November 2020), online (pdf): *ABlawg* <ablawg.ca/wp-content/uploads/2020/11/Blog_HK_RH_DTCA_Part_1.pdf>; Howard Kislowicz & Robert Hamilton "The Standard of Review and the Duty to Consult and Accommodate Indigenous Peoples: What is the Impact of *Vavilov*? Part 2" (24 November 2020), online (pdf): *ABlawg* <ablawg.ca/wp-content/uploads/2020/11/Blog_HK_RH_DTCA_Part_2.pdf>.

be that for questions of fact and mixed law and fact, the reverse may be the case. This is because, in the view of the authors, it seems likely that, in appellate review of administrative decisions, reviewing courts will treat the "palpable and overriding error" as a more deferential standard than unreasonableness as applied to such questions on traditional judicial review.[79] As the authors suggest in their concluding paragraph to Part 1, it is as though the *Vavilov* majority has reintroduced two varieties of deference reminiscent of the pre-*Dunsmuir* era of unreasonableness and patent unreasonableness. Is that what the majority really wanted or intended?

And it must be recognized that this issue does not arise for many energy regulators by reason of the legislative confining of appeals to the courts from their decisions to questions of law and jurisdiction. In that context, the critical questions will revolve around the reach of questions of law and jurisdiction and when a question of law is readily extricable from a determination of mixed fact and law.[80]

In *Vavilov*, the majority articulated the scope of the constitutional questions exception to reasonableness review on applications for judicial review as follows:

> Questions regarding the division of powers between Parliament and the provinces, the relationship between the legislature and the other branches of state, the **scope of Aboriginal and treaty rights under s. 35 of the *Constitution Act, 1982*, and other constitutional matters** [that] require a final and determinate answer from the courts. Therefore, the standard of correctness must continue to be applied in reviewing such questions [emphasis added].[81]

At a general level, one of the questions raised by this statement is the extent to which this assertion of correctness review applies beyond pure questions of law to questions of fact, mixed law and fact, and exercises of discretion. The weight of precedents, including the duty to consult and accommodate case law,[82] and the *Vavilov* majority's unwillingness[83] to interfere with the *Doré v Barreau du Québec*[84] approach to judicial review when *Charter* rights, freedoms and values are in play would seem to suggest, while not explicit, that the majority was not extending correctness review to all aspects of such decision-making. Putting it another way, it was not repudiating reasonableness review with respect to questions of mixed law and fact, fact, and discretion when constitutional questions are involved.

Nonetheless, as Kislowicz and Hamilton argue,[85] the Supreme Court has not been a

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[79] However, it should be noted that there is as yet no consensus on this matter. Thus, in *Quadrexx Hedge Capital Management Ltd.*, *supra* note 66 at para 78, the Ontario Divisional Court appears to equate in some contexts unreasonableness and palpable and overriding error:

> The word "palpable" means "clear to the mind or plain to see", and "overriding" means "determinative" is the sense that the error "affected the result". The Supreme Court has held other formulations capture the same meaning as "palpable error": "clearly wrong", "**unreasonable**" or "unsupported by the evidence [emphasis added and footnotes omitted].

The authors acknowledge this and also recognize a duty to consult judgment of the Nova Scotia Supreme Court to the same effect: *Sipekne'katik v Nova Scotia (Minister of the Environment)*, 2020 NSSC 111 at para 60. However, they then cite a number of more recent Supreme Court of Canada and Court of Appeal precedents which contain characterizations of the "palpable and overriding" error standard in far more deferential terms. In so doing, they cite Stratas JA of the Federal Court of Appeal in *Canada v South Yukon Forest Corporation*, 2012 FCA 165 at para 46:

> Palpable and overriding error is a highly deferential standard of review… "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.

[80] See e.g. *Sipekne'katik*, *ibid* at paras 61–67.

[81] *Supra* note 3 at para 55.

[82] Starting with the foundational judgment of the Supreme Court of Canada in *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida Nation*].

[83] *Supra* note 3 at para 57.

[84] 2012 SCC 12.

[85] With reference not only to *supra* note 82, *but* also more particularly *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53.

model of clarity as to the aspects of the duty to consult and accommodate that attract correctness review and those elements where deferential unreasonableness is the standard. They also raise questions as to whether the duty to consult and accommodate are properly characterized as coming within the "scope of Aboriginal and treaty rights under s. 35 of the *Constitution Act, 1982*." While this does not give full credit to the sophisticated nature of the authors' arguments, is not the duty to consult and accommodate associated not just with the "rights" of Indigenous peoples but their ongoing claims? I will leave this fascinating question for another day though, in so doing, note that the *Vavilov* majority's characterization of the scope of the constitutional questions exception to the presumption of reasonableness review also includes "other constitutional matters." However, even that cannot be read as excluding the possibility of a *sui generis* approach to the task of drawing a constitutionally appropriate line between correctness and reasonableness review in the domain of the duty to consult and accommodate. And, at the end of the day, such a solution appears to be what the authors are after, a solution that for them would resolve in favour of correctness review for some of the areas of uncertainty at the margins.

Prior to these blogs, the Federal Court of Appeal had delivered its judgment in which the Governor in Council's second approval of the TransMountain Pipeline Expansion was being challenged by six Indigenous groups on the basis that the Governor in Council's process had failed to meet the obligations arising out of the duty to consult and, where appropriate, accommodate Indigenous rights, claims and interests: *Coldwater Indian Band v Canada (Attorney General)*.[86]

In responding to the claim on which the application for judicial review was based, the Federal Court of Appeal asserted (and all the parties apparently agreed) that *Vavilov* had not altered materially the principles governing selection of the appropriate standard of review.[87] As the Governor in Council's approval had come before the Federal Court of Appeal on an application for judicial review, it was to be presumed that the standard of review would be that of reasonableness.[88] Moreover, given that the "scope" of the duty to consult was not being contested, the section 35 of the *Constitution Act, 1982* correctness exception identified in *Vavilov* was not triggered.[89] (It is worthy of note, in terms of the blog, that the Court elided "scope" in the context of the reach of section 35, and "scope" in terms of the determination of whether the duty to consult and its reach applied without considering whether section 35 was the sole or principal location for the assertion of the existence of the duty to consult and accommodate.)

In this context, the Court also stated that it was not its role to express a view as to the adequacy of consultation. To do this would be to engage in disguised correctness review.[90] At first blush, this might seem a rather peculiar position given that the very focus of the application for judicial review was on whether the Governor in Council had responded adequately to the earlier Federal Court of Appeal judgment[91] finding that there were defects in the process of consultation that preceded the original approval of the pipeline expansion. However, the nuance becomes apparent in the very next paragraph in which there is another elision this time involving the merits of the of the approval decision and the duty to consult and, perhaps, to accommodate:

> Rather our focus must be on the reasonableness of the Governor in Council's decision including the outcome reached and the justification for it. The issue is not whether the Governor in Council could have or should have come to a different conclusion or whether the consultation process could have been longer or better. The question to be answered is whether the decision approving the Project and the

[86] 2020 FCA 34 [*Coldwater Indian Band*].

[87] *Ibid* at para 25.

[88] *Ibid* at para 26.

[89] *Ibid* at para 27.

[90] *Ibid* at para 28.

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

> justification offered are acceptable and defensible in light of the governing legislation, the evidence before the Court and the circumstances that bear upon a reasonableness review.[92]

What remains unclear, however, is whether this collapsing of the duty to consult into the evaluation of the merits of the approval is meant to signal that there is no room for separate reasonableness challenges to, on the one hand, the reasonableness of the consultation process, and, on the other, the reasonableness of the substantive determination.

Thereafter, the Court went on to apply the *Vavilov* contextual approach to the conduct of reasonableness review.[93] In this regard, the Court acknowledged *Vavilov*'s insistence that the backdrop to this evaluation must start with and focus on the reasons for the decision.[94] It also emphasised the relevance of the earlier Court's identification of what was needed in "a brief and efficient consultation process"[95] to address the shortcomings in the first process. There then followed a listing and application of those among the *Vavilov* contextual considerations that were relevant to an evaluation of the second approval process.

Here, the Court started with the empowering legislation and its implicit vesting of primacy in the Governor in Council, not the courts, for a determination on the merits including as an integral part the assessment of the adequacy of consultation.[96] Next, the Court moved to the law concerning the procedural content of the duty to consult,[97] law which in some senses corresponded to administrative law standards of procedural fairness but which emphasized that, under a standard of reasonableness, perfection was not expected.[98] More generally, in what finds parallels in *Rogers Communications Canada Inc. v Ontario Energy Board*,[99] discussed earlier, those involved in designing and implementing the process followed were to be given "leeway"[100] or, what has been described in other articulations of reasonableness review, "a margin of appreciation."[101] On the other hand, the process of consultation must demonstrate that "the rights claimed by Indigenous peoples" were "considered and addressed…in a meaningful way."[102] Other words and phrases from the extensive case law then followed as the Court provided further elaboration of what "meaningful" and "reasonableness" involved: "good faith,"[103] "dialogue,"[104] "grappl[ing] with the real concerns."[105] As for situations where "deep consultation"[106] was necessary, the Court spelled out specific though non-binding procedural steps:

- the opportunity to make submissions for consideration;
- formal participation in the decision-making process;
- provision of written reasons to show that Indigenous concerns were considered and to reveal the impact they had on the decision; and

[92] *Supra* note 86 at para 29.

[93] *Ibid* at paras 32–63.

[94] *Ibid* at para 31.

[95] *Ibid* at para 32.

[96] *Ibid* at paras 33–36.

[97] *Ibid* at paras 37–46.

[98] *Ibid* at para 38

[99] *Supra* note 52.

[100] *Supra* note 86 at para 38.

[101] In the context of the review of energy regulators and the Northern Gateway saga, see the judgment of Dawson and Stratas JJA in *Gitxaala Nation v Canada*, 2016 FCA 187 at para 6.

[102] *Supra* note 86 at para. 40.

[103] *Ibid* at para 41.

[104] *Ibid*.

[105] *Ibid*.

[106] *Ibid*.

- dispute resolution procedures like mediation or administrative regimes with impartial decision-makers.[107]

Providing a context for or framing all of this[108] were the objectives spelled out in the foundational Supreme Court of Canada judgment on the duty to consult and, where appropriate, accommodate, *Haida Nation v British Columbia (Minister of Forests)*:

> [What] is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake[?][109]

There then followed a lengthy analysis of the concepts of the "honour of the Crown"[110] and "reconciliation."[111] Of special note in all of this is the Court's continued recognition of the proposition that a commitment to reconciliation

> …does not dictate any particular substantive outcome.[112]

That would mean that Indigenous peoples

> …would effectively have a veto over projects such as this one.[113]

This led the Court to recognize that it was necessary to avoid placing too stringent a standard in the evaluation of consultations. That would court the dangers of creating a *de facto* veto right.[114] Moreover, the same held in the context of the process of accommodation.[115] In passing, however, and, I will return to this later, the issue of powers of veto has again resurfaced with the introduction of Bill C-15 and its purported incorporation into Canadian law of the rights and obligations found in the *United Nations Declaration on the Rights of Indigenous Peoples*.

The Court then noted that the Governor in Council's approval did not mark the end of the obligation to consult; there would be continuing obligations to consult throughout the life of the project.[116] Similarly,[117] balanced against *Vavilov*'s specification of the importance of the decision under review to those affected as a contextual factor,[118] was the possibility that through the consultation and accommodation process might come "positive long-term relationships"[119] between the Crown and Indigenous groups, and, presumably also, proponents.

Thereafter, the Court of Appeal proceeded to analyse in detail the process that had been followed in response to the flaws identified in the earlier Court of Appeal judgment. I will not dwell in this context on that examination. However, the terms of the Court's ultimate holding are relevant to an understanding of how this Court conceived of the approach to deferential reasonableness review:

> As the Governor in Council has explained in the Recitals and in the *Explanatory Note*, and as is apparent from the record before us, it could reasonably adopt the view that the limited flaws identified by this Court [in the earlier judicial review] had been adequately addressed and that reasonable and meaningful consultation had taken place.

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[107] *Ibid*.

[108] *Ibid*.

[109] *Supra* note 82 at para 45

[110] *Coldwater Indian Band*, *supra* note 86 at paras 43–46.

[111] *Ibid* at paras 47–56.

[112] *Ibid* at para 53.

[113] *Ibid*.

[114] *Ibid* at para 54.

[115] *Ibid* at para 58.

[116] *Ibid* at para 61.

[117] *Ibid* at paras 62–63.

[118] *Supra* note 3 at paras 133–35.

[119] *Coldwater Indian Band*, *supra* note 86 at para 62.

In further recognition of *Vavilov*'s admonition that reasonableness review should start with the reasons, it is also noteworthy that the Court's evaluation of whether the Governor in Council's decision was reasonable starts with the proposition that

> [t]he Governor in Council's explanations do not suffer from the errors in reasoning or logical deficiencies of the sort identified by the Supreme Court in *Vavilov*.[120]

Suffice it to say in conclusion that the Court's template for the conduct of reasonableness review of issues of consultation and accommodation provides an eminently practical basis for future courts dealing with such issues in accordance with the spirt of *Vavilov*. Certainly, there may remain issues as to the precise location of where the line exists between correctness and reasonableness review in this setting. However, at no point in the elaboration of reasonableness review by reference to several of the *Vavilov* contextual factors, does the Court succumb to the temptation of disguised correctness review. The apple dangled but was recognized and left alone.

Legislative Override

In last year's review, I cited Nigel Bankes' Blog[121] in which he was critical of *Vavilov*'s subjection of statutory appeals from administrative decision-making to correctness review on questions of law, and, more generally, to the standards of appellate court scrutiny of judgments in civil law matters as laid down in *Housen v Nikolaisen*. As a matter of principle, it was wrong-headed and would in any event would raise its own problems of application. Professor Bankes, however, went on to recognize that the *Vavilov* majority had left room for legislative specification of other standards of review for statutory appeals.[122]

In the immediate aftermath of *Vavilov*, there has not been a huge rush on the part of legislatures to take up this offer. However, there is one Alberta example with tangential impact on energy law and regulation. In Part 4 – Appeal and Judicial Review of the *Land and Property Rights Tribunal Act*,[123] an Act amalgamating into a single tribunal four previously separate land regulatory tribunals (including the Surface Rights Board[124]), section 19 provides:

> On an application for judicial review of or leave to appeal a decision or order of the Tribunal or on an appeal of a decision or order of the Tribunal, the standard of review to be applied is reasonableness.

What is immediately striking about this provision is its application of a universal standard of reasonableness across the whole spectrum of court review of the tribunal's decision-making under the *Act*: judicial review, statutory appeals, and even applications for leave to appeal. One consequence is that, in the domain of statutory appeals, *Vavilov* is statutorily reversed. That means that not only on pure questions of law but also questions of fact and mixed law and fact, *Housen v Nikolaisen*[125] will no longer apply. Reasonableness will be the universal standard; it will not be correctness on pure questions of law or "palpable and overriding error" for questions of fact, discretion, and mixed law and fact.

However, this imposition of a universal reasonableness standard raises another more general question: Whether on statutory appeals or applications for judicial review is it constitutionally permissible for a legislature to substitute reasonableness review for correctness

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[120] *Ibid* at para 66.

[121] David Mullan, "2019 Developments in Administrative Law Relevant to Energy Law and Regulation" (2020) 8:1 Energy Regulation Q 28, online (pdf): *ERQ* <www.energyregulationquarterly.ca/wp-content/uploads/2020/04/ERQ_Volume-8_Issue-1-2020-1.pdf>.

[122] *Supra* note 6.

[123] SA 2020, c L-2.3, enacted by section 6 of the *Red Tape Reduction Implementation Act, 2020 (No. 2)*, SA 2020, c 39 (which received Royal Assent on December 9, 2020).

[124] The others were the Land Compensation Board, the Municipal Government Board, and New Home Buyer Protection Board.

[125] *Supra* note 7.

review with respect to the *Vavilov* rule of law categories for which correctness is the appropriate standard of review:

> [C]onstitutional questions, general questions of law of central importance to the legal system as a whole and questions regarding the jurisdictional boundaries between two or more administrative bodies.[126]

It remains to be seen, if and when that question arises in the context of the Land and Property Rights Tribunal, how a reviewing court will respond to it.

Interestingly, in the federal domain in Bill C-11, Part 2 of which is the *Personal Information and Data Protection Tribunal Act*, section 102(2) provides that, for appeals to the Tribunal, the standard of review for questions of law will be correctness, and, for questions of fact and mixed law and fact, "palpable and overriding error" — a legislative mandating of the *Housen v Nikolaisen* civil appeals standard of scrutiny. Nothing is said in the Bill about the standard of review to be applied by the Federal Court on applications for judicial review from the Tribunal's decision. If this provision is enacted in its current form, that will undoubtedly raise questions as to whether the role of the reviewing court will be to assess the decision under appeal by reference to the same standards that the Tribunal itself was required to apply or whether the Tribunal will be entitled to the presumption of reasonableness not only for its determination of questions of law but also its rulings on questions of mixed fact and law.

Also worthy of note are the recommendations in the January 2021 Final Report of the Ontario Capital Markets Modernization Taskforce. In proposing that there be a separate Adjudicative Tribunal established within the framework of securities regulation in Ontario,[127] the Taskforce, with reference to *Vavilov*, recommends reinstating reasonableness as the standard of review for questions of law in any appeals to the courts from the decisions of the recommended Tribunal.[128] That formulation then leaves over the question whether the standard of review for questions of fact, discretion, or mixed law and fact would also be reasonableness, or the *Housen v Nikolaisen* standard of palpable and overriding error.

Interestingly, the Taskforce does not refer to that question but does make it clear that the legislated standard of review should not apply to issues of natural justice or procedural fairness, or to any of the existing *Vavilov* rule of law-based correctness categories.[129] This at least avoids the question posed above in relation to the standard of review designation in the *Act* establishing the Alberta Land and Property Rights Tribunal.

It now remains to be seen whether the Alberta initiative or versions of it is picked up in relation to other tribunals and agencies (including energy regulatory bodies) not only in that province but also more broadly across Canada. However, should any jurisdiction want a reversion to the pre-*Vavilov* position, Nigel Bankes,[130] by reference to the Alberta Utilities Commission, has an elegant solution:

> **Standard of Review on Appeal**
>
> 29A Notwithstanding the use of the word "appeal" in section 29, the Court of Appeal shall apply the same standard of review to an appeal as it would apply to an application for judicial review under Part 3, Division 2 of the Rules of Court.

INDIGENOUS RIGHTS AND ENERGY REGULATION

It is not only with respect to the duty to consult and, where appropriate, accommodate that energy regulators must confront issues affecting Indigenous peoples. In 2020, this point was underscored in two rather different though not completely unrelated contexts that I will discuss in this section.

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[126] *Supra* note 3 at para 53.

[127] Walied Soliman et al., "Capital Markets Modernization Taskforce Final Report" (January 2021) at 20, online (pdf): *Government of Ontario* <files.ontario.ca/books/mof-capital-markets-modernization-taskforce-final-report-en-2021-01-22-v2.pdf>.

[128] *Ibid* at 23–24.

[129] *Ibid*.

[130] *Supra* note 6.

The United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP")

In varying ways, since its adoption by the United Nations General Assembly on September 13, 2007, UNDRIP has figured prominently in discourse on the future of energy regulation in Canada. The biggest flashpoint has been the provisions in UNDRIP referring to "free, prior and informed consent." Article 19 provides:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or **administrative** measures that may affect them [emphasis added].

Similarly, by Article 32, States commit to

> …consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

It was these provisions that led to Canada's initial unwillingness to endorse the Declaration. The salient concern was that, if incorporated into Canadian law, they would in effect give Indigenous peoples a veto over the administrative or legislative approval of any project that impacted their rights, claims, and interests. The apparent requirement of "free, prior and informed consent" would override the position taken by the Supreme Court of Canada that the duty to consult and, where appropriate, accommodate did not confer on Indigenous peoples an unrestricted right to withhold consent to any project that affected their section 35 and other constitutional rights.

However, notwithstanding the perpetuation of those concerns about the impact of adopting UNDRIP as part of Canadian domestic law, Canada eventually endorsed the Declaration in 2010 in a qualified way. Five years later, the Liberal election platform promised implementation of the Declaration, and this was reiterated during the 2019 election campaign. In the meantime, in 2016, Canada had entered an unqualified endorsement of the Declaration at the United Nations. Subsequently, British Columbia enacted legislation incorporating the Declaration into its law.[131] In Ottawa, a private member's Bill[132] aimed at making the Declaration part of Canadian law had been passed by the House of Commons in 2018, but ultimately died on the Order Paper when Parliament was dissolved on the calling of the fall 2019 election.

Then, eventually, on December 3, 2020, the Government introduced in the House of Commons Bill C-15, *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*.[133]

In the Department of Justice Summary appended to the Bill, it is stated that, when enacted, it will commit Canada to "take all measures necessary to ensure that the laws of Canada are consistent with" the Declaration. Section 4(a) then provides that among the purposes of the legislation is to

> affirm the Declaration as a universal international human rights instrument with application in Canadian law.

This follows on and seemingly goes somewhat further than one of many recitals in the legislation's preamble:

> Whereas the Declaration is affirmed as a source for the **interpretation** of Canadian law [emphasis added].

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[131] *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44.

[132] 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, 2019 (as passed by the House of Commons 11 June 2019).

[133] Bill C-15, *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*, 2nd Sess, 43rd Parl, 2020 (first reading 3 December 2020).

However, the Department of Justice,[134] in its website entry explaining the Bill and its purposes, seemed to take a view of the Bill's impact that did not give effect to the requirement of "free, prior and informed consent."

> References to "free, prior and informed consent" are found throughout the Declaration. They emphasize the importance of recognizing and upholding the rights of Indigenous peoples and ensuring there is effective and meaningful participation of Indigenous peoples in decisions that affect them, their communities or the territories.
>
> …If passed, this legislation would not change Canada's existing duty to consult Indigenous groups, or other consultation and participation requirements set out in other legislation like the new Impact Assessment Act.

In a without attribution technical briefing for the press, a senior government official is reported as saying quite remarkably that

> …the bill is not written to make UNDRIP a part of Canadian federal law, but instead identifies the declaration as a human rights instrument that governments and courts can use to guide the development and interpretation of Canadian law.[135]

In any event, the Minister of Justice apparently told the press that

> …meaningful consultation is what is embodied in free, prior and informed consent. The word veto does not exist in the document.[136]

However, as an editorial in the Globe and Mail states:

> The problem is that the word "consent" has a meaning. It normally means the power to say yes or no, full stop.[137]

Nonetheless, I suppose that a strained interpretation of the relevant provisions in the Declaration might however be that the words "**in order to obtain** their free, prior and informed consent" should be read as "**in a good faith endeavour to obtain** their free, prior and informed consent" or "**with a view to obtaining** their free, prior or informed consent." In that way, for example, the obligations imposed by the Bill could be seen as not giving a veto but as allowing for the perpetuation of existing Supreme Court principles respecting the duty to consult and, where appropriate, accommodate. However, in my view, this may be too much of a stretch. What is also clear is that if the Bill becomes law, there will almost inevitably be regulatory proceedings and litigation in which Indigenous groups urge upon regulators and judges their version of the meaning of the critical wording and that it does in effect create a veto power.

The Honour of the Crown – Beyond the Duty to Consult and Accommodate

Fort McKay First Nation v Prosper Petroleum Ltd.[138] involved an appeal by the First Nation from a decision of the Alberta Energy Regulator (AER) approving (subject to authorization from the Lieutenant Governor in Council[139]) a bitumen recovery project which would be located close to First Nation's Moose Lake

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[134] Department of Justice, "Bill C-15: United Nations Declaration on the Rights of Indigenous Peoples Act" (last modified 26 January 2021), online: *Government of Canada* <www.justice.gc.ca/eng/declaration/about-apropos.html>.

[135] Ryan Patrick Jones, "Liberals introduce bill to implement UN Indigenous rights", *CBC News* (3 December 2020), online: <www.cbc.ca/news/politics/liberals-introduce-undrip-legislation-1.5826523>.

[136] "Question for the Trudeau government: What does UNDRIP stand for?", *The Globe and Mail* (7 December 2020), online: <www.theglobeandmail.com/opinion/editorials/article-question-for-the-trudeau-government-what-does-undrip-stand-for/>.

[137] *Ibid*.

[138] 2020 ABCA 163. For other commentary on this judgment, see Nigel Bankes, "The AER Must Consider the Honour of the Crown" (28 April 2020), online(blog): *ABlawg* <ablawg.ca/2020/04/28/the-aer-must-consider-the-honour-of-the-crown/>; See also Martin Ignasiak, Sander Duncanson & Jesse Baker, "Resource Projects and the Honour of the Crown" (2020) 8:3 Energy Regulation Q 43, online (pdf): *ERQ* <www.energyregulationquarterly.ca/wp-content/uploads/2020/09/ERQ_Volume-8_Issue-3-2020.pdf>.

[139] By virtue of section 10(3) of the *Oil Sands Conservation Act*, RSA 2000, c O-7.

Reserves. The First Nation argued that the AER had wrongfully refused to consider whether the honour of the Crown demanded that the project not be approved until the conclusion of ongoing negotiations between the First Nation and the Government of Alberta on the creation of a Moose Lake Access Management Plan (MLAMP) "to address the cumulative effects of oil sands development on the First Nation's Treaty Eight Rights."[140]

As a matter of process, Prosper[141] and Alberta[142] argued that consideration of whether the honour of the Crown was engaged and affected the decision was beyond the competence of the AER. Section 21 of the *Responsible Energy Development Act*[143] provided that the AER did not have jurisdiction to consider the adequacy of Crown consultation in matters coming before it. The reason for the provision was the assignment of that responsibility and, more generally, for management of consultations to the Aboriginal Consultation Office.[144]

However, the Court of Appeal determined that this did not excuse the AER from considering other "relevant matters involving aboriginal peoples"[145] arising out of its mandate. To the extent that the First Nation was invoking the honour of the Crown, while the honour of the Crown did not give rise to "an independent cause of action,"[146] it was not confined to assuring the fulfilment of the duty to consult. It had been recognized as relevant to three other situations.[147] It can give rise to a fiduciary obligation when the Crown "assume[d] discretionary control over a specific Aboriginal interest." It "govern[ed] treaty-making and implementation." It also "require[d] the Crown to act in a way that accomplishes the intended purpose of treaty and statutory grants to Aboriginal peoples." Moreover, this was not a case in which the First Nation was relying on the duty to consult. In terms of the three other honour of the Crown infused situations, the First Nation was basing its claim on the assertion that engaged the implementation of the obligations that were contained in Treaty 8.[148] That aside, its claims were more broadly based in the sense that the First Nation was asserting, based on the principle of reconciliation, that the AER should have evaluated "whether the MLAMP process was relevant to assessing whether the Project was in the public interest."[149] The Court also rejected the argument that these matters were for Cabinet when it came to determine whether it should give effect to the AER's approval of the project.[150]

Since the AER had never addressed these matters,[151] the appropriate course of action was for the matter to be remitted for reconsideration taking into account "the honour of the Crown and the MLAMP."[152]

In her concurrence, Greckol JA went somewhat further than the other two members of the Court of Appeal. In her view, the First Nation had established that the honour of the Crown with respect to treaty implementation had been engaged.[153] The majority preferred to leave that threshold question to the AER's reconsideration, a reconsideration that would be on the basis of yet to be developed full evidentiary record.[154]

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[140] *Supra* note 138 at para 1.

[141] *Ibid* at para 32.

[142] *Ibid* at para 34.

[143] SA 2012, c R-17.3.

[144] An office within the Ministry of Indigenous Relations: *supra* note 138 at para 49.

[145] *Ibid* at para 57

[146] *Ibid* at para 54.

[147] *Ibid* at para 53

[148] *Ibid* at para 56.

[149] *Ibid* at para 57.

[150] *Ibid* at paras 62–67.

[151] *Ibid* at paras 68–71.

[152] *Ibid* at para 71.

[153] *Ibid* at paras 72–83.

[154] *Ibid* at para 70.

Reliance on the honour of the Crown has also surfaced in the context of an Alberta Utilities Commission (AUC) ruling on which leave has been given to appeal to the Court of Appeal: *AltaLink Management Ltd. v Alberta Utilities Commission*.[155] The dispute arose out of AltaLink's transfer of an equity interest in part of an electricity transmission line to two First Nations. This transfer attracted additional annual auditing and hearing costs arising out of the partnership between AltaLink and the two First Nations. In approving the transfer, the Commission ruled that those additional costs should not be borne by ratepayers but by the partnership. Among the grounds on which this ruling was challenged was that it failed to respect the honour of the Crown. The AUC, it was asserted, should have acted on a more holistic basis and with particular reference to the public interest in the creation of such partnerships between regulated utilities and First Nations.[156] Basically, the assertion was that the public interest in such efforts at reconciliation should lead to the added costs being borne by ratepayers, not the partnership.

Should this appeal succeed, it may very well presage more frequent appeals to the honour of the Crown in regulatory proceedings engaging the rights, claims and interests of Indigenous peoples. Process, not in the sense of the mechanics of consultation but the canvas on which such decision-making takes place (the range of relevant factors), may expand considerably.

OTHER PROCESS AND REMEDIAL ISSUES

Applications for Leave to Appeal

In granting leave to appeal in *AltaLink Management Ltd. v Alberta Utilities Commission*,[157] Strekaf JA referred to the five factors that the Alberta Court of Appeal generally considered in determining whether to grant leave to appeal from an energy regulatory decision,[158] and, in short order thereafter, provided reasons for allowing the application. This is in stark contrast to some other judgments of single judges of the Court on leave applications especially in cases were leave is denied.

The judgment of Watson JA in *FortisAlberta Inc. v Alberta (Utilities Commission)*[159] exemplifies the contrast. Focusing largely on the third criterion ("whether the appeal is *prima facie* meritorious") in the list of relevant considerations, Watson JA proceeded[160] to engage in what was to all intents and purposes an in-depth, precedent-based consideration of the merits of the principal ground on which leave to appeal was being sought.

Whether the purpose of imposing a statutory leave requirement is well-served by such extensive canvassing of the merits is an interesting question. To the extent that it explains to applicants why they are likely to lose on the merits of the grounds on which they are seeking leave, it can perhaps be justified in the sense that adequate reasons, albeit not coming from whom you wanted to deal with your appeal, may assuage the loser's disappointment. It may also serve to underscore that, while the first instance reasons were questionable, nevertheless, there were other very good reasons why the applicant had deserved to lose at first instance. That too may make the denial of access to a full-blown appeal more palatable.

On the other hand, on a going forward basis, to the extent to which the applications judge makes pronouncements on the merits of the case, there will, if the same issue arises again, be questions as to the precedential value of those

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[155] 2019 ABCA 482.

[156] *Ibid* at paras 13–14

[157] *Ibid* at para 10.

[158] a.whether the point on appeal is of significance to the practice;
b.whether the point raised is of significance to the action itself;
c.whether the appeal is prima facie meritorious;
d.whether the appeal will unduly hinder the progress of the action; and
e.the standard of appellate review that will be applied on the merits

In an earlier annual survey, I have discussed various aspects of this test: David J. Mullan, "2017 Developments in Administrative Law Relevant to Energy Law and Regulation" (2018) 6:1 Energy Regulation Q 19 at pp 32–33.

[159] 2020 ABCA 271. See also *Milner Power Inc. v Alberta (Utilities Commission)*, 2019 ABCA 127.

[160] *Ibid* at paras 81–111.

pronouncements. There also must be questions as to extent to which the time-consuming crafting of lengthy reasons for either granting or denying leave to appeal are an appropriate use of judicial time given the usual sense of leave provisions as providing a filter against appeals with little or no chance of success reaching the next level. If the matter is not worthy of the Court of Appeal's time, why should a third or more of that time be transferred to or taken up by the leave judge expounding on the merits of the grounds of appeal?

The Raising of New Issues on an Application for Judicial Review or a Statutory Appeal

As mentioned earlier, *Planet Energy (Ontario) Corp. v Ontario Energy Board*[161] gave rise to an issue as to whether the Board had levied an administrative penalty out of time. Section 112.5(2) of the *Ontario Energy Board Act*[162] provides that

> [the] Board shall not make an order under subsection (1) in respect of a contravention later than two years after the later of,
>
> > (a) the day the contravention occurred; and
> >
> > (b) the day on which evidence of the contravention first came to the attention of the Board.

Planet Energy had not raised this issue at the hearing before the Board given that the limitation period had not run, and only did so while the Board's decision was still under reserve. This led Planet Energy to argue that the situation was an exception to the normal principle that all issues should be raised before the administrative decision maker; that neither on an application for judicial review nor, as here, a statutory appeal,[163] could they be advanced for the first time before the reviewing court.

In rejecting this argument,[164] Swinton J outlined the rationales behind the accepted position. To allow the matter to be argued for the first time before the reviewing court would mean that the court would be flying in the face of the legislature's choice to leave such matters at first instance to determination by the board or tribunal. It would also mean that the reviewing court would not have the benefit of the board's or tribunal's position on the contested issue. Finally, in some instances, it might prejudice a respondent's ability to introduce relevant evidence and lead to the court having to review the matter based on an incomplete record.[165]

In responding to Planet Energy's urging the Divisional Court to treat this as an exceptional situation, Swinton J dismissed an argument based on the time that the Board normally took to render a decision. The performance standard on which counsel relied was for rate, not enforcement proceedings.[166] Secondly, she faulted the appellant for not drawing the attention of the Board to the potential problem as the tolling of the limitation period approached.[167] Alternatively, the appellant could have applied to the Board for a reconsideration as provided for in the *Act*.[168] In that regard, the Court rejected as a general principle the position taken by the Alberta Court of Appeal

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[161] *Supra* note 23.

[162] *Supra* note 25.

[163] See *Rowan v Ontario Securities Commission*, 2012 ONCA 208 at paras 70–71, 77, and cited by Swinton J, *supra* note 23 at para 20.

[164] *Supra* note 23 at paras 16–34.

[165] For other recent consideration of this issue in the context of a *Charter* challenge raised for the first time in judicial review proceedings, see the judgment of Stratas JA in *Forest Ethics Advocacy Association v Canada (National Energy Board)*, 2014 FCA 245 at paras 37ff. I commented on this in "2014 Developments in Administrative Law Relevant to Energy Board and Regulation", *supra* note 40. The leading Supreme Court of Canada precedent on this issue remains the judgment of Rothstein J in *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Federation*, 2011 SCC 61 at paras 23–28, a case in which an exception was made to the normal position. It is cited and distinguished by Swinton J, *supra* note 23 at paras 17–19

[166] *Supra* note 23 at paras 21–22.

[167] *Ibid* at para 23.

[168] *Ibid* at paras 24–25.

in *Alberta Power Ltd. v Alberta (Public Utilities Board)*[169] to the effect that the existence of a reconsideration or review power did not preclude the exercise of a right of appeal to the courts. In the circumstances of this proceeding, reconsideration should have been sought. Finally,[170] Swinton J dismissed the contention that an exception should be made given that what was at stake was a "pure question of law" on which, since *Vavilov*, the standard of review would be that of correctness. Even accepting that it might be a pure question of law subject to a correctness standard of review, this ignored the fact that

> …the Board is an expert and highly specialized tribunal that can assist the Court in the exercise of statutory interpretation by providing context and a consideration of various interpretations.[171]

In any event, she went to rule that it was not a pure question of law since by reference to the limitation provision there had to be a determination of when, as a matter of fact, the Board had evidence of the relevant contravention.[172]

To buttress this analysis, Swinton J noted that the section had never been interpreted by the Board and described some of the difficulties in giving meaning or effect to what she described as an "unusual provision."[173] Nevertheless, the Divisional Court's rejection of the appellant's arguments on this issue strikes me as being a very close call. However, it certainly illustrates how deference to a regulatory agency's decision-making prerogatives founded in legislative choice of regulatory instrument can play a role in the exercise of discretionary procedural and remedial powers on judicial review and statutory appeals from tribunals and agencies.

Swinton J's distinguishing of the Alberta Court of Appeal judgment in *Alberta Power Ltd.* also raises the issue of whether, when there is access to a review or reconsideration within the tribunal, the starting point should be that these avenues co-exist; that, save in exceptional circumstances, the choice of whether to forego the review or reconsideration possibility and proceed directly to judicial review or a statutory appeal should be that of the losing party. At some point, this merits a more developed judicial assessment of why the principles of exhaustion of domestic avenues of recourse do not apply to review and reconsideration provisions.

It is also pertinent to recollect that, as noted earlier, in *Enbridge Gas v Ontario Energy Board*,[174] Swinton and Favreau JJ did allow an issue to be raised for the first time in an appeal to the Court from the Board. The issue here was whether in a rate-setting matter, the utility's timing of its rates application should be a factor in the setting of final rates and, more particularly, whether the date from which final rates were to become effective need not correspond to the date fixed earlier for the commencement of interim rates.

Following extensive citation[175] from *Planet Energy*,[176] Swinton and Favreau JJ held, relying on the judgment of Rothstein J in *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*,[177] that this should be treated as an exceptional situation even though "the appellant should have raised the issue before the OEB."[178] First, the issue of whether the timing of the application was a relevant consideration in fixing the date from which the final rates applied was described as a question of law on which there were no facts in dispute. Secondly, this was an issue which the Board had addressed in previous cases and found that, as a matter of law, the

[169] 1990 ABCA 33 at paras 7–8.

[170] *Supra* note 23 at paras 26–33.

[171] *Ibid* at para 26.

[172] *Ibid.*

[173] *Ibid* at para 27.

[174] *Supra* note 28.

[175] *Ibid* at paras 27–28.

[176] *Supra* note 23.

[177] *Supra* note 165 at para 28.

[178] *Supra* note 28 at para 29.

timing of the application was a relevant factor. In other words, the Court had the benefit of the Board's reasoning on the issue. "**Most significantly**,"[179] the issue's recurrence after three previous decisions supported the proposition that the time had come for there to be a definitive resolution. In support of the normal rule, Swinton J did, however, emphasise that this should in no way be interpreted as an invitation to bypass the Board. This was a matter involving "unique circumstances."[180]

When to Remit

One of the collateral issues considered by the majority in *Vavilov*[181] was the question of when a reviewing Court should simply quash a decision and not remit the matter to the decision-maker for determination in accordance with the reasons provided by the reviewing or appellate court. Normally, respect for the decision-making prerogatives of the respondent dictates that remission back for reconsideration is the proper course of action. Moreover, as seen in the earlier discussion of *Hydro One Networks Inc. v Ontario Energy Board*,[182] remission in a formal sense is statutorily required by section 33(4) of the *Ontario Energy Board Act*.[183]

However, the *Vavilov* majority went on to accept that there are situations in which a remission

> …would stymie the timely and effective resolution of matters in a manner that no legislature could have intended.[184]

Nation Rise Wind Farm Limited Partnership v Ontario (Minister of the Environment, Conservation and Parks,[185] a post-*Vavilov* judgment of the Ontario Divisional Court, provides one such example in an energy regulation setting. It involved an appeal to the Minister from a decision of the Ontario Environmental Review Board giving regulatory approval to a large wind energy project. The Minister allowed the appeal and revoked the regulatory approval on the basis that the project would cause catastrophic harm to a colony of bats. On an application for judicial review of the Minister's decision, the Divisional Court[186] held that the Minister had no right to raise an issue that had not been in play before the Board and that had not been raised in submissions of the parties on the appeal. On a reasonableness test, the Minister had misconceived the scope of his role, and, on the record, there was no evidential support for his factual finding as to harm that would be suffered by the bat colony.[187] He had also failed to act in a procedurally fair manner in several respects.[188]

The Court then went on to consider the appropriate remedial response in accordance with the guidance provided by the *Vavilov* majority.[189] This led to the Court determining that this was not a case for quashing and remitting to the Minister for redetermination in accordance with the Court's reasons. Rather, the Minister's decision should simply be quashed with the effect being the reinstatement of the Board's original decision.

The Court provided several reasons for this stance which coalesced to justify the discretionary determination:

1. Given that the Minister had no authority to decide the appeal on grounds not raised by the parties, there would be no point in remitting the matter to the Minister simply to cure that defect.

2. Even if the Minister did have authority to consider the plight of the bats, there was

[179] *Ibid* at para 33.

[180] *Ibid*.

[181] *Supra* note 3 at paras 139–42.

[182] *Supra* note 31.

[183] *Supra* note 25.

[184] *Supra* note 3 at para 142.

[185] *Supra* note 48.

[186] With Swinton and Favreau JJ again members of the panel.

[187] *Supra* note 48 at paras 118–20 (a summary of conclusions).

[188] *Ibid* at paras 125–54.

[189] *Ibid* at paras 156–63, quoting at para 157 from *Vavilov*, *supra* note 3 at para 142

no evidence on the record supporting his dire prognostication as to their fate.

3. Moreover, the Minister had made it clear that the only reason that he allowed the appeal was because of the bats.

4. Finally, and relying on the *Vavilov* majority's endorsement of the "urgency of providing a resolution to the dispute" as a relevant consideration, the Court referred to the completion pressures that the project was facing from the Independent Electricity Service Operator and the possibility of cancellation of the project even if the Minister dismissed the appeal on a reconsideration.

Given all those considerations, the Divisional Court was clearly correct in simply quashing the Minister's decision with the implicit message being that this disposition did not leave any room for the Minister to attempt to reconsider on his own initiative. ■

THE WASHINGTON REPORT

*Robert S. Fleishman**

EDITORS INTRODUCTION

When the ERQ started publishing almost 10 years ago, the first edition of every year was scheduled to review the highlights of the energy regulation year for both Canada and the United States. The American version was called the Washington Report. It was authored by Robert Fleishman, then the editor of the Energy Law Journal published by the Energy Bar Association in Washington. It appeared every year until last year when we ran into a difficulty known as Covid-19. This year the Washington Report is back. We thank Robert for his usual skill and dedication. We have learned over the last few years how interconnected the energy sector in Canada is with the American side of the industry. And we have also followed closely the cross-border disputes that seem to crop up every year. This year is no different.

* * *

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 mid-2019 through early 2021, which we expect to be of interest to readers of the *ERQ*. This report does not address developments with respect to the Biden Administration.

I. OIL, GAS, & ELECTRIC INFRASTRUCTURE

A) *ENERGY ACT OF 2020* AND *PIPES ACT OF 2020*

On December 27, 2020, President Trump signed into law a massive omnibus appropriations and $900 billion COVID-19 relief bill.[1] Two key sections of the bill are significant for energy and infrastructure market participants and investors: (1) Division Z, the *Energy Act of 2020 (Energy Act of 2020)*, a bipartisan energy package that represents the first substantial update to U.S. energy policy in 13 years; and (2) Division R, the *Protecting Our Infrastructure of Pipelines and Enhancing Safety Act of 2020 (PIPES Act of 2020)*, which contains numerous regulatory changes impacting large-scale liquefied natural gas (LNG) facilities, gas gathering pipelines, and gas distribution facilities.

The *Energy Act of 2020* is a bipartisan, bicameral law touted as the first comprehensive national energy policy update since the *Energy Independence and Security Act of 2007*. It includes numerous measures, but principally establishes or reauthorizes various programs intended to facilitate innovations and breakthroughs in renewable and clean energy technologies, authorizing $35 billion in spending on a range of a clean energy

* Robert S. Fleishman is a Partner at Kirkland & Ellis LLP in Washington, D.C., where he represents a range of clients on energy regulatory, enforcement, compliance, transactional, commercial, legislative and public policy matters. He served for close to 15 years as Editor-in-Chief of the Energy Law Journal (published by the Energy Bar Association) and is a former General Counsel and Vice-President for Legislative and Regulatory Policy at Constellation Energy. The author would like to thank the following members of Kirkland's energy, environment, and tax practices for their assistance: Brooksany Barrowes, Tyler Burgess, Scott Cockerham, Jim Dolphin, Alexandra Famer, Nicholas Gladd, Cassidy Hall, Marcia Hook, Ammaar Joya, Michael Saretsky, Drew Stuyvenberg, and Paul Tanaka. The views, opinions, statements, analysis, and information contained in this report are those of the author and do not necessarily reflect the views of Kirkland & Ellis or any of its past, present, and future clients. This report does not constitute legal advice, does not form the basis for the creation of an attorney-client relationship, and should not be relied on without seeking legal advice with respect to the particular facts and current state of the law applicable to any situation requiring legal advice.

[1] US, Bill HR 133, *Consolidated Appropriations Act*, 2021, 116th Cong, 2020 (enacted), online (pdf): <www.congress.gov/116/bills/hr133/BILLS-116hr133enr.pdf>.

research, development, and related programs through 2025.

There are several key provisions in the *Energy Act of 2020*. Title I contains many technology-oriented and technology-neutral measures to improve energy efficiency, including directing the U.S. Secretary of Energy (Secretary of Energy) to establish rebate programs to encourage the replacement of energy inefficient electric motors and transformers. Title II contains a number of measures designed to accelerate the development of improved, clean, and scalable advanced nuclear reactors, such as the establishment of a program to support the availability of high-assay, low-enriched uranium for civilian domestic research, development, demonstration and commercial use. Title III includes measures designed to spur substantial investments in a wide spectrum of renewable energy resources, ranging from marine energy and hydropower to geothermal to wind and solar energy. Titles IV and V cover carbon management and carbon removal and include measures designed to foster innovation and breakthroughs needed to reduce the cost barriers to large-scale implementation and achieve economy-wide deployment of carbon capture, utilization, and storage. Title VIII contains a number of provisions designed to accelerate modernization of the electric grid. Finally, Title IX includes a number of reforms designed to improve the Department of Energy.

Title I of the *PIPES Act of 2020* directs the U.S. Secretary of Transportation (Secretary of Transportation) to update or promulgate regulations that affect the safety of certain gas pipeline, gathering, distribution, and LNG facilities. For example, the Secretary of Transportation must update the minimum operating and maintenance standards applicable to large-scale LNG facilities (other than peak shaving facilities) within three years, must promulgate a final rule governing the safety of gas gathering pipelines, and a study must be conducted regarding operators' ability to map such lines, and is required to promulgate additional regulations to address and reduce methane emissions from new and existing gas transmission and distribution pipelines and the applicability of the pipeline safety requirements to idled natural or other gas transmission and hazardous liquids pipelines. Title II of the *PIPES Act of 2020* requires the Secretary of Transportation to promulgate regulations that ensure that each distribution integrity management plan developed by a distribution system operator includes an evaluation of certain risks.

B) OIL PIPELINE PERMITTING CHALLENGES

The oil pipeline industry has witnessed several unprecedented events that have driven home the permitting challenges that pipelines may increasingly face going forward.

Dakota Access Pipeline

The Dakota Access Pipeline (DAPL), which has now been in service for over three years, experienced a series of unexpected legal defeats that have left the pipeline's future uncertain.

One major blow came on July 6, 2020, when a federal district court (District Court) ordered that the line be shut down pending an environmental review and emptied within 30 days. The order arose from a challenge brought by the Standing Rock Sioux Tribe, the Cheyenne River Sioux Tribe, and other tribes (the Tribes) regarding the sufficiency of the U.S. Army Corps of Engineers' (Corps) environmental analysis under the *National Environmental Protection Act* (*NEPA*) in connection with the granting of an easement for DAPL. Earlier in 2020, the District Court determined that the Corps violated *NEPA* by failing to produce an Environmental Impact Statement (EIS) despite conditions that triggered such a requirement.[2] The District Court remanded the case to the Corps to prepare an EIS, but asked for separate briefing on the appropriate interim remedy during the remand process.[3] In the opinion accompanying the July 6 order, the District Court found that the "[c]lear precedent favoring vacatur during such a remand coupled with the seriousness of the Corps' deficiencies" dictated that "vacatur is the only appropriate remedy…"[4] Accordingly, the District Court ordered that Dakota Access, LLC (Dakota Access), the owner of DAPL, "shall

[2] See *Standing Rock Sioux Tribe v U.S. Army Corps of Engineers*, 440 F Supp (3d) 1 (DDC 2020).

[3] *Ibid* at 29–30.

[4] *Standing Rock Sioux Tribe v U.S. Army Corps of Engineers*, 471 F Supp (3d) 71 at 75, 87 (DDC 2020).

shut down the pipeline and empty it of oil by August 5, 2020…"[5]

Dakota Access quickly filed an emergency motion for stay pending appeal with the United States Court of Appeals for the D.C. Circuit (D.C. Circuit), arguing that the July 6 order would incurably and irreparably infringe Dakota Access' rights, including losses exceeding $1 billion, and would inflict $7.5 billion in losses on North Dakota companies, employees, and the state's budget through 2021. On the day that initially had been set as the deadline to shut down DAPL, the D.C. Circuit issued an order that allowed DAPL to continue operating but denied Dakota Access' request for a stay. In the order, the D.C. Circuit also stated that it expected the appellants "to clarify their positions before the district court as to whether the Corps intends to allow the continued operation of the pipeline notwithstanding vacatur of the easement and for the district court to consider additional relief if necessary."[6]

The litigation has since proceeded before both the District Court and the D.C. Circuit. In August, the Corps provided a status update to the District Court in which the Corps indicated that under its regulations, because the easement was vacated, DAPL now constitutes an encroachment on federal property.[7] However, the Corps indicated that it did not intend to exercise its discretion to immediately recommend an enforcement in return for Dakota Access' agreement to abide by the conditions of the vacated easement. In the D.C. Circuit, the parties briefed the issue of whether the District Court erred in determining that an EIS is required and that vacatur was the appropriate remedy on remand.

Keystone XL Pipeline

The beleaguered Keystone XL Pipeline (Keystone XL), now over a decade into the permitting process, has hit another regulatory wall. Under U.S. law, a party seeking to construct, operate, and maintain a cross-border liquid petroleum or petroleum products pipeline must obtain a Presidential permit.[8] TC Energy Corporation (TC Energy) first applied for a Presidential permit in 2008, which the U.S. Secretary of State (Secretary of State) denied in early 2012. TC Energy applied for another permit to build Keystone XL in 2012. The Secretary of State denied that application, too, determining that issuing a permit to build the pipeline would not serve the national interest. But on January 24, 2017, President Donald Trump issued a memorandum in which he invited TC Energy to reapply for a permit to build Keystone XL. On March 29, 2019, the Presidential permit for Keystone XL was finally issued. As is common with Presidential permits, however, Keystone XL's Presidential permit was subject to express conditions, including a condition stating that the permit "may be terminated, revoked, or amended at any time at the sole discretion of the President."[9]

C) FERC'S NEW ROE POLICIES FOR JURISDICTIONAL ELECTRIC UTILITIES AND NATURAL GAS AND OIL PIPELINES

In May 2020, FERC issued two key orders establishing new policies for determining the return on equity (ROE) component of the cost-of-service rates charged by FERC-jurisdictional electric utilities, natural gas pipelines and oil pipelines. First, with respect to electric utilities, FERC issued an order setting the ROE component of the rates

[5] *Standing Rock Sioux Tribe v U.S. Army Corps of Engineers*, No. 16-cv-01534-JEB, at 2 (DDC 6 July 2020).

[6] *Standing Rock Sioux Tribe v U.S. Army Corps of Engineers*, Order, 1:16-cv-01534-JEB (DDC 5 August 2020).

[7] *Standing Rock Sioux Tribe, et al. v U.S. Army Corps of Engineers*, United States Army Corps of Engineers' Status Report, Case No. 1:16-cv-01534 (JEB), at 2 (31 August 2020).

[8] The Secretary of State has been designated to receive all applications for the issuance or amendment of Presidential permits for the construction, connection, operation, or maintenance of certain cross-border facilities, including products pipelines. See *Issuance of Permits with Respect to Facilities and Land Transportation Crossings at the International Boundaries of the United States*, Exec. Order 13867, 84 Fed Reg 15491 (10 April 2019); *Issuance of Permits With Respect to Certain Energy-Related Facilities and Land Transportation Crossings on the International Boundaries of the United States*, Exec. Order No. 13337, 69 Fed Reg 25299 (30 April 2004); *Providing for the Performance of Certain Functions Heretofore Performed by the President with Respect to Certain Facilities Constructed and Maintained on the Borders of the United States*, Exec. Order 11423, 33 Fed Reg 11741 (20 August 1968).

[9] *Authorizing TransCanada Keystone Pipeline, L.P., to Construct, Connect, Operate, and Maintain Pipeline Facilities at the International Boundary between the United States and Canada*, 84 Fed Reg 13101, Article 1(1) (3 April 2019).

charged by electric transmission owners in the Midcontinent Independent System Operator (MISO) region.[10] Second, FERC issued a policy statement on determining the ROE for natural gas and oil pipelines.[11] Both orders signal a departure from the ROE methodologies previously used by FERC for the respective industries and could significantly impact the earnings of FERC-jurisdictional entities, and the returns ultimately realized by their investors.

FERC generally utilizes cost-of-service ratemaking principles when establishing the rates of jurisdictional entities under which rates are designed based on the cost of providing service, including an opportunity to earn a reasonable rate of return on the entity's investments. In setting the ROE component of the rates, FERC must comply with Supreme Court precedent holding that "the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital."[12] Since the 1980s, FERC has relied almost exclusively upon the discounted cash flow (DCF) methodology to determine ROE for jurisdictional entities.

However, in an October 2018 order addressing a complaint against transmission owners in New England, FERC proposed abandoning its exclusive reliance on the DCF methodology for public utilities, by considering the cost of equity results of three additional methodologies (1) Capital Asset Pricing Model (CAPM), (2) Risk Premium, and (3) Expected Earnings.[13]

Subsequently, FERC issued a March 2019 notice of inquiry[14] and a November 2019 order concerning the MISO transmission owners' ROE.[15] In the latter order, FERC adopted an ROE policy for public utilities that gave equal weight to the results of the DCF and CAPM models, by averaging them, but rejected the use of the Risk Premium and Expected Earnings models.[16] FERC did not adopt or propose those reforms for natural gas or oil pipeline ROEs; instead, FERC requested comment in its March 2019 notice of inquiry regarding whether ROE policy changes would be appropriate for natural gas or oil pipelines.

FERC's MISO Order and Pipeline ROE Policy Statement adopt new ROE policies for electric transmission and natural gas and oil pipeline rates, and those policies differ between the electric sector and the pipeline sector.

In the MISO Order, FERC granted rehearing with respect to various aspects of Opinion No. 569, establishing a new policy for determining public utilities' ROE by averaging the results of three methodologies: (1) DCF, (2) CAPM, and (3) Risk Premium. FERC found that utilizing three methodologies would increase the reliability of ROE results. Although FERC previously rejected the Risk Premium methodology, it changed course and included it in its ROE analysis because averaging it with the other models would reduce ROE volatility.

In the Pipeline ROE Policy Statement, FERC outlined its new policy for determining ROEs for natural gas and oil pipelines, which partly follows the policy outlined in the MISO Order with some key changes to address differences in the respective industries.

The biggest divergence in the policies pertains to the methodologies FERC will use to calculate ROEs for natural gas and oil pipelines. Specifically, FERC adopted the DCF and the CAPM methodologies, but rejected the Risk Premium methodology for gas and oil pipelines. FERC justified this disparate treatment by noting there are very few FERC decisions or settlements providing a stated ROE for natural

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[10] *Ass'n of Bus. Advocating Tariff Equity v Midcontinent Indep. Sys. Operator, Inc.*, 171 FERC ¶ 61,154 (2020) (MISO Order), *aff'd in part, set aside in part*, 173 FERC ¶ 61,159 (2020).

[11] *Policy Statement on Determining Return on Equity for Natural Gas and Oil Pipelines*, 171 FERC ¶ 61,155 (2020) (Pipeline ROE Policy Statement).

[12] *Fed. Power Comm'n v Hope Natural Gas Co*, 320 US 591 at 603 (1944).

[13] *Coakley v Bangor Hydro-Elec. Co.*, 165 FERC ¶ 61,030 (2018).

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

[15] *Ass'n of Bus. Advocating Tariff Equity v Midcontinent Indep. Sys. Operator, Inc.*, Opinion No. 569, 169 FERC ¶ 61,129 (2019).

[16] *Ibid* at para 1.

gas and oil pipelines due to the prevalence of "black box" settlements that do not enumerate specific ROEs. Accordingly, FERC rejected the Risk Premium methodology for natural gas and oil pipelines because FERC and interested parties simply do not have the requisite data needed to apply the methodology to gas and oil pipelines.

Although FERC's application of the new ROE policies in individual proceedings will depend upon specific circumstances and market conditions at the time such proceedings arise, the new policies contain some potentially beneficial revisions for both public utilities and oil and natural gas pipeline companies that could result in higher ROE determinations than if FERC relied exclusively upon its traditional DCF methodology. Despite this, questions remain regarding whether the ROE policies will produce returns on investments in electric, oil and natural gas infrastructure sufficient to support federal and state energy policy goals. There is also some uncertainty how the recently adopted ROE policies will fare in the face of legal challenges. Accordingly, there is likely to be uncertainty until these proceedings reach a final resolution, which could take some time.

D) ELECTRIC TRANSMISSION PLANNING

In recent 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, and 2020 saw even more challenges to regional transmission organizations' (RTOs) and independent system operators' (ISOs) implementation of Order No. 1000.[17] Although the details of those challenges differ from case to case, most of them share a common theme of seeking to expand competitive transmission planning by increasing the type and number of transmission projects subject to competitive solicitation. FERC largely rebuffed those challenges, but many of the FERC decisions were appealed to, and remain pending before, the D.C. Circuit. Thus, it remains possible that the recent efforts to expand competitive transmission planning still could bear fruit. Additionally, there have also 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 to develop certain transmission projects. 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.

Three states — Minnesota, Texas, and Iowa — have now passed such laws, and all three laws have been challenged in court. The Minnesota and Texas laws have been challenged on the theory that the laws violate the dormant Commerce Clause of the U.S. Constitution. The Minnesota law survived that challenge at the U.S. District Court and at the United States Court of Appeals for the Eighth Circuit.[18] However, a petition for a writ of certiorari has been filed with the United States Supreme Court.[19] Similarly, the Texas state ROFR law, which was enacted in May 2019,[20]

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[17] See *PJM Interconnection, L.L.C.*, 170 FERC ¶ 61,295 (2020), *order on reh'g and clarification*, 172 FERC ¶ 61,205 (2020), *appealed sub nom. New York Power Auth. v. FERC*, DC Cir Case No. 20-1283; *Appalachian Power Co.*, 170 FERC ¶ 61,196 (2020), *order addressing arguments raised on reh'g*, 173 FERC ¶ 61,157 (2020), *appealed sub nom. Am. Mun. Power, Inc. v. FERC*, DC Cir Case No. 21-1011; *Delaware Pub. Serv. Comm'n*, 171 FERC ¶ 61,024 (2020), *appealed sub nom. PPL Elec. Utils. Corp. v. FERC*, DC Cir Case No. 20-1390; *Midcontinent Indep. Sys. Operator*, 170 FERC ¶ 61,241 (2020), *order addressing arguments raised on reh'g*, 172 FERC ¶ 61,100 (2020), *appealed sub nom. MISO Transmission Owners v. FERC*, DC Cir Case No. 20-1261; *Linden VFT, LLC*, 170 FERC ¶ 61,122 (2020), *appealed sub nom. Linden VFT, LLC v. FERC*, DC Cir Case No. 20-1382; *ISO New England Inc.*, 172 FERC ¶ 61,293 (2020), *appealed sub nom, LSP Transmission Holdings II, LLC v. FERC*, DC Cir Case No. 20-1422; *Coal. of MISO Transmission Customers*, 172 FERC ¶ 61,099 (2020), *appealed sub nom. Coal. of MISO Transmission Customers v. FERC*, DC Cir Case No. 20-1421; *PJM Interconnection, L.L.C.*, 171 FERC ¶ 61,212 (2020), *addressing arguments on reh'g*, 172 FERC ¶ 61,292 (2020).

[18] See *LSP Transmission Holdings, LLC v Sieben*, 954 F (3d) 1018 at 1025, 1031 (8th Cir 2020).

[19] LSP Transmission Holdings, LLC filed the petition on November 5, 2020, in Docket No. 20-641.

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

survived a challenge filed in the United States Court for the Western District of Texas, which granted a motion to dismiss the lawsuit.[21] That case was appealed to the United States Court of Appeals for the Fifth Circuit. The court heard oral argument in June 2020.[22] In October 2020, certain transmission developers filed a petition challenging Iowa's ROFR law, which was enacted in June 2020.[23] Unlike the other challenges, this petition argues that the law violates the Iowa state constitution's prohibition on logrolling, requirement that a bill's title must contain the subject matter of the bill, and requirement that all laws must operate uniformly.

Although it remains to be seen how these state ROFR cases will play out, their resolution has the potential to significantly impact states' authority to determine which entities may construct transmission infrastructure and the degree to which transmission infrastructure in the United States will be developed through competitive solicitations mandated at the federal level.

E) FERC GAS PIPELINE AND LNG CERTIFICATES AND TOLLING ORDERS

For decades, FERC has allowed interstate natural gas pipeline owners to commence construction activities while requests for rehearing of the pipeline's *Natural Gas Act* (*NGA*) certificate were pending. FERC effectuated that practice by issuing orders, commonly referred to as "tolling orders," to provide itself additional time — in some cases years — to consider arguments raised on rehearing, while permitting construction activities to proceed before FERC concluded its review by issuing an order addressing the merits of the rehearing requests. Although that practice repeatedly had been upheld by the courts, it increasingly has come under attack in recent years by parties concerned that it precludes meaningful judicial review of the FERC's decision because, under the *NGA*, the agency's decision cannot be appealed to court until FERC issues a rehearing order on the merits.

On June 30, 2020, the D.C. Circuit issued an opinion overturning its prior precedent and invalidating FERC's use of tolling orders in this way.[24] The D.C. Circuit issued its opinion just weeks after FERC's issuance of Order No. 871, which was intended to address landowner concerns about pipelines being constructed before FERC completed its rehearing process, by amending FERC's regulations to limit authorizations to commence construction of LNG export and import facilities and interstate natural gas pipeline facilities certificated under Sections 3 and 7(c) of the *NGA*[25] while requests for rehearing are pending.[26] Both the D.C. Circuit's opinion and FERC's Order No. 871 represent marked changes in the law and FERC's policy respectively.

Under the *NGA*, no party may seek judicial review of a FERC order until after requesting rehearing of FERC's decision and the agency issues an order addressing the rehearing request. Under the statute, a request for rehearing is deemed to be denied by operation of law if FERC fails to act on it within 30 days, which then allows an aggrieved party to seek judicial review of FERC's decision in a federal court of appeals.[27] However, in order to respond on the merits to the many issues raised in requests for rehearing, FERC's long-time practice had been to issue tolling orders to provide itself additional time to consider the issues, while simultaneously allowing a certificate holder to proceed with construction. Over the years, various litigants alleged this practice is unfair to affected landowners and interested parties, but the D.C. Circuit (and other courts) upheld FERC's ability to issue tolling orders in this

[21] See *NextEra Energy Capital Holdings, Inc. v Walker, Order on Motion to Dismiss*, Civil No. 1:19-cv-00626 (WD Tex 2020).

[22] Case No. 20-50160, United States Court of Appeals for the Fifth Circuit, Clerk's Calendar, online: <www.ca5.uscourts.gov/clerk/calendar/2006/44.htm>.

[23] Case No. 05771 CVCV060840, Iowa District Court for Polk County (Oct. 14, 2020).

[24] *Allegheny Def. Project v FERC*, 964 F (3d) 1 (DC Cir 2020).

[25] 15 USC §§ 717f(c), 717b.

[26] *Limiting Authorizations to Proceed with Construction Activities Pending Rehearing*, 171 FERC ¶ 61,201 (2020).

[27] 15 USC § 717r(a).

manner in various proceedings since originally ruling on the question in 1969.[28] The recent opinion in *Allegheny Defense Project v FERC* overturns that precedent and invalidates FERC's use of tolling orders to provide itself more than 30 days to address rehearing requests.

The opinion was issued following oral arguments before the *en banc* court in an appeal of a FERC certificate order authorizing the construction and operation of an interstate natural gas pipeline project. The *en banc* court granted rehearing of an earlier decision by a panel of three D.C. Circuit judges, which upheld FERC's certificate order and tolling order in the proceeding. In conjunction with the original panel's decision, D.C. Circuit Judge Patricia Millett filed a lengthy concurring opinion calling into question the fairness of FERC's practice of issuing tolling orders and the continued viability of the D.C. Circuit's precedent upholding FERC's practice.[29]

In its opinion, the D.C. Circuit overturned more than 50 years of precedent and held that "tolling orders are not the kind of action on a rehearing application that can fend off a deemed denial and the opportunity for judicial review."[30] The court found that FERC could not disregard the jurisdictional consequences of its inaction given the *NGA*'s explicit 30-day deadline for action upon requests for rehearing. In addition, the court found that Congress explicitly provided FERC with four options in the *NGA* for how it could act upon a request for rehearing: (1) grant rehearing, (2) deny rehearing, (3) abrogate its order without further hearing or (4) modify its order without further hearing. The court found that FERC's use of tolling orders is not among those options, and it accordingly invalidated FERC's use of tolling orders to extend the time to consider issues raised in requests for rehearing.

Just weeks before the D.C. Circuit's decision, FERC issued Order No. 871 addressing some of the same issues raised in the court's opinion. In Order No. 871, FERC revised its regulations to preclude the agency from authorizing the holder of an *NGA* certificate to proceed with construction of FERC-approved interstate natural gas pipeline and LNG facilities until: (i) FERC acts on the merits of timely filed requests for rehearing or (ii) the time to seek rehearing has passed without any requests for rehearing being submitted. FERC stated that the rule change is intended to balance the agency's need to address the concerns raised on rehearing with the concerns related to proceeding with construction before the agency has completed its review, the latter of which were raised by Justice Millett in her concurring opinion discussed above.

FERC issued Order No. 871 as an instant final rule, meaning the rule change was finalized without notice or the opportunity for public comment under the *Administrative Procedure Act* because it concerns only matters of agency procedure. While certain members of the interstate natural gas pipeline industry, and their representative trade association, have filed appeals to seek judicial review of Order No. 871, it remains to be seen how other stakeholders, including potentially affected landowners and environmental groups, will view FERC's rule change, nor is it clear whether historically aggrieved stakeholders will consider it sufficient, together with the opinion, to address their concerns.

It is likely that the opinion and FERC's Order No. 871 will combine to delay construction and ultimately increase the cost of FERC-approved gas pipelines and LNG facilities, which could create uncertainty for project developers and investors. In addition to the implications for LNG and interstate natural gas pipeline proceedings, the opinion has had significant impacts in FERC proceedings under its *Federal Power Act* (*FPA*) jurisdiction. The relevant provisions of the *FPA* and *NGA* are identical.[31] In the wake of the D.C. Circuit decision discussed above, FERC has begun issuing rehearing orders on the merits within 30 days or it has issued notices denying rehearing in proceedings under both the *NGA* and *FPA*. For notices denying rehearing, FERC now issues either basic denials by operation of law or notices of denial of rehearing by operation of law and providing for further consideration, the latter of which indicates FERC's intent to issue

[28] *Cal Co. v FPC*, 411 F (2d) 720 at 721 (DC Cir 1969) (per curiam).

[29] See *Allegheny Def. Project v FERC*, 932 F (3d) 940 at 948 (DC Cir 2019) (Millett, J., concurring).

[30] *Allegheny Def. Project*, 964 F (3d) at 3-4.

[31] Compare 15 USC § 717r with 16 USC § 825l.

a substantive rehearing order by citing FERC's authority under both the *NGA* and *FPA* to "modify or set aside" the underlying order.

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

In 2020, the Trump Administration continued its efforts to roll back environmental regulations on a myriad of topics ranging from methane emissions to environmental impact reviews under *NEPA*. Many of the regulatory changes remain under litigation or could be reversed by the new Biden Administration, leaving the regulatory landscape somewhat uncertain.

A) REPEAL AND REPLACEMENT OF THE CLEAN POWER PLAN WITH THE ACE RULE

The Clean Power Plan (CPP) issued by the Environmental Protection Agency (EPA) in October 2015[32] under the *Clean Air Act* limited carbon dioxide (CO_2) emissions from existing power generation facilities. Under the CPP, nationwide CO_2 emissions would be reduced by approximately 30 per cent from 2005 levels by 2030 with a flexible interim goal. In July 2019, EPA repealed the CPP,[33] resulting in the D.C. Circuit's dismissal of longstanding litigation challenging the CPP.[34] In September 2019, the D.C. Circuit dismissed the case as moot over the objection of a group of governmental and nonprofit litigants that supported the CPP, who collectively sought to obtain a ruling from the court on the scope of EPA's authority to regulate carbon dioxide emissions under the *Clean Air Act*, even though the CPP was rescinded. Because the CPP never came into effect due to a stay issued by the Supreme Court, however, the dismissal of the litigation — and the repeal of the CPP itself — had little practical effect on regulated entities.

On the same day that EPA repealed the CPP, EPA replaced the CPP with the Affordable Clean Energy (ACE) Rule,[35] which takes a more limited view on EPA's 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 power generation facilities, and likely has a more limited impact on reduction of CO_2 emissions than the CPP. Dozens of states, public health and environmental organizations, and industry groups have challenged the ACE Rule in the D.C. Circuit, and the ACE Rule currently remains under litigation.[36] While EPA announced that it would rollout revisions to its New Source Review (NSR) regulations for new power generation facilities at the same time it took steps to repeal and replace the CPP, the separate NSR rulemaking for new power generation facilities has been delayed and, as of the date of this writing, has not been finalized.[37] Certain litigants challenging the ACE Rule requested that the litigation be paused while awaiting issuance of the New Source Review regulations, but the D.C. Circuit rejected those requests.

B) *NEPA* CLIMATE GUIDANCE AND THE SOCIAL COST OF CARBON

Energy exploration and production activities on federal lands are typically subject to the environmental review requirements under

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[32] EPA, *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, Final rule, 80 Fed Reg 64661 (23 October 2015).

[33] EPA, *Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations*, Final Rule, 84 Fed Reg 32520 (8 July 2019).

[34] See *West Virginia v EPA*, No. 15-1363 (DC Cir) (17 September 2019 Order).

[35] EPA, *supra* note 33.

[36] See *Am. Lung Assoc. v EPA*, No. 19-1140 (DC Cir), consolidated with *New York v EPA*, No. 19-1165 (DC Cir); *Appalachian Mountain Club v EPA*, No. 19-1166 (DC Cir); *Chesapeake Bay Found., Inc v EPA*, No. 19-1173 (DC Cir); *Robinson Enter., Inc. v EPA*, No. 19-1175 (DC Cir); *Westmoreland Mining Holdings v EPA*, No. 19-1176 (DC Cir); *City and Cnty. of Denver Colo. v EPA*, No. 19-1177 (DC Cir); *N. Am. Coal Corp. v EPA*, No. 19-1179 (DC Cir); *Biogenic CO2 Coal. v EPA*, No. 19-1185 (DC Cir); *Advanced Energy Econ. v EPA*, No. 19-1186 (DC Cir); *Am. Wind Energy Assoc. v EPA*, No. 19-1187 (DC Cir); *Consol. Edison, Inc. v EPA*, No. 19-1188 (DC Cir).

[37] EPA has, however, issued general updates to the NSR program which may reduce regulatory burdens for existing power generation facilities. For example, on October 22, 2020, EPA announced, that it was finalizing a rule to clarify the process for evaluating whether NSR permitting would apply to proposed projects at existing major stationary emissions sources, including power generation facilities. The rule seeks to eliminate NSR permitting where a proposed project would result in emissions decreases.

NEPA. *NEPA* requires federal agencies, including the Department of the Interior, to evaluate major agency actions having the potential to significantly impact the human environment. In July 2020, the White House Council on Environmental Quality (CEQ) issued the first significant substantive changes to *NEPA*'s implementing regulations in over 40 years.[38] The revised regulations streamline the environmental review process by, among other things, shortening the time for federal agencies to complete their *NEPA* reviews. The most controversial change eliminates the requirement for federal agencies to evaluate cumulative impacts, which is seen by environmental groups as a way for federal agencies to avoid considering the impact of government actions on greenhouse gas (GHG) emissions and climate change.

The rule was challenged by states and environmental and health advocacy groups in various federal district courts, and the litigation remains ongoing.[39] Litigants in the *Wild Virginia* case within the U.S. District Court for the Western District of Virginia sought a preliminary injunction to enjoin the *NEPA* streamlining regulations from taking effect. The court declined to enjoin the rule and allowed the regulations to go into effect, as scheduled, on September 14, 2020. The *Wild Virginia* litigants moved for summary judgment in November 2020; the motion remains pending before the court. Consistent with guidance from the Office of Management and Budget directing agencies to update their *NEPA* implementing regulations,[40] certain federal agencies — including the Department of the Interior and the U.S. Forest Service — began implementing the streamlining changes through new guidance and agency-specific regulations in 2020.

C) FUEL ECONOMY STANDARDS FOR AUTOMOBILES

In September 2019, the National Highway Traffic Safety Administration (NHTSA) and EPA finalized a rulemaking known as the "Preemption Regulation," the first part of the Safer Affordable Fuel Efficient Vehicles (SAFE) Rule.[41] The Preemption Regulation granted the U.S. Department of Transportation authority to set national fuel economy and emissions standards for motor vehicles and preempted similar state programs, resulting in the withdrawal of a January 2013 preemption waiver granted to California under the *Clean Air Act* for its own GHG and zero emissions requirements for motor vehicles. The rescission of the waiver significantly impacts California and the thirteen 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. The withdrawal of the waiver has been heavily litigated in both federal district courts[42] and the D.C. Circuit[43] due to differing venue requirements for challenges to regulations promulgated by NHTSA and EPA.

In April 2020, NHTSA and EPA published new fuel economy GHG emission standards for passenger vehicles and light duty trucks for model years 2021 through 2026 as part two of

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[38] CEQ, *Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act*, Final Rule, 85 Fed Reg 43304 (16 July 2020).

[39] See *Wild Va. v CEQ*, No. 3:20-cv-00045 (WD Va) (*Wild Virginia*); *Alaska Cmty. Action on Toxics v CEQ*, No. 3:20-cv-05199 (ND Cal); *Envtl. Just. Health All. v CEQ*, No. 1:20-cv-6143 (SDNY); *Cal. v CEQ*, No. 3:20-cv-06057 (ND Cal); *Iowa Citizens for Cmty. Improvement v CEQ*, No. 1:20-cv-02715 (DDC).

[40] Executive Office of the President Office of Management and Budget, "Memorandum for the Heads of Executive Departments and Agencies—Budget and Management Guidance on Updates to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act" (2 November 2020), online (pdf): <www.whitehouse.gov/wp-content/uploads/2020/11/M-21-01.pdf>.

[41] EPA, *The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program*, Withdrawal of Waiver, Final Rule, 84 Fed Reg 51310 (27 September 2019).

[42] See *California v Chao*, No. 1:19-cv-02826 (DDC); consolidated with *S. Coast Air Quality Mgmt. Dist. v Chao*, No. 1:19-cv-03436 (DDC); *Envtl. Defense Fund v Chao*, No. 1:19-cv-02907 (DDC).

[43] See *Union of Concerned Scientists v. NHTSA*, No. 19-1230 (DC Cir); consolidated with *Cal. v Wheeler*, No. 19-1239 (DC Cir); *S. Coast Air Quality Mgmt. Dist. v EPA*, No. 19-1241 (DC Cir); *Nat. Coal. for Advanced Transp. v EPA*, No. 19-1242 (DC Cir); *Sierra Club v EPA*, No. 19-1243 (DC Cir); *Calpine Corp. v EPA*, No. 19-1245 (DC Cir); *City and Cty. of San Francisco v Wheeler*, No. 19-1246 (DC Cir); *Advanced Energy Econ. v EPA*, No. 19-1249 (DC Cir); *Nat. Coal. for Advanced Transp. v EPA*, No. 20-1175 (DC Cir); *Ctr. for Biological Diversity v EPA*, No. 20-1178 (DC Cir).

the SAFE Rule.[44] Nevertheless, in the absence of clarity over the Preemption Regulation during the pendency of the litigation, certain auto manufacturers committed to continuing California's efforts to reduce GHG emissions. California announced it had reached an agreement in August 2020 with BMW (including Rolls Royce), Ford, Honda, Volkswagen (including Audi), and Volvo to make voluntary commitments to annual reductions of vehicle GHG emissions through the 2026 model year and to accelerate the transition to electric vehicles.[45] In addition, GM and Nissan have withdrawn from the litigation, announcing their intention to work with the State of California to establish common-sense vehicle emission standards.[46]

III. ENERGY STORAGE

A) FEDERAL STORAGE RULE AND RTO/ISO TARIFFS CONTINUE TO MATURE

As readers might recall, in 2018 FERC issued a final rule, Order No. 841[47] (*Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*), addressing Storage resources in RTO/ISOs. The rule, which is intended to remove barriers for Storage resource participation in various wholesale markets, such as capacity, energy, and ancillary services, required 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. 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, incorporating the mandated changes.[48]

Since our last report, there has been significant progress in maturation of the federal regulatory framework Order No. 841 established. Following FERC's denial of the requests for rehearing in that proceeding, certain entities filed petitions for judicial review in the D.C. Circuit, seeking to challenge aspects of Order No. 841. Most importantly, those entities sought to overturn FERC's decision not to allow states and other retail regulatory authorities the right to opt-out of the Order No. 841 framework by prohibiting energy storage resources within their jurisdictions from participating in the RTO/ISO markets. On July 10, 2020, the D.C. Circuit upheld Order No. 841 over those challenges, concluding, among other things, that FERC acted within its authority in prohibiting retail regulatory authorities from banning Storage resources from participating in the wholesale markets.[49] Although the court left open the possibility that states could bring as-applied challenges to the Order No. 841 regulatory framework in the future, to the extent a state identifies specific state regulations with which it believes Order No. 841 conflicts,[50] the court's conclusion that Order No. 841, on its face, does not impermissibly intrude on retail regulatory authorities' jurisdiction alleviated one of the more significant sources of lingering regulatory uncertainty associated with Order No. 841.

In parallel with that rehearing and judicial review process, the RTO/ISOs proceeded apace in developing their proposed rules to comply with Order No. 841. Starting in 2019 and

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[44] EPA, *The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks*; Final Rule, 85 Fed Reg 24174 (30 April 2020), *amended in* 85 Fed Reg 40901 (8 July 2020).

[45] California Air Resources Board, "Framework Agreements on Clean Cars" (17 August 2020), online: <ww2.arb.ca.gov/news/framework-agreements-clean-cars>.

[46] See e.g. Coral Davenport, "G.M. Drops Its Support for Trump Climate Rollbacks and Aligns With Biden" *New York Times* (23 November 2020), online: <www.nytimes.com/2020/11/23/climate/general-motors-trump.html>; David Shepardson, "Nissan joins GM in exiting auto group backing Trump" *Automotive News* (4 December 2020), online: <www.autonews.com/regulation-safety/nissan-joins-gm-exiting-auto-group-backing-trump>.

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

[48] 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.

[49] *National Association of Regulatory Utility Commissioners v FERC*, 964 F (3d) 1177 at 1180 (DC Cir 2020).

[50] See *ibid* at 1188–89.

continuing throughout much of 2020, all of the RTO/ISOs subject to FERC jurisdiction filed their proposed amended tariffs with FERC. FERC engaged in an iterative compliance process whereby the agency accepted in part the compliance proposals and directed further compliance filings to modify or refine aspects of each RTO/ISO's proposed tariff amendments. FERC has accepted each RTO/ISO's amended tariffs and, as a result, the rules governing energy storage resources' wholesale market participation have taken effect in all RTO/ISOs except for Southwest Power Pool, Inc. and MISO, whose amended tariffs are slated to take effect in August 2021 and June 2022, respectively.[51]

B) STORAGE AS TRANSMISSION

In August 2020, FERC accepted a proposal from MISO to allow cost recovery for energy storage projects that address transmission-system needs.[52] MISO's so-called "storage as a transmission-only asset" (SATOA) projects are eligible to compete with conventional, poles-and-wires transmission projects in the MISO Transmission Expansion Planning (MTEP) program, can recover costs through MISO's tariff, and need not wait in MISO's years-long interconnection queue.

Consistent with FERC precedent and policy,[53] SATOA projects are ineligible to receive revenues from energy sales in MISO's markets, and any such revenues incidentally received during SATOA operations must be credited back to transmission customers. SATOA operators must ensure that their projects maintain adequate states of charge to fulfill their designated transmission stability functions when called upon.

Other markets are developing their own proposals to promote integration of energy-storage resources as solutions to transmission issues. Notably, PJM Interconnection, L.L.C. (PJM) has been working with stakeholders to develop a proposal for storage as a transmission asset. PJM's Planning Committee is scheduled to address the matter in a special session on February 4, 2021.[54]

A separate proposal from PJM transmission owner Kentucky Power Company to secure cost recovery for its proposed Middle Creek energy-storage project through its transmission rates was rejected by FERC upon a finding that the project was "more analogous to a backup generator serving a subset of retail customers than that of a transmission facility…"[55] FERC affirmed that it would continue to consider whether storage facilities qualify as transmission on a case-by-case basis, and the Middle Creek project — which allowed islanding of retail loads during outages of a 46-kV line — did not serve a transmission function.[56]

IV. PJM CAPACITY MARKET

Since our last report, the battle for the future of the PJM capacity market has continued. As readers may recall, in mid-2018, FERC issued an order acting on a complaint filed by several generators against PJM and a filing by PJM to amend its Open Access Transmission Tariff (Tariff).[57] In the order, FERC found that PJM's Tariff was unjust and unreasonable because it failed to protect the integrity of competition in the PJM capacity market from unreasonable price distortions and cost shifts caused by out-of-market state support for certain generation resources.

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[51] See FERC Docket Nos. ER19-460 (Southwest Power Pool, Inc.'s Order No. 841 compliance docket), ER19-465 (Midcontinent Independent System Operator, Inc.'s Order No. 841 compliance docket), ER19-467 (New York Independent System Operator, Inc.'s Order No. 841 compliance docket), ER19-468 (California Independent System Operator Corp.'s Order No. 841 compliance docket), ER19-469 (PJM Interconnection, L.L.C.'s Order No. 841 compliance docket), ER19-470 (ISO New England, Inc.'s Order No. 841 compliance docket).

[52] *Midcontinent Indep. Sys. Operator*, 172 FERC ¶ 61,132 at para 1 (2020)

[53] See *Utilization of Electric Storage Resources for Multiple Services When Receiving Cost-Based Rate Recovery*, 158 FERC ¶ 61,051 at para 9 (2017); *Western Grid Dev.*, 130 FERC ¶ 61,056 at paras 1–2 (2010).

[54] See PJM Interconnection L.L.C., "Meeting Details" (last visited 3 February 2021), online: <www.pjm.com/forms/registration/Meeting%20Registration.aspx?ID={6D298032-D049-4D3E-A53E-0BE8892AFFC8}>.

[55] *Am. Electric Power Serv. Corp.*, 173 FERC ¶ 61,264 at para 37 (2020) (Kentucky Power Company is an affiliate of American Electric Power Company).

[56] *Ibid* at para 35.

[57] *Calpine Corp. v PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236 (2018).

Following a paper hearing in which dozens of parties participated, FERC issued an order in December 2019 determining a just and reasonable replacement rate and directing PJM to submit a compliance filing to implement the replacement rate (December 2019 Order).[58] The December 2019 Order found that any resource, new or existing, that receives a state subsidy and does not qualify for an exemption, should be subject to the Minimum Offer Price Rule (MOPR).[59] The December 2019 Order also defined state subsidy broadly to include any:

> direct or indirect payment, concession, rebate, subsidy, non-bypassable consumer charge, or other financial benefit that is (1) a result of any action, mandated process, or sponsored process of a state government, a political subdivision or agency of a state, or an electric cooperative formed pursuant to state law, and that (2) is derived from or connected to the procurement of (a) electricity or electric generation capacity sold at wholesale in interstate commerce, or (b) an attribute of the generation process for electricity or electric generation capacity sold at wholesale in interstate commerce, or (3) will support the construction, development, or operation of a new or existing capacity resource, or (4) could have the effect of allowing a resource to clear in any PJM capacity auction.[60]

FERC clarified that the definition would apply to demand response, energy efficiency, and capacity storage resources that participate in the PJM capacity market, and refused to adopt a materiality threshold.[61] In March and June of 2020, PJM submitted proposed revisions to its Tariff to address the requirements of the December 2019 Order.

In October 2020, FERC accepted PJM's compliance filings, in part, rejected PJM's compliance filings, in part, granted waiver regarding certain capacity auction deadlines, and directed PJM to submit a further compliance filing.[62] In particular, FERC accepted certain proposals by PJM that would narrow the applicability of the MOPR. For example, FERC accepted that "sellers involved in bilateral transactions should be allowed to elect the Competitive Exemption where the rights and obligations among multiple off-takers are in equal shares (similar to the *pari passu* arrangements for jointly-owned resources) and where the capacity resource is only entitled to the State Subsidies[63] that are assignable."[64] FERC also accepted PJM's suggestion to exclude "independently evaluated, non-discriminatory, fuel-neutral, competitive state-directed default service auctions" and certain bilateral contracts with self-supply entities from the MOPR.[65] Subject to some modifications, FERC accepted PJM's self-supply exemption, renewable portfolio standard exemption, demand response and energy efficiency resource exemption, competitive exemption, and resource-specific exception.[66] On the issue of PJM's proposed

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[58] *Calpine Corp. v PJM Interconnection, L.L.C.*, 169 FERC ¶ 61,239 (2019), *order on reh'g*, 171 FERC ¶ 61,035 (2020).

[59] December 2019 Order at para 9.

[60] *Ibid*.

[61] *Ibid*.

[62] *Calpine Corp. v PJM Interconnection, L.L.C.*, 173 FERC ¶ 61,061 (2020) (October 2020 Order).

[63] While FERC defined State Subsidy in the December 2019 Order, PJM proposed a slightly modified definition in the compliance filing that FERC accepted in the October 2020 Order. PJM defined State Subsidy as "a direct or indirect payment, concession, rebate, subsidy, non-bypassable consumer charge, or other financial benefit that is a result of any action, mandated process, or sponsored process of a state government, political subdivision or agency of a state or an electric cooperatives formed pursuant to state law, and that (1) is derived from or connected to the procurement of (a) electricity or electric generation capacity sold at wholesale in interstate commerce, or (b) an attribute of the generation process for electricity or electric generation capacity sold at wholesale in interstate commerce; or (2) will support the construction, development, or operation of new or existing Capacity Resource; or (3) could have the effect of allowing a unit to clear in any PJM capacity auction." *Ibid* at paras 37, 41. Additionally, FERC accepted PJM's proposal to exclude seven programs from the definition of State Subsidy. *Ibid* at paras 43, 45.

[64] *Ibid* at para 30.

[65] *Ibid* at paras 69, 87.

[66] *Ibid* at paras 112, 122, 143,165, 280.

default offer price floors for generation-backed demand response, FERC accepted some parts of the compliance filing while rejecting others.[67]

V. 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, as of December 2020, 30 states and the District of Columbia have adopted renewable portfolio standards (RPS) or other policies that require electricity to be procured from certain types of renewable resources.[68] Several states increased their RPS targets in 2020, with several seeking to procure 100 per cent of their power from renewable resources. Those updated RPS targets, in chronological order, are as follows:

- Virginia: 100 per cent by 2045.[69]
- New Jersey: 100 per cent clean energy by 2050.[70]
- Louisiana: 100 per cent by 2050.[71]
- Michigan: 100 per cent carbon-neutral by 2050.[72]
- Connecticut: 100 per cent carbon-free electricity by 2050.[73]
- Arizona: utilities must provide 100 per cent carbon-free energy by 2050.[74]
- There are now 15 jurisdictions that have adopted mandates to procure 100 per cent of their power from carbon-free or renewable resources by mid-century: California; Colorado; Connecticut; District of Columbia; Hawaii; Louisiana; Maine; Michigan; Nevada; New Jersey; New Mexico; New York; Puerto Rico; Virginia; and Washington.[75]

B) THE *VIRGINIA CLEAN ECONOMY ACT*

On April 11, 2020, Virginia Governor Ralph Northam signed the *Virginia Clean Economy Act* (*VCEA*) into law, which seeks to decarbonize Virginia's power grid by, among other things, adopting a RPS program that will require the investor-owned utilities in the state to acquire 100 per cent of their power supply from renewable generation resources by 2050. Meeting this renewable energy procurement mandate will require significant investment in new renewable energy projects, energy storage systems, and the necessary transmission and distribution infrastructure to bring such resources online.

The *VCEA* includes a new, mandatory RPS program that requires all electric utilities and retail electric suppliers to satisfy their load obligations utilizing 100 per cent renewable sources by 2045 for the Dominion Energy Virginia (Dominion) service territory and by 2050 for the service territory of Appalachian Power Company, a subsidiary of American Electric Power (AEP). The *VCEA*'s definition of "renewable energy" explicitly excludes resources that generate electricity using coal, oil, natural gas or nuclear fuel, as well as waste heat from

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[67] *Ibid* at para 229.

[68] U.S. Energy Information Administration, "Summary of Legislation and Regulations Included in the Annual Energy Outlook 2021" (February 2021), online: <www.eia.gov/outlooks/aeo/assumptions/pdf/summary.pdf> (last accessed 8 February 2021).

[69] Kassia Micek, *Commodities 2021: States racing to set goals toward net-zero emission, 100% renewable electricity*, S&P Global Platts (24 December 2020), online: <www.spglobal.com/platts/en/market-insights/latest-news/electric-power/122420-commodities-2021-states-racing-to-set-goals-toward-net-zero-emission-100-renewable-electricity> (last accessed 8 February 2021).

[70] *Ibid*.

[71] *Ibid*.

[72] *Ibid*.

[73] *Ibid*.

[74] *Ibid*.

[75] *Ibid*.

fossil fuel-fired generation facilities. Any entity failing to meet the RPS requirements will be required to make deficiency payments, the proceeds of which will offset administrative costs and fund training programs and renewable energy programs.

The *VCEA* also establishes a schedule by which Dominion and AEP must seek all necessary approvals to construct, acquire or enter into power purchase agreements for specified amounts of generating capacity from solar and onshore wind resources, as well as energy storage capacity. The *VCEA* also requires Dominion and AEP to achieve incremental annual energy efficiency savings.

Recognizing that the cost of developments and investments to comply with the new RPS requirements will be passed through by the investor-owned utilities to their ratepayers, the *VCEA* includes some provisions designed to protect ratepayers within Virginia, including provisions that give the Virginia State Corporation Commission additional oversight over utilities' renewable energy project costs. The *VCEA* also requires Dominion and AEP to conduct competitive solicitations for energy, capacity and environmental attributes to procure at least 35 per cent of their new RPS requirements from third parties. Consequently, the legislation likely will facilitate competition in the development of new renewables projects by requiring that a significant amount of those projects be developed by entities other than Virginia's existing, incumbent investor-owned utilities, Dominion and AEP.

While its ultimate impact remains to be seen, the *VCEA* likely will have significant implications for energy infrastructure investments in Virginia and in nearby states, including ancillary infrastructure. As the state's reliance on intermittent renewable generation increases, Virginia — and the interstate power system of which it is an integral part — likely will need to rely on energy storage resources, as well as upgraded or expanded transmission and distribution system infrastructure, to maintain reliability.

Implementation of the *VCEA* remains ongoing, but the Virginia State Corporation Commission has begun acting in accordance with the *VCEA*, as evidenced by a recent final rule on energy storage issued in December 2020.[76] The rule seeks to implement the *VCEA*'s energy storage target of 3100 MW by 2035. To that end, the rule sets interim targets of 275 MW by 2025 and 1,075 MW by 2030 for the state's largest utilities and sets a requirement that 35 per cent of the procurement capacity must come from third parties.

C) MASSACHUSETTS CLEAN PEAK STANDARD

Massachusetts' *Advance Clean Energy Act of 2018*[77] created the Clean Peak Energy Portfolio Standard (Clean Peak Standard), a first-of-its kind policy designed to provide incentives to clean energy technologies that can either supply electricity or reduce demand during peak demand periods. The final regulations for the Clean Peak Standard took effect on August 7, 2020.

The Clean Peak Standard requires a percentage of electricity delivered during peak hours to come from certain eligible resources (Clean Peak Resources). To that end, the Clean Peak Standard requires retail electric suppliers in Massachusetts to procure a minimum percentage of their total annual electricity sales to Massachusetts end-use customers from Clean Peak Resources by purchasing Clean Peak Energy Certificates (CPECs). The Act provides the qualification requirements for Clean Peak Resources, valuation of CPECs and purchasing requirements for CPECs by retail electric suppliers.

The Department of Energy Resources (DOER) created four categories of Clean Peak Resources, each of which must generate, dispatch, or discharge electricity to the electric distribution system in Massachusetts: (1) new renewable energy generation resources that come online after January 1, 2019; (2) existing renewable energy generation resources that add new energy storage capacity of at least 25 per cent of the renewable energy generation resources nameplate capacity, with a nominal useful energy capacity of at least four hours at the nominal rated power; (3 new energy storage that charges from renewables; and (4) demand response resources

[76] See *Order Adopting Regulations*, Case No. PUR-2020-00120, Va State Corp Comm'n (18 December 2020).

[77] 2018 Mass Acts Ch 227.

(e.g., behind-the-meter energy storage that reduces energy consumption).[78]

Resources participating in the program will earn CPECs for every megawatt hour (MWh) of electricity they produce, or reduce, coincident with Seasonal Peak Periods,[79] with certain resources potentially qualifying for multipliers that boost the number of CPECs they receive.[80] Energy storage systems that are not co-located with renewable energy systems may generally be required to charge during specific hours, depending on whether they are charged from solar resources or wind resources. The timing of the Seasonal Peak Periods and charging windows is designed to send a price signal to pair renewables and energy storage and shift the use of renewable production to peak demand periods.

Under the program, all retail electric suppliers in Massachusetts will be required to procure a minimum percentage of their total annual electricity sales to Massachusetts end-use customers from Clean Peak Resources by either purchasing CPECs or retiring earned CPECs. The minimum requirement increases over time. The minimum Clean Peak Standard started at 1.5 per cent of retail electricity sales in 2020, and rose to 3 per cent for 2021. The minimum increases at least 1.5 per cent each year thereafter, to at least 16.5 per cent by 2030 and 46.5 per cent by 2050.[81] Unless extended by law, the program will expire in 2050.[82]

Each distribution company must competitively procure 30 per cent of the total market obligation of retail electric suppliers in a given compliance year through long-term contracting, subject to adjustment upward or downward depending on the market response — i.e., if market supply is below 50 per cent of the Clean Peak Standard's minimum requirement, DOER may increase the next year's long-term contract procurement requirement by up to 5 per cent, and where market supply is greater than 70 per cent of the Clean Peak Standard's minimum requirement, DOER may decrease the following year's long-term contract procurement by up to 15 per cent.[83] To keep consumer costs down, each retail electric supplier may satisfy the remainder of the Clean Peak Standard's minimum requirement via an alternative compliance payment by the retail electric supplier.[84]

D) WHOLESALE MARKET ACCESS FOR AGGREGATION OF DISTRIBUTED ENERGY RESOURCES

On September 17, 2020, FERC issued its long-awaited, landmark final rule (Order No. 2222) concerning the participation of distributed energy resource (DER) aggregations in the wholesale energy, capacity, and ancillary services markets administered by RTO/ISOs.[85] FERC found that the existing RTO/ISO market rules are unjust and unreasonable because they present barriers to DER aggregations'

[78] 225 CMR 21.05(1)(a) (2020).

[79] "Seasonal Peak Period" means the "time periods during the Clean Peak Seasons when the Net Demand for electricity is typically highest. The Seasonal Peak Periods shall not be less than one (1) hour and not longer than four (4) hours each Business Day in any Clean Peak Season; will be determined on a prospective basis no later than six (6) months prior to the next Compliance year; shall be revised no more than once every three (3) years; and the [DOER] reserves the discretion to exempt existing resources from adjustments to the Seasonal Peak Periods in effect at the time of their qualification." 225 CMR 21.02.

[80] 225 CMR 21.05(6).

[81] 225 CMR 21.07(1)(a).

[82] 225 CMR 21.07(1)(b).

[83] 225 CMR 21.05(8)(a)-(b).

[84] 225 CMR 21.08(3). The initial Alternative Compliance Payment (ACP) rate is $45.00 per MWh through the 2024 compliance year, and it will decline by $1.54 per MWh each compliance year thereafter through 2050, or until the ACP rate reaches $4.96 per MWh. The rate will then remain at $4.96 per MWh for the duration of the Clean Peak Standard program. Like the long-term contract requirement, this automatic reduction may be adjusted based on market supply.

[85] *Participation of Distributed Energy Resource Aggregations in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Order No. 2222, 172 FERC ¶ 61,247 (2020). FERC defined DER as "any resource located on the distribution system, any subsystem thereof or behind a customer meter." *Ibid* n.1. Such resources "may include, but are not limited to, electric storage resources, distributed generation, demand response, energy efficiency, thermal storage, and electric vehicles and their supply equipment." *Ibid*.

participation in those markets, which thereby reduces competition and fails to ensure that the markets produce just and reasonable rates.[86] Accordingly, Order No. 2222 required each RTO/ISO to revise its tariff to ensure that the market rules set forth therein facilitate the participation of DER aggregations.[87]

More specifically, in order to remove barriers to DER aggregations' market participation, FERC directed each RTO/ISO to "establish [DER] aggregators as a type of market participant that can register [DER] aggregations under one or more participation models in the RTO/ISO tariff that accommodate the physical and operational characteristics of each [DER] aggregation."[88] At nearly 300 pages in length, Order No. 2222 is a lengthy and highly technical rule. Among other things, the rule requires each RTO/ISO's DER aggregation rules to establish certain minimum size requirements and address locational requirements, distribution factors and bidding parameters, information and data requirements, metering and telemetry requirements, modifications to a DER aggregation, and requirements for coordination among various entities.[89]

In one of the more controversial aspects of Order No. 2222, FERC declined to include an "opt-out" mechanism, *i.e.* a mechanism for states and other relevant electric retail authorities to prohibit DERs from participating in an RTO/ISO market through a DER aggregation.[90] However, FERC did choose to establish an "opt-in" mechanism for utilities that distributed 4 million MWh or less in the previous fiscal year.[91] Pursuant to that mechanism, customers of such utilities may not participate in DER aggregations unless the relevant electric retail regulatory authority opts-in, by affirmatively allowing such customers to participate in DER aggregations.[92] Further, FERC expressly stated that Order No. 2222 does not "preclude or limit state or local regulation of: retail rates; distribution system planning, distribution system operations, or distribution system reliability; [DER] facility siting; and interconnection of resources to the distribution system that are not subject to [FERC] jurisdiction."[93]

Several entities have requested rehearing of Order No. 2222, raising a broad range of issues, from requests for clarification of certain technical implementation requirements to whether FERC misapprehended its jurisdiction under the *FPA*. It remains possible that FERC could choose to alter Order No. 2222 on rehearing, and/or that one or more entity could seek judicial review of Order No. 2222.

Aside from the regulatory uncertainty associated with the requests for rehearing and potential petitions for judicial appeal, there is significant uncertainty concerning how each RTO/ISO will implement Order No. 2222. Developing the RTO/ISOs' compliance proposals will entail a significant undertaking with robust stakeholder involvement and debate. Further, FERC gave each RTO/ISO discretion to tailor its compliance approach based on its specific regional needs. Thus, the RTO/ISOs' stakeholder processes could produce a wide range of potential market rules. FERC required each RTO/ISO to submit its compliance proposal within 270 days of Order No. 2222's publication date in the *Federal Register*, which makes them due by July 19, 2021.[94] Depending on whether, or to what extent, FERC requires additional, subsequent compliance filings to remedy perceived shortcomings in the initial filings, the compliance process for Order No. 2222 could take the remainder of 2021, and potentially could stretch into 2022.

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[86] *Ibid* at paras 26–28.

[87] *Ibid* at para 29.

[88] *Ibid* at para 6.

[89] *Ibid* at para 8.

[90] See *ibid* at para 56.

[91] *Ibid* at para 64.

[92] *Ibid*.

[93] *Ibid* at para 61.

[94] *Ibid* at para 360; see also Department of Energy, *Participation of Distributed Energy Resource Aggregations in Markets Operated by Regional Transmission Organizations and Independent System Operators; Notice of Correction in Federal Register of Compliance Deadline*, 85 Fed Reg 70143 (4 November 2020).

VI. CLIMATE CHANGE AND RELATED MATTERS

A) WILDFIRES AND PG&E BANKRUPTCY

Northern California utility Pacific Gas & Electric (PG&E) filed for bankruptcy protection in January 2019,[95] in part due to billions of dollars in liability from catastrophic wildfires in the State of California alleged to have been started by faulty PG&E equipment during dry seasons. As part of the proposed bankruptcy plan, PG&E attempted to shed billions in losses under power purchase agreements (PPA) for renewable energy that were executed at a time when renewable energy was priced significantly higher. In January 2019, FERC issued orders that PG&E could not back out of PPAs without the regulator's consent.[96] In June 2019, the bankruptcy court issued a declaratory judgment that the bankruptcy court — not FERC — could determine the fate of the PPAs under its less stringent standard for determining whether a contract can be broken.[97] Allowing rejection of the PPAs could have left renewable companies with significantly less than the full value of their contracts, creating uncertainty for future viability, given PG&E's position as the largest offtaker of renewable energy in California. FERC appealed the bankruptcy court's decision to the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit). Ultimately, PG&E assumed the PPAs through its reorganization plan, and PG&E emerged from bankruptcy in July 2020.[98] In October 2020, the Ninth Circuit vacated FERC's January 2019 orders, given the underlying dispute over the contracts was moot, as well as the bankruptcy court's June 2019 declaratory judgment, teeing up the possibility of future litigation regarding the tension between FERC and bankruptcy court authority with respect to wholesale power contracts.[99]

B) METHANE EMISSIONS

In an effort to roll back Obama-era methane regulations known as the 2016 Waste Prevention Rule, the U.S. Department of the Interior's Bureau of Land Management (BLM) finalized a replacement "Revision Rule" in September 2018.[100] The Revision Rule rolled back certain requirements of the 2016 Waste Prevention Rule seeking to reduce regulatory requirements and reduce the cost of compliance for oil and gas operators. On July 15, 2020 the Revision Rule was vacated by the U.S. District Court for the Northern District of California.[101] BLM has appealed this decision, which remains pending before the Ninth Circuit.[102] Further, on October 8, 2020, the U.S. District Court for the District of Wyoming vacated the 2016 Waste Prevention Rule, which BLM has not appealed.[103]

In addition, in September 2020, EPA finalized two rules — the "Review Rule" and "Reconsideration Rule" — that amend to New Source Performance Standards under the *Clean Air Act* known as Subpart OOOOa for new oil and gas operations on private lands. Combined, the Review Rule and Reconsideration Rule reconsider and roll back Obama-era limitations on methane and volatile organic compounds.[104]

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[95] PG&E, News Release, "Files for Reorganization Under Chapter 11" (29 January 2019) online: <www.pge.com/en/about/newsroom/newsdetails/index.page?title=20190129_pge_files_for_reorganization_under_chapter_11>.

[96] See *NextEra Energy, Inc. v Pac. Gas & Elec. Co.*, 166 FERC ¶ 61,049 at para 28 (2019); *Exelon Corp. v Pac. Gas & Elec. Co.*, 166 FERC ¶ 61,053 at para 25 (2019).

[97] *In re PG&E Corporation*, No. 19-30088-DM (Bankr ND Cal) (7 June 2019), (Memorandum Decision on Action for Declaratory and Injunctive Relief), online (pdf): <www.courthousenews.com/wp-content/uploads/2019/06/pge-ferc-ruling.pdf>.

[98] See e.g. Ivan Penn, "PG&E, Troubled California Utility, Emerges from Bankruptcy", *New York Times* (1 July 2020), online: <www.nytimes.com/2020/07/01/business/energy-environment/pge-bankruptcy-ends.html>.

[99] *Pac. Gas & Elec. Co. v FERC et al.*, No. 19-71615 (7 October 2020), online (pdf): <cdn.ca9.uscourts.gov/datastore/memoranda/2020/10/07/19-71615.pdf>.

[100] Department of the Interior, *Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements*, Final Rule, 83 Fed Reg 49184 (28 September 2018).

[101] *California v Bernhardt*, consolidated with *Sierra Club v Bernhardt*, No. 4:18-cv-05712-YGR (ND Cal.).

[102] *California v Zinke*, Nos. 20-16793, 20-16794, 20-16801 (9th Cir).

[103] *Wyoming v U.S. Dep't of the Interior*, No. 2:16-CV-00285 (D Wyo); consolidated with *Western Energy Alliance v Jewell*, 2:16-CV-0280 (D Wyo).

[104] EPA, *Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Reconsideration*, Final Rule, 85 Fed Reg 57398 (15 September 2020).

In response to industry pushback, EPA granted revised requirements for fugitive emissions, standards for well site pneumatic pumps, and certifications for closed vent systems, and also incorporated provisions to streamline implementation of the rule. A number of states and municipalities and a coalition of environmental groups challenged the rules, which remain in effect during the pending litigation.[105]

C) CARBON CAPTURE, UTILIZATION, AND SEQUESTRATION

Federal tax incentives for carbon capture and sequestration (CCS) along with California's Low Carbon Fuel Standards (LCFS) CCS protocol have sparked increased interest in CCS projects over the past year. Potential tax-equity investors had been awaiting guidance around key aspects of the federal income tax credit for CCS projects under section 45Q of the Internal Revenue Code (45Q tax credit) before committing significant capital to CCS. That guidance has now been released. The Department of the Treasury and the Internal Revenue Service issued two sets of initial guidance covering tax-equity structuring and 45Q tax credit qualification in February 2020.[106] Proposed regulations covering many of the other areas in which the CCS industry had asked for guidance were issued in May 2020,[107] and a final set of regulations was issued in January 2021.[108] Section 45Q provides a dollar-for-dollar reduction in federal income tax liability for each metric ton of "qualified carbon oxide" captured at a qualifying plant and then permanently buried, used as a tertiary injectant in an enhanced oil or natural gas recovery project, or used in another process that would result in the permanent sequestration of the carbon oxide. The LCFS program is a market-based policy that sets annual carbon intensity benchmarks on transport fuels sold, supplied or offered for sale in California. LCFS credits are available to projects that capture and sequester CO_2 and that have the requisite nexus to the California transportation fuels market. The 45Q tax credits can be stacked with California's LCFS credits, thereby increasing the incentives for projects eligible for both programs. The incentives are increasingly being seen as an important tool in reducing GHG emissions and achieving the Paris Agreement goals (i.e. to limit global warming to below 2°C, compared to pre-industrial levels). Interest in CCS projects is expected to increase as other states consider implementing low carbon fuel standard programs similar to the California LCFS (e.g., Oregon) and incorporate CCS projects into statewide action plans to meet carbon emission reduction targets (e.g., Wyoming, Colorado, Louisiana).

VII. FERC AND CFTC ENFORCEMENT

The 2020 fiscal year was a somewhat down year for FERC enforcement activities. According to FERC's 2020 Report on Enforcement (2020 Annual Report), issued in November 2020, Enforcement Staff opened six new investigations — a decrease from the twelve investigations opened in 2019.[109] Similarly, FERC's penalty and disgorgement totals of $437,500 and $115,876,[110] respectively, were significantly less than the $7.4 million and $7 million assessed in 2019.[111] According to the 2020 Annual Report, while the Office of Enforcement "continued its typical investigations, audits, and surveillance activities" in fiscal year 2020, "it also took steps to help regulated entities manage their potential enforcement and compliance-related obligations in response to the unprecedented

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[105] *California v Wheeler*, No. 20-1357 (DC Cir); *Envtl. Defense Fund v Wheeler*, No. 20-01359 (DC Cir).

[106] IRS, "Guidance on Structuring Transactions" (Rev. Proc. 2020-12), online (pdf): <www.irs.gov/pub/irs-drop/rp-20-12.pdf>; IRS, "Beginning of Construction for the Credit for Carbon Oxide Sequestration under Section 45Q" (Notice 2020-12), online (pdf): <www.irs.gov/pub/irs-drop/n-20-12.pdf>.

[107] Department of the Treasury, *Credit for Carbon Oxide Sequestration*, Notice of proposed rulemaking, 85 Fed Reg 34050 (2 June 2020).

[108] Final regulations, *Credit for Carbon Oxide Sequestration*, 86 Fed Reg 4728 (15 January 2021).

[109] FERC, "2020 Report on Enforcement" (19 November 2020) at 31, online (pdf): <www.ferc.gov/sites/default/files/2020-11/2020%20Annual%20Report%20on%20Enforcement.pdf>.

[110] *Ibid* at 7.

[111] FERC, "2019 Report on Enforcement" (21 November 2019) at 8, online (pdf): <cms.ferc.gov/sites/default/files/2020-05/11-21-19-enforcement.pdf>.

COVID-19 pandemic."[112] The accommodations to regulated entities included:

> [w]orking with the subjects of continuing non-public investigations and audits, and entities with continuing compliance obligations associated with completed enforcement cases, to provide flexibility with discovery-related or other deadlines through July 31, 2020; [s]uspending the initiation of new audits until July 31, 2020; and [p]ostponing contacting entities regarding surveillance inquiries, except those involving market behavior that could result in significant risk of harm to the market.[113]

In 2020, FERC also was engaged in federal court litigation stemming from enforcement actions commenced in prior years. For example, on October 25, 2019, FERC approved a penalty order against Vitol, Inc. (Vitol) and Federico Corteggiano (Corteggiano), who traded energy-related products for the company.[114] The order imposed a civil penalty of $1,515,738 and disgorgement of $1,227,143, plus interest, against Vitol and a $1,000,000 civil penalty against Corteggiano.[115] When the parties failed to pay the penalties and disgorgement within the 60-day payment period prescribed in the *FPA*,[116] FERC brought an action in the United States District Court for the Eastern District of California seeking an order affirming and enforcing its October 25 order.[117] In March 2020, Vitol and Corteggiano filed motions to dismiss, arguing that FERC's complaint was time-barred by the five-year statute of limitations set forth in Section 2462 of Title 28 of the U.S. Code and that FERC failed to state a claim for a manipulation violation.[118] According to Vitol and Corteggiano, because the trading underlying the allegations occurred between October 28, 2013 and November 1, 2013 and the parties entered into a one-year tolling agreement, FERC was required to file the complaint on or before October 28, 2019.[119] Their motions to dismiss came less than a month after the U.S. Court of Appeals for the Fourth Circuit ruled that the five-year statute of limitations to enforce manipulation penalties commences when the enforcement target fails to pay the penalties, as that is the date when all the *FPA*'s statutory prerequisites to filing suit in district court have been satisfied,[120] a decision the defendants attempted to characterize as "poorly reasoned."[121]

In contrast to FERC's relatively down year in terms of enforcement actions, the Commodity Futures Trading Commission (CFTC) filed the most enforcement actions in the CFTC's history in fiscal year 2020. According to the CFTC Division of Enforcement's annual report for fiscal year 2020, the CFTC's Division of Enforcement filed 113 enforcement actions, the most of any year in the CFTC's history.[122] And the monetary relief ordered during that period, exceeding $1.3 billion, was the fourth largest in CFTC history.[123]

While many of these proceedings involved non-energy commodities, one notable proceeding settled in December 2020 involved Vitol, which was charged with manipulative and deceptive conduct. The CFTC found that, among other things, Vitol attempted to manipulate certain U.S. price assessment benchmarks published by S&P Global Platts

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[112] FERC, *supra* note 109 at 5.

[113] *Ibid* at 5–6.

[114] *Vitol Inc. and Federico Corteggiano*, 169 FERC ¶ 61,070 at para 1 (2019).

[115] *Ibid*.

[116] 16 USC § 823b(d)(3)(B).

[117] *FERC v Vitol Inc. and Federico Corteggiano*, Complaint, Case No. 2:20-cv-00040-KJM-AC (6 January 2020).

[118] *FERC v Vitol Inc. and Federico Corteggiano*, Vitol, Inc. Notice of Motion and Motion to Dismiss, Case No. 2:20-cv-00040-KJM-AC (6 March 2020) [Vitol Motion to Dismiss].

[119] *Ibid*.

[120] *FERC v Powhatan Energy Fund*, LLC, 949 F (3d) 891 (4th Cir 2020).

[121] Vitol Motion to Dismiss at 3.

[122] CFTC, "FY 2020 Division of Enforcement Annual Report" at 1 (1 December 2020), online (pdf): <www.cftc.gov/media/5321/DOE_FY2020_AnnualReport_120120/download>.

[123] *Ibid*.

relating to physical fuel oil products in order to benefit its related physical and derivatives positions.[124] The Department of Justice also brought charges against Vitol, alleging conspiracy to violate the *Foreign Corrupt Practices Act*. Vitol settled with the CFTC, neither admitting nor denying the CFTC's findings, except to the extent that Vitol admits those findings in any related action against Vitol by, or any agreement with, the Department of Justice or any other governmental agency or office.[125] The Vitol proceeding serves as a stark reminder of the potential for multi-agency investigations for efforts to rig or otherwise manipulate energy markets.

VIII. FERC AND BANKRUPTCY COURT JURISDICTION REGARDING NATURAL GAS AND OIL PIPELINE TRANSPORTATION CONTRACTS

Numerous challenges, including decreased demand resulting from the onset of the COVID-19 pandemic, prompted high numbers of independent oil and natural gas producers to file for bankruptcy in 2020. Parties to several of these cases, (including the bankruptcies of Ultra Petroleum Corporation (Ultra), Chesapeake Energy Corporation (Chesapeake), Gulfport Energy Corporation (Gulfport), and Extraction Oil & Gas, Inc. (Extraction) raised a significant jurisdictional question — whether debtors in bankruptcy should be compelled to obtain FERC authorization, in addition to authorization from a bankruptcy court, in order to reject a FERC-jurisdictional agreement for interstate natural gas or oil pipeline transportation service.[126] In these proceedings, FERC, joined by numerous pipelines companies, strongly advocated its view that debtors seeking to reject FERC-jurisdictional transportation agreements must obtain FERC approval under the *NGA* or *Interstate Commerce Act* (*ICA*), as applicable. Conversely, the bankruptcy courts hearing these arguments ruled that debtors need not obtain FERC authorization to reject FERC-jurisdictional agreements in bankruptcy.[127]

While this jurisdictional issue has been litigated in the past in the context of FERC-jurisdictional agreements under the *FPA*, there had been little litigation regarding FERC-jurisdictional agreements under the *NGA* and *ICA* prior to 2020. This changed with a proceeding involving Ultra and Rockies Express Pipeline LLC (REX). Prior to Ultra's bankruptcy filing, REX filed a petition with FERC seeking a declaratory ruling that Ultra could not reject its FERC-jurisdictional agreement with REX without FERC approval under the *NGA* and the *Mobile-Sierra* doctrine.[128] However, prior to FERC acting on REX's petition, Ultra filed for bankruptcy protection in the United States Bankruptcy Court for the Southern District of Texas. After the bankruptcy court informed REX that continuing to pursue its petition at FERC would violate the bankruptcy code's automatic stay provision, REX withdrew its FERC petition. Following extensive discovery and a multi-day hearing, the bankruptcy court granted Ultra's motion to reject and found, among other things, that Ultra did not need to obtain authorization from FERC to reject its FERC-jurisdictional agreement with REX in bankruptcy.[129] The bankruptcy court followed

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[124] *In the matter of Vitol Inc.*, Order Instituting Proceedings Pursuant to Section 6(c) and 6(d) of the Commodity Exchange Act, Making Findings, and Imposing Remedial Sanctions, CFTC Docket No. 21-01 at 6 (3 December 2020).

[125] *Ibid* at 1.

[126] As background, Section 365 of the Bankruptcy Code allows a trustee or a debtor-in-possession in bankruptcy to "assume or reject any executory contract". 11 U.S.C. § 365(a). Thus, debtors have the ability to determine "whether the contract is a good deal for the estate going forward." *Mission Prod. Holdings, Inc. v. Tempnology*, LLC, 139 S Ct 1652 at 1658 (2019). Bankruptcy courts generally approve the debtor's decision regarding whether to reject or assume the executory contract under the deferential business judgment standard. *Ibid.* The Bankruptcy Code explicitly states that rejection of a contract "constitutes a breach of such contract." 11 U.S.C. § 365(g).

[127] See *In re Ultra Petroleum Corp.*, 621 BR 188 at 198 (Bankr SD Tex 21 August 2020) (concluding that "the FERC approved contract at issue here falls within the broad scope of 'all executory contracts.' Thus, the Agreement is subject to rejection." (internal citations omitted)); *In re Extraction Oil & Gas, et al.*, 622 BR 608 at 614 (Bankr D Del 2 November 2020) ("There is no prohibition on or limitation against rejecting a FERC approved contract.").

[128] Petition for Declaratory Order and Request for Expedited Action of Rockies Express Pipeline LLC, *Rockies Express Pipeline LLC*, Docket No. RP20-822-000 (filed 29 April 2020). Under the *Mobile-Sierra* doctrine, FERC is the only entity that may modify or abrogate filed rates, and it only may do so upon a finding that the filed rate harms the public interest. See *United States Pipe Line Co. v Mobile Gas Serv. Corp.*, 350 US 332 at 339 (1956); *Fed. Power Comm'n v Sierra Pac. Power Co.*, 350 US 348 at 353 (1956).

[129] *In re Ultra Petroleum*, No. 20-32631, 2020 WL 4940240 (Bankr SD Tex 2020).

controlling Fifth Circuit precedent in *In re Mirant Corp.*[130] for its holding that rejection in bankruptcy does not equate to a modification or abrogation of a FERC-jurisdictional agreement and that, therefore, the *Mobile-Sierra* doctrine is not implicated.

Later in 2020, FERC had an opportunity to issue an order addressing the jurisdictional question in response to a petition for declaratory order filed by ETC Tiger Pipeline, LLC (ETC Tiger) in anticipation of a bankruptcy filing that ETC Tiger anticipated Chesapeake would make.[131] In its order granting ETC Tiger's petition, FERC found that it has concurrent jurisdiction with the bankruptcy courts under *NGA* sections 4 and 5 with respect to ETC Tiger's transportation agreements with Chesapeake and that the approval of the bankruptcy court *and* FERC would be necessary if Chesapeake were to seek to reject the agreements in bankruptcy.[132] Chesapeake subsequently filed for bankruptcy, and filed a motion to reject certain of its agreements with ETC Tiger.

FERC later reiterated its holdings from the ETC Tiger proceeding in four proceedings involving Gulfport and various interstate natural gas pipeline companies.[133] However, in the Gulfport proceedings, FERC went a step further and established proceedings under the *NGA* and the *Mobile-Sierra* doctrine to determine if the contracts at issue in each proceeding could be modified or abrogated, including by rejection in bankruptcy. In each of these proceedings, FERC found that there had been no demonstration under the *Mobile-Sierra* doctrine that modification or abrogation of the agreements at issue was necessitated by the public interest.[134] Gulfport subsequently filed for bankruptcy, and filed motions to reject some of the agreements at issue in the FERC proceedings described above. Many of Gulfport's motions to reject remain pending.

In addition, a bankruptcy court addressed this jurisdictional challenge for the first time in the context of FERC-jurisdictional interstate oil transportation service agreements under the *ICA*. In the Extraction bankruptcy proceeding, Extraction sought to reject FERC-jurisdictional transportation agreements with multiple interstate oil pipeline companies, while the oil pipeline companies and FERC argued that FERC approval must be obtained under the *ICA* and the *Mobile-Sierra* doctrine. Ultimately, relying on reasoning similar to what was seen in the Ultra and Chesapeake cases, the Bankruptcy Court for the District of Delaware found that FERC authorization was not necessary for Extraction to reject its FERC-jurisdictional agreements with interstate oil pipelines in bankruptcy.[135]

IX. CARBON PRICING PROPOSED POLICY STATEMENT

On October 15, 2020, FERC issued a Notice of Proposed Policy Statement (Proposed Policy Statement) on Carbon Pricing in Organized Wholesale Electricity Markets.[136] The Proposed Policy Statement clarified FERC's jurisdiction over rules that incorporate a state-determined carbon price in markets administered by RTO/ISOs, and encouraged RTO/ISO efforts to explore the establishment of such rules pursuant to section 205 of the *FPA*.[137] FERC acknowledged that numerous states have

[130] 378 F (3d) 511 (5th Cir 2004).

[131] Petition for Declaratory Order and Request for Expedited Action of ETC Tiger Pipeline, LLC, *ETC Tiger Pipeline, LLC*, Docket No. RP20-881-000 (filed 19 May 2020); *ETC Tiger Pipeline, LLC*, 171 FERC ¶ 61,248 (2020).

[132] *ETC Tiger Pipeline, LLC*, 171 FERC ¶ 61,248 at para 20 (2020).

[133] See e.g., *Rockies Express Pipeline LLC*, 172 FERC ¶ 61,279 at para 27 (2020); *Midship Pipeline Co., LLC*, 173 FERC ¶ 61,011 at para 29–30 (2020); *ANR Pipeline Co. et al.*, 173 FERC ¶ 61,018 at para 27–28 (2020); *Rover Pipeline LLC*, 173 FERC ¶ 61,019 para 25–26 (2020).

[134] See e.g., *Rockies Express Pipeline, LLC*, 173 FERC ¶ 61,099 at para 1 (2020); *Midship Pipeline Co., LLC*, 173 FERC ¶ 61,130 at para 1 (2020); *ANR Pipeline Co. et al.*, 173 FERC ¶ 61,131 at para 1 (2020); *Rover Pipeline LLC*, 173 FERC ¶ 61,133 at para 1 (2020).

[135] *In re Extraction Oil & Gas, Inc.*, No. 20-11548, 2020 WL 6389252 (Bankr D Del 2020).

[136] *Carbon Pricing in Organized Wholesale Electricity Markets*, Notice of Proposed Policy Statement, 173 FERC ¶ 61,062 (2020).

[137] *Ibid* at para 1.

commenced decarbonization initiatives,[138] and that carbon pricing has emerged as a key market-based tool in states' efforts to reduce GHG emissions in the electricity sector.[139]

The Proposed Policy Statement clarified that FERC has jurisdiction over certain "RTO/ISO market rules that incorporate a state-determined carbon price in those markets."[140] FERC did not categorically assert jurisdiction over such market rules in all instances, but rather explained that such rules "can fall within [FERC's] jurisdiction as a practice affecting wholesale rates."[141] FERC explained that, in *EPSA*, the Supreme Court set forth a two-pronged test for evaluating whether FERC action is within its jurisdiction to regulate practices affecting wholesale rates: (1) the regulated activity must "directly affect" wholesale rates; and (2) the regulated activity must not be a matter that *FPA* section 201(b) reserves exclusively to the states.[142] FERC reasoned that wholesale market rules that incorporate a state-determined carbon price can meet the first prong because such rules, like the rules at issue in *EPSA*, "could, depending on the particular circumstances, govern how resources participate in the RTO/ISO market, how market operators dispatch those resources, and how those resources are ultimately compensated."[143] FERC explained that such rules can satisfy the second prong because rules incorporating state-determined carbon prices in the wholesale markets do not diminish the authority that the *FPA* reserves to the states, or "otherwise displace state authority, including state authority over generation facilities."[144] Thus, under the Proposed Policy Statement, states retain the authority to enact and oversee carbon prices.[145]

Through the Proposed Policy Statement, FERC expressly encouraged RTO/ISOs and their stakeholders to consider market rules that incorporate state carbon prices. FERC believes that state carbon pricing rules could help increase the efficiency of wholesale markets.[146] FERC made clear certain important limitations of the Proposed Policy Statement. FERC explained that the Proposed Policy Statement addresses only filings made pursuant to *FPA* section 205, and not proceedings initiated pursuant to *FPA* section 206.[147] In other words, FERC declined to take a position on whether it could, or would, *require* the RTO/ISOs to change their market rules to incorporate carbon prices pursuant to *FPA* section 206. FERC further made clear that it is "not an environmental regulator," but instead is tasked with regulating the rules by which generating resources recover the costs of complying with federal and state environmental regulations.[148] FERC sought comments on the Proposed Policy Statement and on five specific considerations to take into account with carbon prices. Numerous entities timely filed comments and reply comments.[149]

X. *PURPA* REFORMS

In July 2020, FERC finalized a significant reform of regulations and policies that

[138] In the Proposed Policy Statement, FERC uses "carbon pricing" to "include both 'price-based' methods adopted by states that directly establish a price on GHG emissions as well as 'quantity-based' approaches adopted by states that do so indirectly." *Ibid* at para 3.

[139] *Ibid* at para 2.

[140] *Ibid* at para 7.

[141] *Ibid* at para 8.

[142] *Ibid* at paras 9, 11 (citing *FERC v Elec. Power Supply Ass'n*, 136 S. Ct. 760 at 774–75 (2016), *as revised* (28 January 2016) (*EPSA*)).

[143] 173 FERC ¶ 61, 062 at para 10.

[144] *Ibid* at para 12.

[145] *Ibid*.

[146] *Ibid* at para 15.

[147] *Ibid* at para 1, n.2.

[148] *Ibid* at paras 4–5.

[149] See Docket No. AD20-14-000.

implement the *Public Utility Regulatory Policies Act of 1978* (*PURPA*),[150] a statute enacted in the midst of domestic energy crises in order to promote new generation from independent and unconventional sources.

PURPA aimed to overcome barriers to entry in vertically integrated utility markets by (i) guaranteeing owners and operators of so-called "qualifying facilities" (QFs, which include certain cogeneration and renewable generators, as well as those utilizing certain fuel wastes) the ability to interconnect to an electric utility's system, (ii) requiring electric utilities to purchase their output at up to an "avoided cost" rate (the cost the electric utility would have incurred to acquire the next unit of generating capacity; avoided cost is established by state regulators), (iii) providing that an electric utility could incur a legally enforceable obligation (LEO) to purchase from a QF even if the utility refused to enter into a formal contract, (iv) mandating that electric utilities must supply backup power to QFs on a non-discriminatory basis, and (v) providing QFs exemptions from aspects of the *FPA*, the *Public Utility Holding Company Act* (*PUHCA*), and certain state laws and regulations that govern utility rates and financial matters, among other protections.

Since *PURPA* was first enacted, modest changes have been made to the statute, including that FERC gained the flexibility to determine that QFs in certain markets have non-discriminatory market access, and therefore electric utilities need not be required to purchase their outputs. But most of *PURPA*'s statutory requirements have remained in place. Accordingly, FERC's new rule preserves many of the basic protections set forth in *PURPA*, while attempting to respond to concerns from electric utilities, non-QF independent power producers, and some state utilities regulators that *PURPA*'s provisions are outdated and unreasonably favourable to QFs.

The rule, which became effective December 31, 2020, revises FERC's *PURPA*-implementation regulations in five main areas:

- New flexibility for states in setting the avoided-cost rates for QFs. Under the new rule, the energy rates under a contract or other LEO may change over the course of the term or may be based on project rates over the course of the term (rather than based on avoided cost at time the contract or LEO is established). Sales at as-available rates (an alternative to fixed-rate sales under *PURPA*) may use locational marginal prices established in certain restructured markets. States may also set as-available energy avoided costs at competitive market hubs or use natural-gas-price indices and specified heat rates. States also gain the flexibility to set energy and capacity rates through competitive solicitations.

- New "same-site" presumptions. Previously, owners or operators of renewable and waste-fueled QFs reported the capacity of affiliated QFs within one mile using the same generating technology (the one-mile rule) for purposes of determining whether they were at the same site and therefore subject to aggregation for purposes of *PURPA*'s 80-MW size limit. FERC's new rule replaced the one-mile rule with a series of presumptions: (1) within one mile, the facilities are irrebuttably presumed to be at the same site; (2) from one mile to ten miles, FERC rebuttably presumes that the facilities are not at the same site, but allows interested parties to rebut this presumption; and (3) beyond ten miles, FERC irrebuttably presumes that the QFs are not at the same site. FERC set forth a series of characteristics that it may use to determine whether affiliated QFs from one to ten miles apart are at the same site, but stated that no single characteristic or set of characteristics would be dispositive.

[150] See *Qualifying Facility Rates and Requirements Implementation Issues Under the Public Utility Regulatory Policies Act of 1978*, Order No. 872, 172 FERC ¶ 61,041 (2020) (Order No. 872), *clarified by Qualifying Facility Rates and Requirements Implementation Issues Under the Public Utility Regulatory Policies Act of 1978*, Order No. 872-A, 173 FERC ¶ 61,158 (2020) (Order No. 872-A).

- Reduced barriers for challenges. The new rule allows interested parties to challenge QF filings within 30 days of the filing date. QFs that certified before the new rule became effective will receive "legacy" treatment until the first substantive self-recertification filing.[151]

- Non-discriminatory market access threshold reduction. The new rule reduces the size at which QFs are rebuttably presumed to have non-discriminatory market access, from 20 MW to 5 MW, while establishing certain exceptions.

- Minimum LEO requirements. The new rule establishes that QFs must demonstrate commercial viability and a financial commitment pursuant to objective standards established by each state. States may also require that a QF has applied for all permits and paid all applicable fees.

FERC also clarified that existing *PURPA* regulations require states to account for load reductions resulting from retail competition in setting rates for QF capacity sales.

The full impact of the new rule remains to be seen, both because little time has elapsed since the rule became effective and because several changes will have an effect only when states elect to use newly granted flexibilities. In addition, the new rule may be further modified or set aside, as it is currently subject to review by the Ninth Circuit.[152]

Broadview Solar

FERC's new *PURPA* rule introduced significant uncertainty in the QF sector. FERC added to this uncertainty for solar photovoltaic (PV) QF interests in September 2020, when it issued its order in *Broadview Solar, LLC* (*Broadview*),[153] in which it announced a new framework for determining whether QFs exceed the 80-MW ceiling imposed by *PURPA*.[154] In a significant break with precedent, FERC determined that its nearly 40-year-old approach emphasizing a QF's "send-out" or "output" capability, first set forth in *Occidental Geothermal, Inc.* (*Occidental*),[155] is inconsistent with *PURPA*'s focus on "power production capacity."[156] As part of its revised approach, FERC expressly eliminated the ability to include "adjustments for inverters or other output-limiting devices,"[157] a determination that uniquely affects solar PV QFs, which often utilize arrays with direct current (DC) capacities that are significantly larger (typically 1.3 to 1.5 times) than the facilities' inverter-dependent alternating current (AC) output for a variety of operational and electrical reasons. Such a facility's power production capability, under FERC's new policy, is its DC capacity, rather than the post-inverter AC capacity.

Given the new policy's potential to create significant disruptions for existing solar PV QFs that would fail to be QFs under the new policy (many of which have offtake agreements that require QF status), FERC expressly limited the application of *Broadview* to those QFs that self-certify or apply for certification on or after the date of the order.[158]

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[151] See Order No. 872 at paras 549-550. Examples of "substantive" changes are increases in generating capacity of 1 MW or 5 percent of installed capacity, or a 10 percent or greater increase in equity interest by an owner. Order No. 872 at para 550, Order No. 872-A at para 323.

[152] Ninth Circuit, Case Nos. 20-72788, 20-73375, and 21-70113.

[153] *Broadview Solar, LLC*, 172 FERC ¶ 61,194 (2020).

[154] See 16 USC § 796(17)(A)(ii) and 18 CFR § 292.204(a)(1).

[155] *Occidental Geothermal, Inc.*, 17 FERC ¶ 61,231 (1981).

[156] *Broadview*, *supra* note 153 at para 23.

[157] *Ibid* at para 25.

[158] *Ibid* at para 27. FERC stated:

> [i]f a QF that has listed a maximum net power production capacity of 80 MW or less has a Form No. 556 on file with the Commission prior to the date of this order, even if it may have included adjustments for inverters or other output-limiting devices to calculate its maximum net power production capacity as 80 MW or less, then it will be grandfathered with regard to the holding in Occidental. In other words, those previously certified QFs will still be considered to be small power production facilities for purposes of PURPA.

This ruling has had a focused, but significant, effect on the portion of the solar PV industry that has projects in the development pipeline that approach the 80-MW limit on an AC basis (and exceed it on a DC basis), or that are already QFs, but anticipate near-term recertifications.[159] Entities have requested rehearing and clarification in the case, but FERC has yet to respond. *Broadview* is subject to review by the D.C. Circuit.[160]

XI. DOE RULEMAKING REGARDING THE BULK POWER SYSTEM

On May 1, 2020, President Trump invoked the *International Emergency Economic Powers Act*[161] and the *National Emergencies Act*[162] to issue Executive Order 13920 (E.O. 13920) upon his finding that "foreign adversaries" create and exploit vulnerabilities in the U.S. bulk-power system (BPS).[163]

E.O. 13920 directed the Secretary of Energy to prohibit "any acquisition, importation, transfer, or installation of any [BPS] electric equipment…where the transaction involves any property in which any foreign country or a national thereof has any interest…" whenever the Secretary of Energy has determined, in consultation with heads of other agencies, that (a) the transaction involves BPS electric equipment "designed, developed, manufactured, or supplied, by persons owned by, controlled by, or subject to the jurisdiction or direction of a foreign adversary…" and (b) the equipment poses undue or unacceptable risks (1) of "sabotage to or subversion of the design, integrity, manufacturing, production, distribution, installation, operation, or maintenance of the bulk-power system"; (2) of "catastrophic effects" to critical infrastructure resilience or security, or to the U.S. economy; or (3) to U.S. national security or the safety and security of "U.S. persons."[164]

E.O. 13920 authorized the Secretary of Energy to: establish criteria for use in pre-qualifying equipment and vendors; identify existing electric equipment that poses undue risks and recommend how to address them; and establish a task force in order to provide for interagency cooperation and information-sharing. Moreover, it required the Secretary of Energy, in consultation with heads of other relevant agencies, to publish rules and regulations in accordance with E.O. 13920 within 150 days, or by September 28, 2020.

In response, the Department of Energy (DOE) issued a Request for Information (RFI) in July 2020 to better "understand the energy industry's current practices to identify and mitigate vulnerabilities in the supply chain for components of the [BPS]."[165] The RFI posed a series of questions related to foreign ownership, control and influence, as well as cybersecurity and vendor and supply-chain risk management matters, with respect to transformers, reactive-power equipment, circuit breakers, and generation — including hardware and electronics — as a first step in a "phased process."[166] The DOE also sought information on projected compliance costs across the full scope of E.O. 13920 equipment.

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[159] While FERC expressly stated that it would "grandfather" QFs that had self-certified or applied for QF status prior to September 1, it did not expressly address the effects of recertification.

[160] DC Cir, Case Nos. 20-1487 and 20-1500.

[161] 50 USC § 1701 *et seq*.

[162] 50 USC § 1601 *et seq*.

[163] *Securing the United States Bulk-Power System*, Exec. Order No. 13920, 85 Fed Reg 26595 (4 May 2020).

[164] *Ibid* at 26,595–96. E.O. 13920 defines "bulk power system" as meaning "(i) facilities and control systems necessary for operating an interconnected electric energy transmission network (or any portion thereof); and (ii) electric energy from generation facilities needed to maintain transmission reliability." The definition includes transmission lines rated at 69,000 volts (69 kV) or more, but does not include local distribution facilities. "Bulk power system electric equipment" means "control rooms, or power generating stations, including reactors, capacitors, substation transformers, current coupling capacitors, large generators, backup generators, substation voltage regulators, shunt capacitor equipment, automatic circuit reclosers, instrument transformers, coupling capacity voltage transformers, protective relaying, metering equipment, high voltage circuit breakers, generation turbines, industrial control systems, distributed control systems, and safety instrumented systems."

[165] Department of Energy, *Securing the United States Bulk Power System*, Request for information, 85 Fed Reg 41023 (8 July 2020).

[166] *Ibid* at 41024.

The DOE accepted comments in response to the RFI through August 24, 2020.[167] The nearly 100 commenters included traditional electric utilities, manufacturers and vendors, trade associations and other industry groups. To date, however, DOE has neither issued regulations nor proposed a rulemaking.

Despite the absence of rulemaking activity, DOE Secretary Dan Brouillette issued the Prohibition Order Securing Critical Defense Facilities (Prohibition Order) on December 17, 2020,[168] pursuant to authority granted by E.O. 13920. The Prohibition Order stated that DOE "has reason to believe…that the government of People's Republic of China…is equipped and actively planning to undermine the BPS," and so prohibited any "acquisition, importation, transfer, or subsequent installation of" such equipment and components[169] by any "Responsible Utility" that owns or operates "Defense Critical Electric Infrastructure."[170]

XII. 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 and climate considerations and the need for reliable and reasonably priced 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 gained momentum on various energy policies mid-term, many states enacted their own measures, sometimes in support of — and other times running counter to — the federal initiatives. These at times conflicting federal and state initiatives have created a complicated and challenging regulatory environment, with various risks and opportunities. ■

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[167] Department of Energy, *Securing the United States Bulk Power System*, Extension of public comment period, 85 Fed Reg 44061 (21 July 2020).

[168] Department of Energy, *Prohibition Order Securing Critical Defense Facilities*, Prohibition Order, 86 Fed Reg 533 (6 January 2021).

[169] *Ibid*.

[170] *Ibid* at 534. Defense Critical Electric Infrastructure is defined in Section 215A(a)(4) of the *FPA* (16 U.S.C. § 824o-1) as any electric infrastructure located in any of the 48 contiguous States or the District of Columbia that (i) serves a facility designated by the Secretary of Energy as (A) critical to the defense of the United States and (B) vulnerable to a disruption of the supply of electric energy provided to such facility by an external provider, but (ii) is not owned or operated by the owner or operator of the facility designated in clause (i).

REDUCING RED TAPE IN ALBERTA: A COMMISSION, A COMMITTEE, AND RECOMMENDATIONS

*Moin A. Yahya**

In 2019, the newly elected government of Alberta announced that it was creating an Associate Minister of Red Tape Reduction and passed the Alberta *Red Tape Reduction Act*. In response, the Alberta Utilities Commission (AUC) took the initiative and appointed an independent committee, named the AUC Procedures and Processes Review Committee, to "review the Commission's rate application adjudicative processes and procedures and make recommendations to the AUC Chair…on how process and procedure steps can be made more efficient or eliminated altogether."[1]

Three members were appointed to the Committee, all of whom have extensive regulatory experience: C. Kemm Yates, Q.C., a leader in the regulatory bar; David J. Mullan, an emeritus law professor from Queen's University and one of Canada's foremost experts in administrative law; and Rowland J. Harrison, Q.C., also a former law professor and a former well-respected long-serving member of the National Energy Board (now the Canada Energy Regulator). The committee was appointed on May 8, 2020. It completed its work on August 14, 2020 issuing a 136-page report.[2] Shortly after the report was issued, the AUC announced that it would abide by all the recommendations in the report.[3]

In this note, I will provide an overview of the Committee's recommendations and some commentary. The reader can refer to the report for details on the consultation process with the various stakeholders as well as the terms and references of the committee.

THE RECOMMENDATIONS

The committee made 30 specific recommendations organized in 18 broad categories. The recommendations are laid out in detail in the report. The thrust of the recommendations is that the AUC should take an active role in rate hearings in a manner that is efficient and fair. The committee set out a variety of recommendations based on the stakeholder feedback guided by sound legal analysis.

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* Moin A. Yahya is a Professor of Law at the University of Alberta and a former member of the Alberta Utilities Commission (AUC). The views expressed here are personal academic reflections and not meant to reflect the current or past views of the AUC on current or past proceedings or decisions. The views are also not meant to cast any aspersions on any of the parties mentioned in the article, but rather mentioned for demonstrative purposes.

[1] Alberta Utilities Commission, "Bulltein 2020-17" (8 May 2020), online (pdf): *AUC* <www.auc.ab.ca/News/2020/Bulletin%202020-17.pdf>.

[2] C. Kemm Yates, David J. Mullan & Rowland J. Harrison, "Report of the AUC Procedures and Processes Review Committee" (14 August 2020), online (pdf): *AUC* <www.auc.ab.ca/Shared%20Documents/2020-10-22-AUCReviewCommitteeReport.pdf>.

[3] There was one recommendation that the report did not make but that the AUC adopted, nonetheless. See Alberta Utilities Commission, "Announcement" (22 October 2020), online (pdf): *AUC* <www.auc.ab.ca/News/2020/2020-10-22-Announcement.pdf>.

The first category of recommendations, which set the tone for the rest of the recommendations, call for proactive and assertive case management.[4] Specifically, the Committee recommended that the AUC should be assertive with respect to the scoping and scheduling of the process. The Committee also recommended that the AUC issue a list of issues to be addressed in the proceeding, a preliminary schedule in advance, and a framework explaining to the parties how to expand on the list of issues and the processes. Finally, while the Committee did not recommend a strict legislatively mandated set of time limits to be imposed on the AUC for when to produce a decision in a proceeding, the AUC, in addition to accepting all the other recommendations, stated that it would enact time limits and adhere to them.

The Committee then proposed a category of recommendations related to the proceedings. These recommendations address, for instance, how to deal with confidential materials in the proceedings. Another recommendation is that all hearings be conducted in writing, subject to the participants demonstrating the need for an oral hearing. Issues discussed in the hearing should be determined in advance through the scoping process and determined according to the schedule set out at the start of the proceeding, as mentioned earlier.

With respect to interrogatories or information requests, the committee provided many recommendations. The thrust of these recommendations related to limiting the scope and volume of information requested. A schedule to ensure timely filings of the interrogatories and the responses, a standardized practice for handling motions related to the interrogatories, as well as a requirement that the information requested be justified are examples of some of the specific recommendations. Additionally, there should be a presumption of one round of interrogatories, especially when oral cross-examination can be used to uncover any further ambiguities arising from the written responses.

Cross-examinations were also the subject of several recommendations. Excessive cross-examination should be discouraged. Cross-examination should be limited to specific evidence and to areas and issues that the AUC would need to determine in its judgment in the proceeding. Non-expert opinion evidence should also be discouraged by reducing the costs that utilities and interveners can recover. The focus of cross-examination should be the reduction of the regulatory burden and discharging the AUC's mandate.

With respect to making the final argument, the Committee recommended that the AUC adopt an efficient oral argument process after the close of the hearing record. The scope of the final argument would be determined by the AUC in advance with a set of topics identified for argument as well as time limits.

As to the AUC itself, the Committee recommended that decisions be written according to an issue-driven template. Members and staff of the AUC should receive training on writing such issue-driven decisions. Members of the AUC should also receive periodic training on their role as members of a quasi-judicial tribunal, as well as training on the basic legal requirements and responsibilities for assertive case management. Members of the AUC should have plenary meetings to discuss generic issues arising in the proceedings.

The Committee also made some recommendations regarding interveners, costs, and implementing the Committee's recommendations through the AUC's rules. A reader interested in the details should consult the report. The Report is clearly written and cogent. Rather than recite the various recommendations and analyze them, in the next section, I will provide some perspective on how we may have arrived at the situation where the Committee's work was needed and some thoughts on how to best embrace the recommendations.

COMMENTARY

The Committee was struck in response to the provincial government's red tape reduction initiative, and the recommendations are very sensible and on point for that goal.

[4] For the sake of simplicity, I have summarized the recommendations without quotation marks. As such, some of my words are taken directly from the report. The reader should assume that the source is the Committee's report whether paraphrased or directly quoted.

The recommendations stem both from the stakeholders' feedback as well as a careful analysis of the legal guidelines that govern the AUC's conduct. As a former member of the Commission, I commend the Committee on its rigorous work completed in a very timely manner. The value of these recommendations should be seen not only in what they recommend for the AUC, but, in a way, also what they suggest to all the participants in the rate-making process. Reading the submissions and the recommendations reminded me of many of the concerns I had when I was at the AUC. Indeed, many of the recommendations had been discussed by staff, other members of the AUC, as well as other stakeholders, but the challenge was always how to implement them.

The recommendations effectively codify best-practices that stakeholders and the AUC may have agreed to in principle in the past but may have had trouble implementing on a case-by-case basis. After all, it is easy to state at the outset that one is committed to an efficient process, but if that means, for example, sacrificing an opportunity to orally cross-examine an adverse witness, the commitment may weaken. Having a set of rules that are a product of consultation by the respected and experienced Committee members should give all some comfort in moving forward with implementing the recommendations.

There is always a tension between expeditious efficient proceedings and fairness, especially procedural. The most famous efficient proceeding is the one litigated in the foundational case of *Northwestern Utilities Ltd. v Edmonton*.[5] The case is often cited for the three principles of fair return for public utilities, namely that a "company will be allowed as large a return on the capital invested in its enterprise (which will be net to the company) as it would receive if it were investing the same amount in other securities possessing an attractiveness, stability and certainty equal to that of the company's enterprise."[6] The predecessor board of the AUC had awarded an allowed rate of return to the Northwestern Utilities. Later, interest rates fell and the board decided to unilaterally lower the allowed rate of return without a hearing. The Supreme court not only allowed the substantive award under the test for fair rate of return but was also not bothered by the lack of a hearing. Indeed, just a few years ago (now retired) Justice Côté of the Alberta Court of Appeal cited *Northwestern* for the proposition that "the Commission can get its information in whatever mode it sees fit."[7] Awarding allowed rates of return with no hearing would be the ultimate in terms of efficient regulation. But this would raise a whole set of fairness questions, and not just the procedural ones.

After all, economic circumstances can easily change rendering prior decisions impractical or unfair to the regulated utilities. Consider the last economic downturn in 2008. The AUC had previously established a formula for awarding the allowed rate of return. The formula had been in use for many years prior to the financial meltdown. At that stage, the AUC could have kept the formula in operation. That process would have been the most efficient in terms of hearing costs. Nonetheless, the parties all agreed that the formula was not the proper regulatory tool at that time. The result was a lengthy and exhaustive process involving weeks of oral hearings and thousands of pages in the record culminating in the 2009 Generic Cost of Capital (GCOC) Decision.[8] The Decision determined that the existing formula would not generate rates of return commensurate with the economic conditions facing the utilities. As such, it suspended the formula and made a one-time finding on the rate of return. Two years later, the AUC took up the question on the GCOC again. This time, to avoid the lengthy process of the 2009 GCOC hearing, the AUC decided to incorporate the 2009 record into the 2011 hearing.[9] Fortunately, the incorporation of the record came at the suggestion of the utilities and with the approval of the interveners, which allowed for an expeditious process. Perhaps the

[5] *Northwestern Utilities Ltd. v Edmonton (City)*, [1929] SCR 186.

[6] *Ibid* at 193.

[7] *Calgary (City) v Alberta (Energy and Utilities Board)*, 2010 ABCA 132 at para 193.

[8] *Re 2009 Generic Cost of Capital* (12 November 2009), 2009-216, online (pdf): *AUC* <www.auc.ab.ca/regulatory_documents/ProceedingDocuments/2009/2009-216.pdf>.

[9] *Re 2011 Generic Cost of Capital* (8 December 2011), 2011-474 at para 13, online (pdf): *AUC* <www.auc.ab.ca/regulatory_documents/ProceedingDocuments/2011/2011-474.pdf>.

previous process, concluded just two years prior, informed this push by the parties. On the other hand, the passage of time can also fade memories and experiences of the parties and their counsel. New parties or counsel may be tempted to seek the full panoply of, what they perceive as, procedural fairness protections in, what is undoubtedly for them, the most important proceeding. As such, having the Committee's recommendations, both in the form of the report and in the AUC rules, makes it easier for the AUC to overcome the default approach of long sluggish hearings.

As these recommendations are put into action, I would also encourage all the parties who participated in giving the Committee feedback as well as those who are active in AUC proceedings to think of other innovations that can be easily adopted. Building on the 2011 GCOC proceeding, for example, and given that the records of all AUC proceedings are stored electronically and easily searchable, I would suggest that reintroducing evidence for every proceeding seems unnecessary and cumbersome. It would be a worthwhile endeavor for the AUC to develop a rolling record of financial data for the macro-economy as well for the individual utilities regulated by the AUC. This would mean that the utilities would only need to update or contest specific data points in the record in each hearing.

Returning to the committee's recommendations, I reiterate that these are not only beneficial for the AUC but also for the parties in hearings. Notwithstanding every party's commitment at the outset to ensure an efficient hearing, rabbit-holes always appear and are often pursued. Parties suddenly discover a new-found interest in the evidence presented and wish to explore the evidence in a more wholesome manner. This presents a conundrum to the AUC and the panel presiding over the hearing: should the AUC allow more discovery or stick to its original scope and deadlines? The age-old tension between efficiency and fairness rears its head once again. Consider the 2011 ATCO gas hearing.[10] One intervenor had sought some information from ATCO Gas in its gas rate hearing. ATCO provided some responses, which the intervenor thought inadequate. It brought a motion to compel ATCO to provide further information.[11] The AUC decided that some of the responses were adequate and some were inadequate, thereby directing ATCO to provide more responses. ATCO responded that it needed more time. More back and forth between ATCO Gas, the intervenor, and the AUC resulted in a motion by ATCO Gas to strike a portion of intervenor's evidence, which the AUC granted.[12] The intervenor then asked for a review and variance in the hearing, which the AUC denied. In the same hearing, another intervener asked for the suspension of the hearing in light of a recent acquisition by the ATCO Group of an Australian gas company. The AUC denied that request. By the end of the hearing, in addition to the usual substantive arguments regarding the appropriate rate of return, additional procedural fairness arguments were made. Some of these even concerned the role of AUC counsel and whether the counsel was biased in the way he questioned the ATCO Gas witnesses.

I mention these examples not to cast aspersions on any of the parties or their counsel, but to point out that what may start off as a simple rate hearing with a predetermined set of issues can mutate into a complex hearing requiring the AUC to decide upon nuanced administrative law questions, such as the role of counsel. These questions do not have simple answers. No matter how much one searches the cases or the treatises by learned administrative law professors, the answers do not jump out at the AUC members or their counsel. And this is where the default response of favouring procedural fairness can kick in, usually at the expense of efficiency of the process.

Perhaps this default to excessive fairness is an overhang from the fallout from the now infamous spying incident.[13] As someone who was appointed shortly after the incident,

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[10] *Re ATCO Gas 2011-2012 General Rate Application Phase I* (5 December 2011), 2011-450, online (pdf): *AUC* <www.auc.ab.ca/regulatory_documents/ProceedingDocuments/2011/2011-450.pdf>.

[11] *Ibid* at paras 24–32 (Section 2.1.1).

[12] *Ibid* at paras 37–40 (Section 2.1.3).

[13] The story can be easily found in an online search, but a short summary can be found in *Lavesta Area Group Inc. v Alberta (Energy and Utilities Board)*, 2012 ABCA 84.

there was a sense at the time that no claim of procedural unfairness was too small to dismiss. The Supreme Court of Canada's *Stores Block* judgment and its progeny at the Alberta Court of Appeal seemed to create a sense that the AUC was the appellate courts favourite agency for exacting scrutiny on both substance and procedure.[14] But perhaps the pendulum swung too far. And that is why we are here today with the Committee and its recommendations.

Indeed, perhaps an indicator of the level of fairness at the AUC is the number of appeals from its decisions that raise questions of procedural fairness. A search of recent appeals to the Alberta Court of Appeal from decisions of the AUC reveals a heavy focus on the substantive outcomes, as opposed to the procedures adopted by the AUC. Using CanLII, I searched for cases involving the AUC, and narrowed the search by keywords "procedural fairness" and "bias". There were 55 cases over the past 12 years, with only 11 mentioning procedural fairness or bias, or about 20 per cent. Almost none of them succeeded in their claims of unfairness.

Lest the reader wonder if the Committee's recommendations may lead to more appeals on fairness grounds, which it might, but which will also result in reversals on appeal, the Committee conducted a legal analysis of its recommendations. I commend the committee for its rigorous legal analysis, which strongly suggests that the AUC can implement the recommendations without fear of reversal on procedural fairness grounds.

A major example where procedural fairness was the one of the main grounds of appeal is the AUC's decision in the Milner Power complaint regarding the ISO line loss methodology.[15] I should note that the case did not involve rate-making but is nonetheless informative. The Court of Appeal refused to grant leave to appeal the AUC's decision in a series of judgments by Justice O'Ferrall, one of which dealt with the question of procedural fairness.[16] Justice O'Ferrall found that the AUC had not denied the parties their right to procedural fairness. The case took 14 years from when the complaint by Milner was first filed to the AUC in 2005 to when the final judgment of the Court of Appeal was rendered. Interspersed throughout those years were many appeals to the Court of Appeal, a hearing at the AUC generating a split decision,[17] followed by a review and variance motion, which was granted, and then a series of decisions by the AUC followed by a three-part denial of leave to appeal by the Court of Appeal.[18] Indeed, had the Court of Appeal found for the appealing parties, the ISO line loss proceeding would have rivalled Jarndyce and Jarndyce in terms of complications and duration.

What may be now forgotten is that what started this long saga was that the predecessor board of the AUC had dismissed Milner's complaint regarding the ISO line loss rule without a hearing, because the board found that the complaint was "frivolous and vexatious."[19] This decision was overturned by the Court of Appeal and returned to the AUC for a hearing on the merits of Milner's complaint.[20] One cannot help but wonder where all the parties would be today had the hearing been held on an expedited basis according to the committee's recommendations? Whether the predecessor board had found for or against Milner, the Court of Appeal would have probably upheld the decision as reasonable and reached the same conclusion Justice O'Ferrall did. The difference may have been 12 years of protracted regulatory and appellate litigation and decisions. The

[14] The cases are all described in detail in *Re Utility Asset Disposition* (26 November 2013), 2013-417, online (pdf): *AUC* <www.auc.ab.ca/regulatory_documents/ProceedingDocuments/2013/2013-417.pdf>.

[15] *Re Milner Power Inc. Complaints regarding the ISO Transmission Loss Factor Rule and Loss Factor Methodology* (20 January 2015), 790-D02-2015, online (pdf): *AUC* <www.auc.ab.ca/regulatory_documents/ProceedingDocuments/2015/790-D02-2015.pdf>.

[16] *Milner Power Inc v Alberta Utilities Commission*, 2019 ABCA 127. The Court of Appeals cases are *Capital Power Corporation v Alberta Utilities Commission*, 2018 ABCA 437 [*Capital Power Corp*], *Milner Power Inc v Alberta Utilities Commission*, 2019 ABCA 127, *ENMAX Energy Corporation v Alberta Utilities Commission*, 2019 ABCA 222.

[17] *Re Complaint by Milner Power Inc. Regarding the ISO Transmission Loss Factor Rule and Loss Factor Methodology* (16 April 2012), 2012-104, online (pdf): *AUC* <www.auc.ab.ca/regulatory_documents/ProceedingDocuments/2012/2012-104.pdf>.

[18] The history of the proceeding and its decisions are nicely summarized in *Capital Power Corp*, *supra* note 16.

[19] *Re Milner Power Inc. Complaint Against the Proposed AESO Line Loss Rule* (30 December 2015), 2005-150, online (pdf): *AUC* <www.auc.ab.ca/regulatory_documents/ProceedingDocuments/2005/2005-150.pdf>.

[20] *Milner Power Inc. v Alberta (Energy and Utilities Board)*, 2010 ABCA 236.

lesson for all parties should be that a process that balances efficiency and fairness helps all those who are involved in the long-run.

The technically complex nature of the ISO line loss rule may also explain why the proceeding dragged on for so long. This raises the more general question of whether the adversarial nature of AUC proceedings is the best way to decide these matters. There had been many discussions while I was at the AUC of roundtables and other alternatives to hearings. Similarly, ideas such as hot-tubbing the experts so that there is a more consensus-driven hearing, at least for the technical evidence, had been discussed. The AUC may wish to examine these as ways to augment the Committee's recommendations, especially if technical hearings continue to be lengthy and complicated.

All in all, implementing these recommendations, especially under the umbrella recommendation of more assertive case management, should be welcomed by all. The AUC and its staff now have some written guidance in the committee's report (hopefully codified in the AUC rules), a report borne of stakeholders' comments and feedback. The parties in the process, utilities and interveners alike, also now have a reference document to guide them and remind them that the process is to be more expeditious.

I recall that the former chair of the AUC, the late Willie Grieve, QC, used to always point to the AUC's mission statement,[21] which he had worked on developing and had hung on every office wall in the AUC. Whenever there was an internal discussion regarding a process or outcome, Grieve would point to the wall and read off a relevant sentence, such as "[t]he Alberta Utilities Commission is a trusted leader that delivers innovative and efficient regulatory solutions for Alberta." The committee's report fits well into the AUC's mission, and should accompany it on the metaphorical wall for all to refer to when conducting themselves at the AUC. ■

[21] Alberta Utilities Commission, "Mission Statement" (last visited 21 January 2020), online: <www.auc.ab.ca/pages/mission-statement.aspx>.

THE HEATHROW AIRPORT CASE REVISITED

*Melanie Gillis and James MacDuff**

EDITORS' INTRODUCTION

The last issue of the Energy Regulation Quarterly published an article[1] that featured the decision of the Court of Appeal of England and Wales in *R (Friends of the Earth) v Secretary of State for Transport and others*.[2] The decision offered a detailed examination of how climate change law can curtail large-scale infrastructure projects.

The Court in Heathrow held that the Secretary of State's failure to take the United Kingdom's commitments under the Paris Agreement[3] into account before approving the policy that would pave the way for the construction of a third runway at Heathrow Airport vitiated the approval. Specifically, the Court held that the *Planning Act*[4] required the Secretary of State to consider government policies on climate change, and that the Paris Agreement fell within the meaning of 'government policy'.

Shortly after the article went to press the UK Supreme Court issued a unanimous decision allowing the appeal of the Heathrow decision.[5] The Editors felt a Case Comment on the latest decision would be of interest to the ERQ readers.

THE HEATHROW APPEAL

It is important to note that the appeal was brought not by the Secretary of State, but by the corporate owner of Heathrow Airport, which had already invested significant funds into the project when the Court of Appeal issued its decision.

The Court completely overturned the Court of Appeal's decision in several key respects. Significantly, the Court held that the Paris Agreement did *not* enjoy the status of 'government policy' as that term is used in the *Planning Act*. The Court held that to read a liberal meaning of the term 'government policy' under the *Planning Act* would create a 'bear trap' for government. Instead, the Court favoured a narrower interpretation of 'government policy', which they circumscribed to carefully formulated written statements of policy that have been cleared by the relevant departments on a Government-wide basis. Specifically, the Court held as follows:

> 105…For the subsection to operate sensibly the phrase needs to be given a relatively narrow meaning so that the relevant policies can readily be identified. Otherwise, civil servants would have to trawl through Hansard and press statements to see if anything had been said by a minister which

* James MacDuff is a Partner at McInnes Cooper. He is a member of the firm's Energy and Natural Resources Group and his practice focuses on corporate and regulatory law matters.

Melanie Gillis is a Lawyer at McInnes Cooper. She has a growing practice in commercial, construction, environmental and energy litigation.

[1] Melanie Gillis & James MacDuff, "When climate and construction collide: how net zero legislation might be used to challenge high-emitting infrastructure projects" (2020) 8:4 Energy Regulation Q 21.

[2] [2020] EWCA Civ 214.

[3] *The Paris Agreement*, 22 April 2016, Can TS 2016 No 9 (entered into force 4 November 2016) [Paris Agreement].

[4] *Planning Act* (UK), 2008, c 29, s 5(8).

[5] *R (on the application of Friends of the Earth Ltd and others) v Heathrow Airport Ltd.*, [2020] UKSC 52.

> might be characterised as "policy". Parliament cannot have intended to create a bear trap for ministers by requiring them to take into account any ministerial statement which could as a matter of ordinary language be described as a statement of policy relating to the relevant field.[6]

The Court further held that international treaties that have been ratified but not incorporated into domestic law are not binding domestically, and that ratification is an act that impacts only upon the international plane:

> 108…The fact that the United Kingdom had ratified the Paris Agreement is not of itself a statement of Government policy in the requisite sense. Ratification is an act on the international plane. It gives rise to obligations of the United Kingdom in international law which continue whether or not a particular government remains in office and which, as treaty obligations, "are not part of UK law and give rise to no legal rights or obligations in domestic law"…[7]

The Court was also very deferential to the Secretary of State's weighing of various considerations pursuant to his authority under the *Planning Act*, and found it was reasonable:

> 155…It was not irrational to decide not to attempt to assess post-2050 emissions by reference to future policies which had yet to be formulated. It was rational for him to assume that future policies in relation to the post-2050 period, including new emissions targets, could be enforced by the [development consent order] process and mechanisms such as carbon pricing, improvements to aircraft design, operational efficiency improvements and limitation of demand growth.[8]

Clearly, the Heathrow Appeal was a resounding retreat back to a much more conservative and deferential approach, one which the decision below in the Heathrow Case had appeared (however briefly) to break free of.

While the churning sea that is the contest between international climate change commitments and domestic policy-making may have been momentarily quelled by the Supreme Court's decision, these two warring decisions made by two *unanimous* higher level courts should demonstrate the ongoing tumult in the common law around this topic, and highlight the danger this ongoing legal uncertainty poses for proponents of large-scale infrastructure projects in the era of 'net zero' legislation. ■

[6] *Ibid* at para 105.

[7] *Ibid* at para 108.

[8] *Ibid* at para 155.

A LITERATURE REVIEW ON REGULATORY INDEPENDENCE IN CANADA'S ENERGY SYSTEMS: ORIGINS, RATIONALE AND KEY FEATURES, IAN T. D. THOMSON, POSITIVE ENERGY, UNIVERSITY OF OTTAWA, NOVEMBER 2020

Rowland J. Harrison, Q.C.

The purpose of the University of Ottawa's Positive Energy initiative is to use "the convening power of the university to bring together academic researchers and senior decision-makers from industry, government, indigenous communities, local communities and environmental organizations to determine how to strengthen public confidence in energy decision-making."[1] The work of this important project has been featured periodically in past issues of *Energy Regulation Quarterly*, beginning in December 2017 with an article by Michael Cleland and Monica Gattinger, "System Under Stress: Energy Decision-Making in Canada and the Need for Informed Reform."[2]

One of Positive Energy's current projects is aimed at "exploring the relationship between regulators and other actors in energy decision-making processes," under the title "Policymakers, Regulators and Court – Who Decides What, When and How?" The project is part of Positive Energy's broader examination of "the roles and responsibilities of decision-making authorities

[1] Positve Energy, "About Positive Energy" (last visited 18 January 2021), online: <www.uottawa.ca/positive-energy/about-positive-energy>.

[2] Michael Cleland & Monica Gattinger, "System Under Stress: Energy Decision-Making in Canada and the Need for Informed Reform" (2017) 5:4 Energy Regulation Q 11; See also Michael Cleland & Monica Gattinger, "Canada's Energy Future in an Age of Climate Change: Public Confidence and Institutional Foundations for Change" (2019) 7:3 Energy Regulation Q 19.

in Canada's energy decision-making system."[3] A Discussion Paper outlining preliminary findings and ideas was released in December 2020.[4]

As part of its research for this project, Positive Energy has released a valuable background document, *A Literature Review on Regulatory Independence in Canada's Energy Systems: Origins, Rationale and Key Features (Literature Review)*.[5]

After leading, appropriately, with a discussion of the "Rationale for Independence," the *Literature Review* surveys "Key Moments in The History of Regulatory Independence in Canada," tracing that history to the delegation of regulatory functions to the Railway Committee of the Privy Council in 1851, "Canada's first administrative and decidedly non-independent tribunal."[6] The Railway Committee rejected the American model of independent regulation. However, issues with respect to the suitability of a sub-committee of cabinet for the task at hand (lack of familiarity with the subject-matter, political vulnerability to outside influences, constantly changing membership, etc.) eventually led to the recommendations of the McLean Royal Commission and the establishment in 1903 of the first federal regulatory body, the Board of Railway Commissioners, under the *Railway Act*.[7]

The *Literature Review* traces both the subsequent proliferation of regulatory agencies in Canada through the early-to-mid 20th century and, later, the expansion of their roles, which were "once novel and narrow," to "increasingly affecting and influencing the lives of Canadians…"[8] While in the past "political controversy led to greater independence for regulators from the political process," more recently "controversy surrounding a regulator has led to reduced faith in regulatory decision-making and lessened regulatory independence for agencies and tribunals."[9] The *Literature Review* points to the National Energy Board, the Ontario Energy Board and the Alberta Energy Regulator as examples.

Canada's energy future is in transition. As Positive Energy has observed: "Clearly articulating and strengthening roles and responsibilities between and among public authorities is one of the most pivotal but understudied factors shaping Canada's energy future in an age of climate change."[10] Understanding how those roles and responsibilities have evolved to date should provide a sound foundation for charting that future course. *A Literature Review on Regulatory Independence in Canada's Energy Systems: Origins, Rationale and Key Features* is a helpful contribution to meeting the challenge. ■

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[3] Michael Cleland, Ian T.D. Thomson & Monica Gattinger, "Policymakers, Regulators and Courts – Who Decides What, When and How? The Evolution of Regulatory Independence, Discussion Paper" (December 2020) at 4, online (pdf): *Positive Energy* <www.uottawa.ca/positive-energy/sites/www.uottawa.ca.positive-energy/files/policymakers_regulators_and_courts_-_who_decides_what_when_and_how_final.pdf>.

[4] *Ibid*.

[5] Ian T.D. Thomson, "A Literature Review on Regulatory Independence in Canada's Energy Systems: Origins, Rationale and Key Features" (November 2020), online (pdf): *Positive Energy* <www.uottawa.ca/positive-energy/sites/www.uottawa.ca.positive-energy/files/a_literature_review_on_regulatory_independence_in_canadas_energy_systems_final.pdf>.

[6] *Ibid* at 8.

[7] *Ibid* at 10.

[8] *Ibid* at 11.

[9] *Ibid* at 19.

[10] *Ibid* at 5.

THE NEW MAP: ENERGY, CLIMATE, AND THE CLASH OF NATIONS[1]

*Kenneth A. Barry**

INTRODUCTION

It has been nine years since Daniel Yergin published *The Quest*, a panoramic examination of the energy industry — its evolution, its booms and busts, and how it propels the economic ambitions and geopolitical fortunes of governments.[2] While that book was recent enough to encompass such notable 21st century events as the early phases of the U.S. shale revolution and the movement in developed economies to reduce hydrocarbons in the energy mix, the globe keeps spinning and new events keep reshaping the energy industry and international relations. Yergin's revisitation, *The New Map: Energy, Climate, and the Clash of Nations*, is an updated grand tour of this planet's fractious mixture of energy policies and the geopolitical aims (or anxieties) of nations.[3] The roughly 425-page tome dramatizes how established and emerging nations are jostling for regional or global leadership, refocusing their dependency on conventional energy resources (whether for consumption or export), and balancing the need to tackle climate change with the demand for reliable and affordable fuels.

Yergin's extensive research, coupled with his lucid, unfussy prose and knack for storytelling, make his books compelling for energy professionals and lay readers alike. The forty-six chapters of *The New Map* may be read as standalone profiles on global hotspots and issues, but there are common threads. The chapters are generally introduced with an anecdote that captures a pivotal moment in a nation's economic or geopolitical development, with due attention to dynamic personalities at its center. In addition, Yergin adopts as an organizing metaphor the creation and revision of maps recurring through history — maps showing national borders as well as dominion over seas and islands (turmoil over control of the South China Sea figures prominently in one section). Often, the author closes a chapter with a "stay-tuned" observation drawing the reader into the next episode. Yet, despite his credentials as a veteran, Pulitzer Prize-winning commentator with multiple books to his credit,[4] Yergin consistently refrains from intrusive narration. The notable absence of the word "I" in this volume adds to its aura of objectivity and authority.

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[1] An earlier version of this review appeared in *Energy Law Journal*, a publication of the Energy Bar Association (Washington, D.C.); see Kenneth A. Barry, "The New Map: Energy, Climate, and the Clash of Nations" (2020) 41:2 Energy LJ 375, online (pdf): <www.eba-net.org/assets/1/6/41.2_Issue_Cover_to_Cover.pdf>.

* Kenneth A. Barry is the former Chief Energy Counsel of Reynolds Metals Co. in Richmond, Va., and has served as Counsel in the energy regulatory section of Hunton Andrews Kurth's Washington D.C. office. He has also been a regular contributor to two national energy law publications.

[2] Daniel Yergin, *The Quest: Energy, Security, and the Remaking of the Modern World* (New York, NY: Penguin Press, 2011).

[3] Daniel Yergin, *The New Map: Energy, Climate, and the Clash of Nations* (New York, NY: Penguin Press, 2020); For a Podcast hosted by the Columbia Center on Global Energy Policy interviewing Yergin on *The New Map*, see "The New Map: Energy, Climate, and the Clash of Nations" (21 September 2020), online (podcast): *Columbia University* <www.energypolicy.columbia.edu/new-map-energy-climate-and-clash-nations>.

[4] Yergin was awarded the Pulitzer Prize for *The Prize: The Epic Quest for Oil, Money, & Power* (New York, NY: Free Press, 1990).

HISTORY, ANCIENT AND MODERN

The New Map relates, in considerable detail, how the era of medieval exploration and subsequent wars, treaties, eruptions of terrorism, and diverse campaigns of countries to extend their spheres of influence have redrawn literal borders or pushed aside barriers by forging economic "pathways," as modern-day China has striven to do in Southeast and Central Asia. In his Middle East chapters, Yergin gives us a vivid account of how the centuries-old Ottoman Empire was carved up into the nation-state jigsaw puzzle of today by the victors of World War I. The lead map redrawers — Britain and France — were driven by their realization that the mechanization of warfare meant access to oil would henceforth be crucial. Yet, they had to appease Woodrow Wilson's insistence that national autonomy must replace colonial empire-building. The result was a hybrid, or some might say a hodgepodge, of arbitrarily drawn lines, with interim supervisory authority allocated to Britain or France. In time, secular Arab nationalism or Islamic fundamentalism would fray those tethers to Europe.

The diversity of characters in these dramas is dazzling. In one chapter, we meet Lawrence of Arabia seeking to promote Arab leadership against the Turks in desert battlefields as well as Chaim Weizmann, the British chemist and pioneer of Zionism, tracking down the charismatic Prince Faisal to sell him (not quite successfully) on the idea of a Jewish homeland in Palestine. A bit later, we learn how an enterprising American businessman revolutionized world trade in the 1950s by inventing container shipping.

Yergin has previously chronicled the dizzying boom-and-bust cycles of the oil business and their geopolitical impacts. His newest book relates the complex interactions, including the growth of U.S. shale oil in the last half-dozen years, the slowdown in the China economic engine, and the rising antagonisms between Shiite Iran and its Sunni Middle East neighbors, that led to a ruinous price war in 2015–2018. Then, just a few years after Russia and Saudi Arabia arrived at something approaching a solution, the 2020 coronavirus pandemic reared up to slam global economies, the bottom dropped out of demand, the fragile consensus among Organization of the Petroleum Exporting Countries (OPEC) nations and Russia unraveled, and it was again every country for itself.

In this way, across the sprawling canvass of *The New Map*, the reader receives a broad education in the tumultuous history of key nations up to the present day. Yergin's view operates generally (but not always) through the prism of energy to support national economies and geopolitical ambitions in a shrinking, seemingly more antagonistic world. Because the narrative is divided into so many discrete sections, a thumbnail summary of *The New Map's* contents is impracticable. And if the book may be described as a succession of potted histories, loosely stitched together — simply because so many countries' particular histories and challenges are covered — that is not detraction. Rather, it is a tribute to Yergin's deft ability to chronicle the background and current state of affairs in so many locations, refreshing and deepening readers' understanding of events they may only dimly recall from headlines they read not so long ago. Those who are stimulated to learn more about a particular region or issue in more depth will find detailed endnotes in *The New Map* with numerous citations to books and articles Yergin has drawn from.

A GLOBAL SAMPLER

A few short excerpts may offer a flavour for Yergin's sweeping approach and material:

- How the ISIS Offensive Challenged the Post-WWI Map of the Middle East. Yergin describes the extremist strain of fundamentalism that led to the founding of the Islamic State in Iraq and Syria (ISIS), and sums up how its aim of establishing a borderless "caliphate" in the Middle East through a ruthless military campaign staggered a region already riven with ethnic tensions: "ISIS ignited a new crisis for a region that had been rocked by turbulence for a century, arising from war and the collapse of an empire, the competition of great powers, Arab nationalism, religious fervor, ideological clash, dynastic ambitions, imperial dreams, American intervention, a Jewish state, and competition for oil. All of this would unfold in a region critical for the world's energy – and thus to the global economy – but also at a time when confrontation between Saudi

Arabia and Iran had become central to the region's future."[5]

- China's Grandiose "One Belt One Road" Vision. China, *The New Map* relates, has developed a scheme ("One Belt One Road") to bind together a large swath of the globe, using its financial wherewithal and commercial heft to build new trading pathways and recruit multi-national participation, with the goal of concentrating its influence. Yergin states: "The program would tie China together with all of 'Eurasia' – the continents of Europe and Asia seen as one vast entity – through infrastructure, energy, investment, communications, politics, and culture…China would be the engine of development, the partner of choice, the lead financier, the promoter, and the grand strategist."[6] Moreover, Yergin stresses, China's willingness to engage with and uplift lesser economies would come with no meddlesome strings attached: "With China at the helm, there would be no agenda of 'regime change,' no support for 'color revolutions,' no championing of human rights activists. China instead would recognize and respect 'absolute sovereignty.'"[7]

- How Iran extended its tentacles deeply into Iraq. The book extensively discusses how, in the aftermath of the second Gulf War that deposed Saddam Hussein, once the U.S. forces largely withdrew, Iran seized on the opportunity to profoundly influence Iraq and use it as a corridor to support its proxies in Syria and Lebanon. Yergin observes: "Altogether, Iran has thoroughly penetrated the Iraqi political and security structure, with [General Quassem] Soleimani[8] as the orchestrator of it all. In 2019, seven hundred leaked Iranian intelligence cables provided granular evidence of the dense network of agents and spies, facilitated by bribes and intimidation. As one Iranian put it, 'We have a good number of allies among Iraqi leaders who we can trust with our eyes closed.'"[9]

- How the growth in U.S. shale oil cushioned the oil market from price shocks. Yergin describes the September 2019 drone and missile attack on Saudi oil field facilities, widely presumed to have come from Iran (despite that country's denial of responsibility). While in past decades such a crisis would have caused a price spike in international oil markets, this time there was no such reaction, he observes, in part because the Saudis had significant oil in inventory to tide over the disruption in current production, but also because of the new prominence of U.S. shale oil: "What also made a difference was the rebalancing of the world oil market by the continuing surge in U.S. oil. For, it turned out, shale has not only reconfigured the world oil market. It has also reconfigured the psychology of the world market, providing a new sense of security."[10]

FURTHER DOWN THE ROAD

The final 100 pages of the book (a series of chapters collectively dubbed "Roadmap") peer into the future of the energy business and its societal ramifications. The watchword is "transition," as Yergin appraises the potential of greener alternatives to displace conventional fuels.

Since transportation has long been oil's preserve, Yergin kicks off this section with an examination of the origins and recent progress of electric cars (EVs). The introductory vignette involves a 2003 lunch meeting Elon Musk took with a pair of engineers, the ostensible purpose of which was to pitch Musk on electric *airplanes*. When Musk peremptorily nixed the idea, the conversation turned to EVs. At that, Musk lit up with enthusiasm, and soon was

[5] Yergin, *supra* note 3 at 194.

[6] *Ibid* at 178.

[7] *Ibid* at 182.

[8] General Soleimani, the book relates, was the prime mover behind Iran's Quds Force, which it utilized to foment military attacks beyond its own borders. The book also documents Soleimani's death in early 2020 at the hands of a U.S. drone attack, just as the general was driving away from the Baghdad Airport (see *Ibid* at 289).

[9] Yergin, *supra* note 3 at 233.

[10] *Ibid* at 288.

writing the engineers a check to bankroll a startup based largely on their shared enthusiasm for realizing this dream. Yergin records that America's first cars were, in fact, electric, and that Edison was sufficiently enamored of the idea to invest in it. But Henry Ford's assembly line, along with such advances in the internal combustion engine as substituting electric starters for the old-fashioned cranks, enabled the gasoline-powered car to surge ahead.

The idea of electric cars was revived in the 1990s, Yergin relates, as California regulators pressured automakers to improve fleet fuel efficiency. General Motors (GM) spent a billion dollars to design a product that entered the marketplace in 1996 — unsuccessfully, as it turned out. It fell to Musk and his visionary engineers, beginning with the Roadster in 2006 and the Model S in 2012, to move the needle with head-turning, fun-to-drive products — in the process shocking the industry, which didn't believe an obscure startup could outflank the majors. Yergin then surveys the ensuing efforts of the established companies, including GM, to break through with their own EV models, and describes impressive strides in China — now the largest, if smoggiest, car market in the world — to produce state-of-the-art EVs for domestic consumption and export.[11]

Never a mere cheerleader, Yergin underscores that the technical and commercial successes of EVs to date, both in the U.S. and abroad, owe much to government mandates, generous subsidies, tax credits, and special road privileges for EV drivers. For example, we learn that (1) licenses to drive in China's biggest cities are issued freely to owners of EVs but are sparingly allocated by lottery to non-EV owners; and (2) Norway, with the largest penetration of EVs of any nation at 40 per cent, propels EV sales via nearly irresistible subsidies (which the nation can well afford) and driver-lane preferences. Yergin ponders when EVs — still only 3 per cent of global sales — will become mainstream, and whether the transition will require still more regulatory mandates and large subsidies (which countries exiting the pandemic may ill afford) to spur their manufacture and sale. There are, moreover, significant hurdles, he notes, in battery manufacturing and supply chain costs, as well as in widespread availability and speed of charging stations.

The "range of [EV adoption] predictions can be very wide," Yergin concludes, and "governments will certainly have overriding, even decisive impact."[12] In a subsequent discussion, his long-term outlook is framed this way: "Oil is no longer the unchallenged king in automotive transportation. But for some time to come, its writ will still extend quite widely across the realm of transportation."[13]

In *The New Map's* closing chapters, the author looks more squarely at the status of the climate change debate, the state of play for renewables, the changing fuel mix, and what he terms "the disrupted future." Yergin provides a compact summary of the runup to the Paris Climate Accord, its consummation in December 2015, what it does and does not entail, and how a newly elected President Trump denounced U.S. participation early in his term, commencing the lengthy withdrawal process.[14] Nevertheless, maintains Yergin, the Paris Climate Accord shifted the debate from whether human activity is warming the planet and by how much, to a more proactive posture: what are nations (and its corporate citizens) willing to do about it.

Yergin also points out how the ringing of alarms over climate change has migrated to the financial/investment world: "The claxon was sounded by Mark Carney, the then-governor of the Bank of England" calling for a "'sweeping reallocation' of investment away from traditional energy companies" and towards "de-carbonization of economies."[15] However, the author also documents the "pushback" against divestment agendas, quoting Bill Gates's comment that such advocacy "probably has reduced about zero tons of emissions" and adding himself: "Consumer demand [for conventional fuels] still has to be met."[16]

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[11] *Ibid* at 341–42 (Yergin notes that China views the EV business as a "new game" wherein it can compete internationally (unlike the conventional car business), adding that almost 1 million EVs were sold there in 2019).

[12] *Ibid* at 346.

[13] *Ibid* at 371.

[14] *Ibid* at 382

[15] *Ibid* at 384–85.

[16] *Ibid* at 386.

The divestment campaign has also sprouted on college campuses, with Yale and Harvard endowment managers under siege.[17] As to the strategy of some activists to rebrand fossil fuels as "dangerous and addictive" *a la* tobacco companies, Yergin acerbically remarks: "The difference, of course, is that tobacco is a habit, while oil and gas are enablers of modern life."[18]

In his roundup of recent European Union (EU) declarations and measures to achieve a much greener energy mix, Yergin terms the EU's proposed forced march towards "net zero" carbon emissions in 2050 "breathtaking: nothing less than reshaping economic activity, directing investment, and rebuilding Europe's economy" in a way that will "aggregate power to the European Commission" by "regulating businesses and allocating capital."[19] While Yergin does not go as far as pronouncing such a goal unachievable, he provides some cost estimates and labels the entire project "daunting."

In his "Renewables Landscape" chapter, Yergin underscores China's tremendous press to dominate global solar equipment manufacturing while also becoming the world's largest solar panel consumer — representing half the global market in 2017.[20] While documenting the considerable growth of solar and wind capacity in the U.S. and globally through 2020, Yergin warns that *availability* factors are well below advertised capacity (averaging about 20 per cent for solar, 25 per cent for wind, though greater for the newer installations and offshore wind). After discussing the balancing challenges for grid operators posed by increasing amounts of intermittent and distributed generation, he offers this cautionary assessment: "…[A]t this time, at least, solar and wind cannot go it alone. They need partners. Natural gas generation is a flexible partner for solar and wind. Gas is lower-carbon and lower emissions (with methane control) and gas generation can be ramped up and down to provide balance against the fluctuations of wind and solar."[21]

The New Map's gaze into the future also includes a short "Breakthrough Technologies" chapter.[22] With respect to carbon capture, Yergin stresses that, while some environmental activists are dismissive of it because they believe society should forswear all human, carbon-emitting activities, the "large-scale management" of carbon is "of critical importance" and the U.N. Intergovernmental Panel on Climate Change — one of the most influential bodies driving the movement to de-carbonize — "accords an important role to carbon capture, as does the International Energy Agency."[23]

The author also takes a detour into the less-developed world, examining the "energy poverty" experienced by three billion people (40 per cent of the world's population) who often suffer from the "indoor pollution" caused by reliance on primitive cooking fuels.[24] The chapter concentrates on India — soon to be the world's most populous country — which is heavily dependent on coal and oil for its commercial energy.[25] For the sake of public health, the government is attempting to "usher in a gas-based economy," including propane and LNG. The plan is to use gas to diversify and incrementally decarbonize the generation mix, as well as displace diesel fuel in the transportation sector with compressed natural gas.[26] Thus, says Yergin, the phrase "energy transition" has a different meaning in the developing world.

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[17] *Ibid*.

[18] *Ibid* at 387.

[19] *Ibid* at 389.

[20] *Ibid* at 396.

[21] *Ibid* at 402.

[22] Yergin points out that he and former Department of Energy Secretary Ernest Moniz have teamed up on a new study, *Advancing the Landscape of Clean Energy Innovation*, sponsored by the Gates Foundation and the Breakthrough Energy Coalition. This study inventories some twenty-three technologies with high potential.

[23] Yergin, *supra* note 3 at 404.

[24] *Ibid* at 407.

[25] *Ibid* at 408.

[26] *Ibid* at 410.

In an extended discussion of the future for big oil and gas companies ("The Changing Mix"), Yergin points out that (1) any decline in oil demand over the next 30 years will be at most gradual, as growing utilization in developing countries offsets anticipated conservation and fuel-switching in the developed world, and (2) demand for natural gas, including LNG, remains in a growth mode.[27] Besides, these companies are accelerating their research and development efforts into technologies offering renewable alternatives to oil and gas as well as carbon capture, with some embracing their own "net zero carbon" targets.[28]

CONCLUSION

While few reviewers are inclined to proclaim any book "flawless," and no book can be all things to all people, *The New Map* approaches those ideals.[29] Its remarkable breadth of scope explores the numerous facets of a complex subject in an accessible manner that should satisfy both an energy professional's appetite for up-to-date facts, statistics, and charts, and a generalist's interest in historical perspectives and overarching themes. For energy practitioners and policymakers, Yergin provides a comprehensive, well-indexed and -footnoted treatise that is stimulating to read straight through but can also serve as a reference work. It studiously avoids the polemics that plague some texts on energy, geopolitics, and their intersection; when the author offers an opinion, it is reasoned and nuanced — not didactic. He keeps the reader cognizant of the many contingencies, uncertainties, and challenges that complicate predictions.

In short, Yergin has provided his audience once again with a timely, far-reaching book that, with considerable patience and wisdom, explains how energy matters, how it works, and how the world will continue to revolve around it. ■

[27] *Ibid* at 417–18.

[28] *Ibid* at 419.

[29] The book includes some maps, which are key to understanding a number of chapters, but at times the reader wishes for a few more – or cross-references to the pages with relevant maps. In rare instances, it seems that the wrong word is used, or consecutive sentences begin with "but," a minor stylistic hiccup.