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Executive Actions Provide Clues to Development of US Energy Policy Under a Trump Administration

By Donna J. Bobbish

Since November 9, observers of the energy industry have been poring over the campaign speeches and statements of candidate Donald Trump to divine the energy policy that may be promulgated by President Donald Trump.

In a May 2016 speech to the North Dakota Petroleum Council, Trump announced an “America First Energy Plan,” promising, among other things, that during his first 100 days in office he would “rescind the Climate Action Plan,” “save the coal industry,” “ask TransCanada to renew its permit application for the Keystone Pipeline,” “lift moratoriums [sic] on energy production in federal areas” and “cancel the Paris Climate Agreement.”

In a September 2016 speech delivered in Pittsburgh to the Marcellus Shale Coalition, the Ohio Oil and Gas Association, and the West Virginia Oil and Natural Gas Association, Trump proposed to “streamline the permitting process for all energy infrastructure projects,” “lift the restrictions on American energy” and “eliminate all unnecessary regulations.” Trump also declared that his energy policy “will make full use of our domestic energy sources, including traditional and renewable energy sources.”

During the first presidential debate in September 2016, Trump declared that “[US] energy policies are a disaster.”

In several actions taken during his first full week in office, President Trump signaled his preference for using executive authority to fulfill his energy-related campaign promises and implement his “America First Energy Plan.”

On January 25, Trump issued a Presidential Memorandum to the Secretaries of State, the Army and the Interior inviting TransCanada Keystone Pipeline, L.P. (TransCanada) to resubmit its application to the Department of State for a Presidential permit for the construction and operation of the Keystone SL Pipeline (Keystone) to import petroleum to the United States from Canada.¹ The memorandum requires the Secretary of State to reach a final permitting decision within 60 days of the date of TransCanada’s application and to the extent permitted by law, consider the Final Supplemental Environmental Impact Statement issued for Keystone in 2014 to satisfy the National Environmental Policy Act of 1969 (NEPA) and any other provision of law that requires executive department consultation or review.

Trump also issued an executive order directing the Chairman of the White House Council on Environmental Quality (CEQ) to identify “high priority” infrastructure projects that require federal reviews and approvals and to coordinate with the head of the relevant agency to establish expedited procedures and deadlines for completion of environmental reviews and approvals of those projects.²

¹ *Presidential Memorandum Regarding Construction of the Keystone XL Pipeline*, Jan. 24, 2017

² *Executive Order Expediting Environmental Reviews and Approvals For High Priority Infrastructure Projects*, Jan. 24, 2017

Finally, Trump issued a Presidential Memorandum requiring the Secretary of Commerce to submit to the President within six months a plan under which all new pipelines, as well as retrofitted, repaired or expanded pipelines, inside the borders of the United States, use materials and equipment produced in the US to the maximum extent possible and to the extent permitted by law.³

Trump's executive orders likely will be challenged in court by environmental groups, either as executive orders or in challenges to the federal approvals issued consistent with the executive orders.

US energy policy is comprised of statutes enacted by Congress, regulations, orders and policy statements issued by independent agencies and cabinet departments implementing those statutes, executive orders issued by the President and federal court decisions reviewing those statutes, regulations and executive orders; not to mention the laws enacted by state legislatures, the regulations, orders and policy statements issued by state-level commissions agencies and state court decisions reviewing those state laws, regulations and orders.

In addition to executive orders, President Trump can utilize executive authority in the short term to shape US energy policy through his appointments to the US Department of Energy (DOE) and the Federal Energy Regulatory Commission (FERC).

DOE

Created by the Department of Energy Organization Act of 1977 (DOE Organization Act), DOE is a cabinet-level department headed by the Secretary of Energy, who is appointed by the President and confirmed by the Senate. The Secretary of Energy serves at the pleasure of the President. DOE's primary responsibilities are managing the nation's nuclear weapons, the environmental cleanup of the national nuclear weapons complex and overseeing the national laboratories. However, DOE also is the lead agency with respect to the formulation and implementation of national energy policy mandated by the DOE Organization Act. In addition, DOE's Office of Fossil Energy is responsible for authorizing exports of natural gas, including liquefied natural gas (LNG), and DOE's Office of Electricity Delivery and Energy Reliability is responsible for authorizing exports of electric energy and issuing Presidential Permits for the construction, operation, maintenance and connection of electric transmission facilities at the international border.

President Trump has nominated Rick Perry, the former Governor of Texas, to be the Secretary of Energy. If confirmed, Perry, who previously advocated eliminating DOE, could promote the US oil and natural gas industries by proposing DOE budgets that increase funding for fossil energy-related programs and decrease funding for renewable energy and climate change-related programs at DOE.

Perry also could direct DOE's Assistant Secretary for Fossil Energy, who also will be nominated by President Trump and confirmed by the Senate, to act more quickly on applications for long-term, large-scale exports of US-produced LNG while at the same time complying with the requirements of the Natural Gas Act (NGA) and NEPA.

Section 3 of the NGA gives DOE authority over exports of US-produced natural gas, including LNG. Under Section 3(c) of the NGA, exports of natural gas to countries with which the United States has free trade agreements that require "national treatment" for trade in natural gas are automatically considered in the public interest, and applications to export gas to such countries must be approved without modification or delay. The United States currently has such free trade agreements with Australia, Bahrain, Canada, Chile, Colombia, Dominican Republic, El Salvador, Guatemala, Honduras, Jordan, Mexico, Morocco, Nicaragua, Oman, Panama, Peru, Republic of Korea and Singapore (FTA Countries).

³ *Presidential Memorandum Regarding Construction of American Pipelines*, Jan. 24, 2017

On the other hand, authorization to export natural gas to non-FTA Countries requires DOE to find that the proposed exports are not inconsistent with the public interest. In making this determination, DOE considers the domestic need for the natural gas proposed to be exported, whether the proposed exports pose a threat to the security of domestic natural gas supplies and other factors bearing on the public interest. DOE also must review the potential environmental effects of the proposed export under NEPA.

Project developers have expressed frustration at the length of time it takes to receive authorization from DOE to export LNG to non-FTA Countries. Legislation introduced into Congress in 2016, but ultimately not passed after the presidential election, would have required DOE to issue a final decision on any application for authorization under Section 3 of the NGA to export LNG to non-FTA Countries no later than 30 days after concluding the review to site, construct, expand or operate the LNG facilities required by NEPA.

The Republican-led Congress could reintroduce such a requirement in a new omnibus energy bill that would have the support of President Trump, but absent that, the new Secretary of Energy could effectively place an internal requirement on issuance of final decisions.

President Trump and his Secretary of Energy also could begin to shape US energy policy by utilizing the energy policy plan requirement in the federal law that created the Department of Energy. Title VIII of the DOE Organization Act requires the President to submit to Congress a comprehensive National Energy Policy Plan (NEPP) every two years, starting in 1979, for the purpose of formulating and implementing a coordinated national energy policy.

Key elements of the NEPP include establishing five- and 10-year energy production, utilization and conservation objectives focusing on the need for full employment, price stability, energy security, economic growth, environmental protection and nuclear non-proliferation, as well as special regional needs and the efficient utilization of public and private resources; identifying strategies to be followed to achieve the objectives and outlining the appropriate policies and actions of the federal government to maximize private production and investment in each significant energy supply sector; and estimating the domestic and foreign energy supplies on which the United States will be expected to rely and evaluating current and foreseeable trends in the price, quality, management and utilization of energy resources and the effects of those trends on the social, economic, environmental and other requirements of the nation. The Energy Policy Act of 1992 modified Title VIII of the DOE Organization Act to require that future NEPPs include a “least-cost energy strategy.”

From 1979 to 1998, six NEPPs were submitted to Congress by Presidents Carter, Reagan, George H.W. Bush and Clinton. Although in 2001, the administration of President George W. Bush issued a National Energy Policy prepared by a National Energy Policy Development Group headed by Vice President Cheney, it was not submitted to Congress as an NEPP under the DOE Organization Act.

Starting with President Carter, presidents utilized a national energy policy process to develop and propose major energy legislation. In 1978, in response to President Carter’s proposals, Congress enacted several major pieces of legislation that still are in effect today, including the Powerplant and Industrial Fuel Use Act, the Natural Gas Policy Act of 1978 and the Public Utility Regulatory Policies Act of 1978 (PURPA).

PURPA established a new class of generating facilities—qualifying small power production facilities and qualifying cogeneration facilities known as “QFs.” Two of the major benefits of QF status are the requirement that electric utilities purchase the output of QFs at avoided cost rates and exemption from certain federal state laws and regulations. PURPA often is credited with helping to create the independent power industry and increasing the use of renewable energy resources in the generation of electric energy.

In 2005, as part of the Energy Policy Act of 2005, Congress amended PURPA to, among other things, give FERC authority to terminate the mandatory QF purchase obligation of electric utilities after making specified findings.

The National Energy Strategy submitted in 1991 by President George H.W. Bush formed the basis for the Energy Policy Act of 1992, which among other things, amended the Public Utility Holding Company Act of 1935 to create exempt wholesale generators—or EWGs—that are exempt from PUHCA regulations.

In 2014, President Obama proposed to change energy policy development under the DOE Organization Act. He issued a Presidential Memorandum establishing a Quarterly Energy Review (QER) Task Force to include the heads of 22 federal agencies and offices, and directing the QER Task Force to deliver a report to the President that provides an integrated view of, and recommendations for, federal energy policy in the context of economic, environmental, occupational, security and health and safety priorities, reviews the adequacy of existing executive and legislative actions and recommends additional executive and legislative actions as appropriate, assesses and recommends priorities for research, development and demonstration programs to support key energy innovation goals, and identifies analytical tools and data needed to support further policy development and implementation.

The Presidential Memorandum required that the first QER focus on “challenges facing the Nation’s energy infrastructures.”

In April 2015, as part of its Climate Action Plan, the Obama Administration issued the first QER developed by the QER Task Force. This QER asserted that the United States has become the world’s leading producer of oil and natural gas combines, is less dependent on foreign oil as a percentage of national oil consumption than it has been since 1971, US electricity consumption was flat during the period 2005-2014 and total energy use declined by 1.9 percent. The QER further provides that the composition of US energy supply also has shifted, petroleum consumption is flat and coal consumption is declining, while the use of natural gas and renewables is growing. In 2014, renewable energy sources accounted for half of newly installed electric generation capacity, with natural gas units making up most of the remainder.

The first QER noted that “the last national energy policy report was published nearly 14 years ago,” and argues that the focus of US energy policy discussions has shifted from concerns about rising oil imports and high gasoline prices to debates about how much and what kinds of US energy should be exported, concerns about the safety of transporting large quantities of domestic crude oil by rail and questions of what changes in patterns of US energy supply and demand will be needed for the United States to meet global climate change and how they will be achieved.

The QER examined infrastructures for energy transmission, storage and distribution, including among other things, electricity transmission and distribution lines and storage; natural gas gathering, pipelines, storage, distribution and LNG production and storage; coal rail, truck and barge transport, and export terminals; and crude oil pipelines and refineries. The QER’s major recommendations included establishing a program at DOE to provide financial assistance to the states for the purpose of providing incentives for cost-effective improvement in the safety and performance in natural gas distribution systems, and coordination between DOE, the Department of Homeland Security and other Federal agencies, the states and industry on an initiative to mitigate the risk associated with the loss of transformers in the US electricity grid, including development of one or more “transformer reserves.”

At least two proposals have been introduced into Congress to codify the QER as a replacement for the biennial NEPP requirement under the DOE Organization Act, but neither proposal has passed. At this time, it is not clear whether President Trump and his new Secretary of Energy will use the QER process initiated by President Obama to set US energy policy through executive action, or return to the NEPP process for the purpose of proposing major new energy legislation.

FERC

President Trump's appointments to FERC could change the way in which FERC regulates the natural gas and electricity industries.

FERC is an independent agency under DOE that regulates the interstate transmission of electricity, natural gas and oil. FERC authorizes the construction and operation of LNG terminals and interstate natural gas pipelines and licenses hydroelectric projects. FERC also authorizes certain public utility mergers, the disposition and acquisition of facilities subject to its jurisdiction and corporate transactions by public utility companies.

FERC is composed of up to five commissioners who are appointed by the President and confirmed by the Senate. FERC commissioners serve five-year terms and the President designates the Chairman of FERC from among the sitting commissioners. The Chairman is FERC's chief operating officer and determines when and how the full commission acts on applications, rulemakings and other matters requiring a commission vote. Historically, FERC commissioners have been appointed from the oil and gas industry, state public utility commissions and congressional energy committee staff. By law, no more than three FERC commissioners may be from the President's political party.

Since assuming the presidency on January 20, Donald Trump has the ability over the next several months to appoint four new FERC commissioners. He will appoint three new commissioners from his party, following the resignation of FERC Chairman Norman Bay, and one new commissioner that is either a democrat or an independent, as Democrat Colette D. Honorable's term expires in June 2017.

On January 26, Trump designated Cheryl A. LaFleur, who is a democrat appointed by President Obama, as Acting Chairman of FERC until he has a chance to nominate new FERC commissioners and designate a Chairman from those new commissioners.

FERC, headed by a Republican Chairman named by President Trump with a majority of commissioners nominated by President Trump, could revise its regulations and its internal review processes to expedite consideration of applications for the construction of LNG terminals and interstate natural gas pipelines and applications for public utility mergers and other transactions subject to FERC jurisdiction. During the last Congress, legislation had been proposed to expedite FERC authorization of pipeline and LNG facilities, but did not pass. Trump's executive order with respect to "high priority" infrastructure projects could be used in connection with FERC's authorizations for natural gas pipelines, LNG terminals and hydroelectric licenses. Two projects appearing on a list of "high priority" projects reported by McClatchy, the Atlantic Coast Pipeline and the Alaska LNG Project, are currently under review by FERC. During the presidential campaign, Trump criticized FERC's denial of authorization for the Jordan Cove LNG project (see related article).

Finally, many energy industry observers wonder what the Trump Administration working with a Republican-led Congress will mean for the renewable energy industry, particularly in light of some of the statements in the Republican platform during the election. The energy plank of the Republican platform encouraged "the cost-effective development of renewable energy sources—wind, solar, biomass, biofuel, geothermal, and tidal energy—by private capital."

It is not clear what effect the Trump Administration will have on a major driver of US renewable energy development—renewable tax credits for wind and solar electric generation projects. In December 2015, Congress passed and President Obama signed a five-year extension of renewable energy tax credits for wind and solar. At this time, there is no indication that either the Trump Administration or the Republican-led Congress would seek repeal of the tax credits, either as part of

omnibus energy legislation or as part of a tax legislation proposal, or that the Trump Administration would seek to change the implementation of the tax credit through Treasury- or IRS-issued guidance on the use of the tax credits.

It is also not clear whether the Trump Administration or the Republican-led Congress would seek further amendment of PURPA or changes in its implementation at FERC.

On June 29, 2016, FERC staff conducted a technical conference to discuss implementation issues related to PURPA.⁴ After reviewing the comments submitted in the proceeding, FERC could initiate a new rulemaking proceeding to revise its regulations under PURPA.

To date, President Trump has not announced any nominations for FERC commissioners.

⁴ *Implementation Issues Under the Public Utility Regulatory Policies Act of 1978*, Docket No. AD16-16-000.



Supreme Court Ruling on Brexit—Implications and Next Steps for the UK Energy Sector

By Iain Elder and Sarah Kirkness

The Supreme Court has given its much anticipated majority ruling⁵ on whether the UK Government has the power to give notice pursuant to Article 50 of the Treaty on European Union of the United Kingdom’s intention to withdraw from the European Union, without an Act of Parliament providing prior authorization. Answering that question in the negative is perhaps the first concrete step in starting to give effect to the June 23, 2016 referendum decision to leave the European Union.

In making its ruling, certain of the Lords⁶ made it clear that the case had “nothing to do with issues such as the wisdom of the decision to withdraw from the European Union, the terms of withdrawal, the timetable or arrangements for withdrawal, or the details of any future relationship with the European Union. Those are all political issues which are matters for ministers and Parliament to resolve.”

The majority also pointed out that “It is common ground that UK domestic law will change as a result of the UK ceasing to be party to the EU treaties and the rights enjoyed by UK residents granted through EU law will be affected.” This article briefly considers this from the perspective of the energy sector—what is currently in place and how it will be affected as these political issues start to be debated, negotiated and ultimately resolved.

Development of Extensive Links With the EU

On 22 January 1972, the United Kingdom signed the Treaty of Accession pursuant to which it acceded to the European Communities Treaties on 1 January 1973. On that date, EEC law took effect as part of the domestic law of the United Kingdom, in accordance with the European Communities Act 1972 which had been passed only ten weeks earlier.

Since then, the UK energy sector has developed extensive links with the EU through trade, directives and interconnection. It is well understood how successive UK Governments championed both liberalization and decarbonization agendas within the EU, including the development of the single market in energy.

The 2013 House of Lords EU Sub-Committee D report, *No country is an energy island: Securing investment for the EU’s future*, concluded that there were “clear benefits to be derived from working within the EU on the energy challenge” and a larger, harmonized energy market with fewer trade barriers was understood, in theory, to promote competition, reduce consumer prices, and increase security of supply.

⁵ *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant)* [2017] UKSC 5—see here for the judgment (by a majority of 8 to 3).

⁶ The majority—Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption and Lord Hodge.

In practical terms, the UK is (currently) part of the EU's Internal Energy Market, which enables harmonized, tariff-free trading of gas and electricity across Europe. According to energy regulator Ofgem, the market appears to be competitive and outperforms virtually all relevant European and US benchmarks, with low levels of concentration, robust market entry and exit, and low levels of vertical integration.⁷

The UK's gas market is amongst the most mature and liquid gas markets in Europe and is physically integrated through three interconnectors (IUK, BBL and Moffat) with only small wholesale price differences and little congestion. The UK is a net importer of gas and therefore security of gas supply will be a consideration. As for the upstream sector, this is less influenced by EU legislation than the downstream sector, as many of the rules of the Third Energy Package do not apply to it. The UK will have to decide whether to continue to apply the (relatively few) EU Directives relating to oil and gas to the UK Continental Shelf or whether to develop its own domestic legislation.

The UK's electricity sector is mature, unbundled and interconnected to the EU, even though it is "relatively illiquid" (although this is something the regulator is looking to improve). The UK has been an active supporter of the EU's Third Energy Package, committed to decarbonization, demand reduction and supporting the integration of renewables into the system. It has supported market-based interventions such as market coupling, which is aimed at using cross-border transmission capacity efficiently. It is also physically interconnected through four interconnectors (IFA, BritNed, Moyle and East West) and is still planning further links.⁸

As for nuclear energy however, there is the potential for a significant impact. The European Atomic Energy Community (Euratom) has a separate legal personality from the EU, but its Member States and institutions are the same.⁹ Changes to the current status will require detailed and considered transitional arrangements as new agreements with the various EU Member States and other countries who have Nuclear Cooperation Agreements within the Euratom framework.¹⁰

The value of EU membership and participation in the IEM for the UK energy sector can therefore be understood at both a macro and micro level. Internal energy market participation has brought advantages in terms of investor confidence and certainty and access to and influence on energy policy, amongst other benefits. At the sector level, it has provided access to lower-priced gas, maintained security of gas supply, provided liquid markets and trading hubs, optimized the use of UK electricity assets through market coupling, cross-border balancing and capacity market trading and supported the investment arguments for new interconnectors.

⁷ Ofgem Report, Wholesale Energy Markets in 2016, 3 August 2016.

⁸ A 1,000 MW interconnector with Belgium is under construction for 2018 commissioning, and a 1,400 MWe link over 750 km with Norway is under construction for 2021 commissioning. A further 2,000 MW connection to Normandy was approved in September 2016 to enable the import of French nuclear power from 2022.

⁹ The Government's view is that withdrawal from the EU "includes the European Atomic Energy Community ('Euratom'), as the European Union (Amendment) Act 2008 sets out that the term "EU" includes (as the context permits or requires) Euratom." The Government said leaving the EU means leaving Euratom as well, because "they are uniquely legally joined."

¹⁰ Eight agreements are in place (with the US, Japan, Canada, Australia, Kazakhstan, Ukraine, Uzbekistan and South Africa), which vary in scope.

Considering the Implications—the Government Consults the Energy Sector

Therefore, as part of efforts to understand the wider implications, the Government’s Energy and Climate Change Select Committee opened an inquiry¹¹ to look specifically at the implications for UK energy policy of leaving the European Union. In particular, it was interested in the extent to which Government energy policies had been driven by the EU and whether any policy areas were now at risk, what the priorities should be for the Government in negotiating the UK’s exit from the EU (separate to questions regarding the mechanism for actually effecting the notification for exit) and what a successful negotiation outcome would (or should) look like and what aspects of existing EU energy policies and directives are beneficial to the UK and what should be the Government’s priorities in deciding which EU-led energy policies and legislation to retain.

After hearing evidence from a wide range of interested parties, the Committee reported on the implications for UK energy and climate change policy of leaving the EU as part of a wider report on the energy revolution and future challenges for UK energy and climate change policy.¹²

The UK government has suggested that “Links with the EU market are likely to continue,”¹³ although the exact details of how this will be managed are yet to be clarified. The links themselves, however, are well established, and there are many hundreds of EU laws, relevant to the UK energy sector, that are directly applicable.

So How Much Legislation Is There?

According to the Directory of EU legislation, there are some 379 separate pieces of EU legislation relating to the energy sector alone, broken down further into legislation on:

- Energy statistics – 7
- General principles and programs (including rational utilization and energy conservation) – 116
- Coal (including promotion of the coal industry, competition rates and other conditions of sale, coal products and other measures relating to coal) – 36
- Electricity – 24
- Nuclear energy – (including fuel supplies, power stations and joint undertakings, safeguards, nuclear research and other measures relating to nuclear energy) – 169
- Oil and gas (including supplies and stocks, intra-Community trade and other measures relating to oil or gas) – 22
- Other sources of energy – 12

Under the European Communities Act 1972 (ECA), the UK’s Parliament voluntarily gave effect to the UK’s obligations and duties under the former Community (and now EU Treaties) in national law. The ECA defined the legal relationship between

¹¹ The inquiry, *Leaving the EU: Implications for UK energy policy*, was opened on 7 July 2016. Its terms of reference were intended to inform the Committee about the policy areas that will need to be addressed during the exit negotiations.

¹² House of Commons Energy and Climate Change Committee Report, *The energy revolution and future challenges for UK energy and climate change policy*, 14 October 2016. This report was a combined report on three separate energy and policy enquiries—it was published as a combined report following changes to the UK government and various government departments in the aftermath of the Brexit vote. The new Prime Minister announced the creation of a new Government department, the Department for Business, Energy and Industrial Strategy (BEIS), which brought together all of DECC with parts of the former Department for Business, Innovation and Skills (BIS) and the work of the Committees, whose structures “mirror” Whitehall and were similarly reorganized.

¹³ House of Commons Library Briefing Paper, 26 August 2016.

the two otherwise separate spheres of law, and without it EU law could not have entered into national law. Section 2(1) of the ECA establishes the authority for directly applicable EU law to have legal effect in UK law without needing further UK enactment.

Several different types of EU law are directly applicable: EU Treaty provisions, EU regulations and EU decisions. “Directly applicable” means that the EU law applies in the Member States without further national implementing measures, and these usually also have a direct effect, which creates rights that individuals can rely on before national courts. These are said to “pose a particular problem,” as “there are a great many of them, they may be difficult to identify and therefore to ‘disentangle’, and many are not laws at all in the UK, but administrative rules or other ‘soft law’ measures.”¹⁴

The Government has said¹⁵ it intends to “convert” EU laws into UK law “wherever practical,” so they can continue to operate in the UK until the Government and Parliament decide what to do with them. If there is no specific provision for them, they will no longer apply in the UK as soon as the ECA is repealed.

In the energy sector, some 61 separate Regulations have been identified as being “directly applicable.” The Commons Briefing Paper on directly applicable EU law made the point that what the Government and Parliament do with the directly applicable EU law “will depend largely on the outcome of the EU-UK withdrawal negotiations and the UK’s future relationship with the EU.”

It has been suggested, therefore, that the most likely approach will be the use of transitional legislation (which will have the effect of retaining much of the legislation derived from EU law) to bridge any voids in domestic legislation until the gaps can be analysed and appropriate legislation can be enacted to meet the objectives of Brexit.

Areas of Particular Concern?

Various themes or areas of particular concern for the energy sector were identified over the course of the Committee’s hearings. These included:

- the EU Emissions Trading System;
- the EU Effort Sharing process (emissions reduction in non-traded sectors);
- the Paris Agreement and future international climate negotiations;
- the Internal Energy Market (IEM);
- security of supply and the role of EU interconnection;
- EU funding streams; and
- investor confidence.

Of particular interest here are issues concerning the IEM, interconnection, funding and investor confidence.

IEM

On the question of the UK’s access to the IEM, the weight of evidence from interested stakeholders was in favor of maintaining access. In deciding the nature of the UK’s future relationship with the market, the Committee said the

¹⁴ House of Commons Library Briefing Paper, *Legislating for Brexit: directly applicable EU law*, Number 7863, 12 January 2017.

¹⁵ Theresa May’s Speech to Conservative Party Conference, 2 October 2016; David Davis, Secretary of State for Exiting the EU, Statement to House of Commons, 10 October 2016.

Government will need to weigh the costs of associated legislation and regulation against the economic, security of supply and carbon reduction benefits afforded by IEM membership. It recognized, however, that negotiations around this are likely to be affected by broader issues, including freedom of movement.

IEM

The Committee suggested that if IEM participation is to be pursued, the Government should explore “potential membership models,” such as the Energy Community Treaty.¹⁶ However, if continued IEM is not possible, then the Government should undertake a thorough assessment to ensure that policy risks are understood and minimized.

The Committee also suggested that if the UK does lose its membership in, but retains access to, the IEM, then the Government should identify new options for shaping the development of IEM policy. It warned that without this, the UK risks losing its role as an IEM “rule-maker,” instead becoming a “rule-taker.”¹⁷

If the UK wishes and is able to continue participating in the IEM, then it will be expected to continue to comply with the European Network Codes (ENCs). If that happens, it was suggested that energy regulators Ofgem and National Grid should seek to retain membership of ACER,¹⁸ ENTSO-E¹⁹ and ENTSOG²⁰ so that the UK can continue to shape the development of new codes. The Committee suggested, however, that if the UK sought to resign from the European Network Codes, then the Government would need to “ensure that resultant gaps in domestic network codes are filled.”

The Government has given some indication as to its thinking when it said that in negotiating the nature of the UK’s future relationship with the IEM, it “will need to weigh the costs of the associated legislation and regulation and broader issues against the benefits afforded by various models of membership,” and that “whatever the future relationship may be we will seek to ensure that we maintain the efficient cross-border trading we have today which increases security of supply, reduces costs for consumers and increases the efficiency of low carbon generation.”²¹

It said it will pay particular attention to the impact that a different relationship with the IEM may have on the Single Electricity Market (SEM) in Northern Ireland and the Republic of Ireland and “seek to ensure that the SEM continues to operate efficiently, bringing security of supply and reduced costs for consumers in both Northern Ireland and the Republic of Ireland.”²²

¹⁶ The Energy Community Treaty sees the Contracting Parties agreeing to implement core parts of the EU *acquis communautaire*, both sector-specific and general. The Contracting Parties also adopt development plans with a view to bringing their energy sectors in line with generally applicable standards of the EU. It provides for the free movement of network energy and allows for further measures to be taken with a view to creating a single energy market and also establishes an external energy trade policy and provides for a mechanism of mutual assistance between the Parties in the event of energy disruption.

¹⁷ House of Commons Select Committee Report, *The energy revolution and future challenges for UK energy and climate change policy*, 14 October 2016.

¹⁸ The Agency for the Cooperation of Energy Regulators, which was created by the Third Energy Package to further progress the completion of the internal energy market both for electricity and natural gas.

¹⁹ The European Network of Transmission System Operators for Electricity, which represents 42 electricity transmission system operators (TSOs) from 35 countries across Europe, and which was established and given legal mandates by the EU’s Third Legislative Package to shape policy for energy security, market integration, sustainability and network adequacy.

²⁰ The European Network of Transmission System Operators for Gas, which was also legally mandated by the Third Energy Package; it facilitates and enhances cooperation between national gas transmission system operators (TSOs) across Europe “in order to ensure the development of a pan-European transmission system in line with European Union energy goals.”

²¹ Fourth Special Report of Session 2016–17, *The energy revolution and future challenges for UK energy and climate change policy: Government Response to the Energy and Climate Change Committee’s Third Report of Session 2016–17*, 24 January 2017.

²² *Ibid.*

Interconnection

In terms of security of supply, the Committee warned about the level of dependence on both imported gas and electricity and highlighted the benefits that pan-European coordination has brought to ensuring security of supply. It said the Government should “seek to build investor confidence, to avoid exacerbating difficulties in bringing forward investment in new electricity capacity and new indigenous resources.”

It also called on the Government to examine the role of the “solidarity principle”²³ in managing potential gas crises, specifically how the UK can continue to participate, and said if the UK were excluded then the Government “must urgently investigate alternative back-up arrangements to ensure security of supply in the event of a crisis.”

The status of the UK in terms of its membership in various EU bodies responsible for European energy transmission systems remains uncertain. Non-Member States are currently represented on ENTSO-E and ENTSO-G, but not ACER. However, observer status is open to certain non-Member States. Much will depend on the final terms for Brexit as to what extent the UK sees its future connected with the still-emerging single European energy market.

That said, it is likely that the UK will continue to be involved in some capacity with these bodies (and also in the single European energy market) given both its existing interconnectors and the potential stranding of Ireland from the rest of the EU (although work in relation to an electricity interconnector between Ireland and France is underway). At this stage, however, there still remain many more questions than answers.

Having acknowledged the importance of trading across interconnectors, the Government intends to “seek to ensure that arrangements are in place that facilitate efficient cross-border trade and avoid any market distortions arising from differences in UK and EU rules.”²⁴

Funding

On funding for projects, the Government has committed to underwrite competitive EU funding where recipients bid directly to the European Commission for funds and HM Treasury has provided assurances related to funding for structural and investment fund projects which are signed before the UK’s departure from the EU, and which continue after departure from the EU. Funding for these projects will be honored by HM Treasury “so long as they provide strong value for money and are in line with domestic strategic priorities.”²⁵

Furthermore, it has said that over the coming months it will consult with stakeholders to review all EU funding schemes to ensure that any continuing funding commitments best serve the UK’s national interest, whilst ensuring appropriate investor certainty.²⁶

Investor Confidence

Underpinning a number of the Committee recommendations was the recognition of the importance of maintaining and developing further investor confidence by providing “clear signals on the direction of domestic energy policy” and “avoid exacerbating difficulties in bringing forward investment in new electricity capacity and new indigenous resources.”

²³ This is a policy designed to ensure that Member States receive immediate assistance in the event of a gas supply crisis.

²⁴ Fourth Special Report of Session 2016–17, The energy revolution and future challenges for UK energy and climate change policy: Government Response to the Energy and Climate Change Committee’s Third Report of Session 2016–17, 24 January 2017.

²⁵ Ibid.

²⁶ Ibid.

The Committee suggested that the UK's departure from the EU is "not expected to change the general direction of UK energy policy, since this is perceived to be driven primarily by the Climate Change Act 2008, and domestic concerns about supply security and affordability." However, it warned that "the absence of external enforcement and accountability mechanisms could weaken the imperative to deliver on policy targets. EU energy and climate change policies have historically played an important role in underpinning UK policy and providing a 'double-lock' to decarbonization commitments. This has bolstered investor confidence by providing policy stability beyond the five-year domestic parliamentary cycle."

However, as the Supreme Court acknowledged, these will be determined by political choices, and the outcome remains to be seen.

Summary

It has been suggested that in terms of the energy sector, there are certain UK sectors where some legal changes may be advantageous. In upstream oil and gas, EU competition law has been described as an obstacle to attempts to create the collaborative approach needed to ensure the North Sea's future development, and state aid rules and EU-wide public accounting standards have restricted the UK's flexibility to support a nationally determined fuel mix. It is also well known that capacity margins have been decreasing as older coal and oil-fired power stations are closing due to age and the need to comply with European environmental regulations.²⁷

The key, therefore, will be what these domestic strategic priorities actually are. However, as a result of the Supreme Court judgment, Parliament will have the opportunity to ratify the referendum, which may result in further debate into the manner in which the UK's exit negotiations progress. It is also hoped that clarification as to many of the important questions which will affect the UK energy sector will also continue to be addressed as the Government's statement of intention is given detail in the delivery.

²⁷ However, the vote to leave the EU does not change the UK's requirement to reduce emissions in line with the Paris Agreement and domestic legislation. The required levels of emissions reduction through to the early 2030s, during the fifth carbon budget period, have already been set by the UK Parliament.



The Forecast for Uranium Demand, Production and Export, Illustrated by Developments in Greenland's Uranium Export Legal Regime

By Chelsea Gunter

The spot price for uranium slowly began to rise in December after historic lows. After record highs of over \$100 per pound in 2007, the spot price for the commodity fell following the Fukushima disaster and its global repercussions.²⁸ On December 23, Platts reported that a pound of U_3O_8 rose to \$20.65, after having hit a 12-year low of \$17.75 per pound on December 2.²⁹ Analysts remain cautiously optimistic that the price of uranium will continue to rise in 2017. Driving this predicted increase are signs that market demand will increase. At the start of this year, there are 477 operating nuclear power plants and 60 reactors currently under construction worldwide. An additional 167 reactors are on order or planned, representing a potential increase of 235,000 MWe generated by nuclear power coming online by the late 2020s.³⁰ While there are many factors that render forecasting uranium demand complex, the International Atomic Energy Agency (IAEA) and the Nuclear Energy Agency of the OECD nonetheless predict that demand for U_3O_8 will rise 11-81% over the next 20 years, and between 5-20% in the next five years alone.³¹

Predicted growth in the demand for uranium continues to drive new exploration and technology. Cameco, the world's largest producer of uranium,³² and AREVA will drill at least one hole on the Waterbury West Claim north of Cigar Lake in the first quarter of 2017,³³ Azarga Uranium received approval from the Nuclear Regulatory Commission for construction of a mining project in South Dakota³⁴ and, at the lowest point in the uranium market this year, Berkeley Energia broke ground on a shallow pit mine near Salamanca, Spain.³⁵ Improved prospects for the cost of uranium have also encouraged steps

²⁸ It was further kept low by non-discretionary buying by utilities and ramp up of production at mines such as Cigar Lake. Frik Els, *Uranium Market is Getting Crushed*, MINING.COM (Apr. 20, 2016), <http://www.mining.com/uranium-market-getting-crushed/>.

²⁹ *Buying activity continues to push daily spot price higher, reaches \$20.65/lb*, S&P GLOBAL PLATTS, Nuclear Fuel Uranium Pricing Supplement, Dec. 23, 2016.

³⁰ *World Nuclear Power Reactors & Uranium Requirements*, WORLD NUCLEAR ASSOCIATION (Nov. 1, 2016), <http://www.world-nuclear.org/information-library/facts-and-figures/world-nuclear-power-reactors-and-uranium-requireme.aspx>.

³¹ Such as changes in performance of installed nuclear power plants, improvements at fuel cycle facilities, and optimization of enrichment processes. *Uranium 2016: Resources, Production, and Demand*, IAEA & NEA (Nov. 30, 2016), 92-5, <http://www.oecd-nea.org/ndd/pubs/2016/7301-uranium-2016.pdf>.

³² Jocelyn Aspa, *Top Uranium-producing Companies in the World* (Nov. 8, 2016), INVESTINGNEWS.COM, <http://investingnews.com/daily/resource-investing/energy-investing/uranium-investing/uranium-producing-companies-bhp-rio-tinto-cameco-areva-paladin-ur-energy-uranium-one-energy-fuels-peninsula-uranium-resources/>.

³³ *Cameco and AREVA to Drill Waterbury West Claim*, CANALASKA URANIUM LTD. (Dec. 12, 2016), <http://www.canalaska.com/s/News.asp?ReportID=773265>.

³⁴ *Azarga Uranium Completes NRC License Conditions for Dewey Burdock* (Dec. 7, 2016), MARKETWIRED, <http://www.marketwired.com/press-release/azarga-uranium-completes-nrc-license-conditions-for-dewey-burdock-tsx-azz-2181410.htm>.

³⁵ Jon Yeomans, *Uranium: the unloved metal whose price is poised to go radioactive*, Telegraph (Nov. 20, 2016), <http://www.telegraph.co.uk/business/2016/11/20/uranium-the-unloved-metal-whose-price-is-poised-to-go-radioactiv/>.

forward in the demonstration of new enrichment technology. In November, GE-Hitachi Global Laser Enrichment agreed to purchase 300,000 MTU of high assay tails from the Department of Energy for enrichment into natural grade uranium.³⁶ This uranium would be enriched using SILEX (separation of isotopes through laser excitation) technology, initially developed in Australia in the 1990s, to enrich uranium with pulsed lasers.

Meeting the predicted demand for uranium, however, is not a simple process given the safety, security, environmental and public health issues associated with uranium mining, opening of mines, the demonstration of new technology and export of U₃O₈, all of which entail completing manifold licensing and permitting processes governed by local, national and international law and regulation. Efforts to mine one of the world's largest estimated deposits of uranium, at Kvanjefeld in Greenland, illustrate the potential complexity inherent in opening a new mine and exporting uranium.³⁷ Greenland, never having operated a uranium mine, had no clear regulation governing the export of uranium. Australia's Greenland Minerals and Energy Co. (GME), which had been developing the Kvanjefeld since 2009, waited seven years for the passage of necessary legislation.³⁸

The Legal Framework for Uranium Mining and Export in Greenland

Greenland's legal framework for uranium mining is governed by the 2009 Mineral Resources Act, passed pursuant to the 2009 Act on Greenland Self-Government.³⁹ The Mineral Resources Act includes clear lines of authority for exploration and exploitation licenses, as well as straightforward requirements for remediation plans, occupational safety and environmental protection requirements, and financial means tests. Although commentators have criticized the Act citing shortcomings—such as in detailing requirements for an environmental impact assessment—it nonetheless outlines a cogent licensing and permitting process for mining companies.⁴⁰

Establishing the legal regime for the export of uranium, however, has not been straightforward, largely as a result of Greenland's status as an "Overseas Countries and Territories" (OCT) entity. OCTs are special territories of EU member states that have relationships with the EU governed by provisions in their country's accession agreements or EU legislative agreements. Greenland, the only OCT to have withdrawn from the European Union, sought greater independence from Denmark via the 2009 Act on Greenland Self-Government, which gave Greenland responsibility for establishing courts of law, financial regulation and mineral resource activities, while Denmark retains the lead for Greenland's foreign defense and security policy.⁴¹ Although Denmark is a signatory to IAEA and Euratom agreements, it has never developed activities related to uranium mining or the nuclear sector generally and, consequently, does not have a comprehensive legal

³⁶ *The US Department of Energy and GLE (Licensee for the SILEX Technology) reach agreement for the sale and purchase of depleted uranium hexafluoride*, SILEX (Nov. 11, 2016), [http://www.silex.com.au/SILEX-Laser-Uranium-Enrichment-Technology/US-DOE-and-GLE-Sign-Agreement-involving-SILEX-Plan.aspx?ext=.pdf.ToString\(\).Replace\(%22~%22,%22%22\)](http://www.silex.com.au/SILEX-Laser-Uranium-Enrichment-Technology/US-DOE-and-GLE-Sign-Agreement-involving-SILEX-Plan.aspx?ext=.pdf.ToString().Replace(%22~%22,%22%22)).

³⁷ It is estimated that approximately 600 million pounds of uranium remain in Kvanjefeld, rendering it the world's sixth largest uranium mine. See Kristine Thrane, Per Kalvig & Nynke Keulen, *Uranium Potential in Greenland*, GEOLOGICAL SURVEY OF DEN. AND GREEN., <http://www-pub.iaea.org/iaea meetings/cn216pn/Tuesday/Session2/023-Thrane.pdf>.

³⁸ *Greenland Minerals and Energy Ltd.*, Home, <http://www.ggg.gl/>.

³⁹ *2009 Mineral Resources Act*, available at http://www.govmin.gl/images/stories/faelles/mineral_resources_act_unofficial_translation.pdf.

⁴⁰ Poul Johansen, Christian Glahder & Gert Asmund, *BMP Guidelines for Preparing an Environmental Impact Assessment: Report for Mineral Exploitation in Greenland*, BUREAU OF MINERALS AND PETROLEUM (Jan. 2011), available at http://www.govmin.gl/images/stories/minerals/EIA_guidelines_mining.pdf.

⁴¹ Cindy Vestergaard, *The European Union, Its Overseas Territories and Non-Proliferation: The Case of Arctic Yellowcake*, THE EU NON-PROLIFERATION CONSORTIUM (Jan. 2013), http://www.sipri.org/research/disarmament/eu-consortium/publications/EUNPC_no%2025.pdf.

framework governing uranium import or export, and the extent to which its agreements would in any case bind Greenland has been a matter of dispute.⁴²

IAEA Safeguards and Euratom Treaty Article 77

Disagreement as to whether Greenland could negotiate the export of uranium on its own terms and on uranium ore reporting requirements is the result of complexities in IAEA and Euratom regulation of uranium, and how those regulations apply to Greenland as a result of its OCT status and the 2009 Act. A comprehensive safeguards agreement (based on IAEA INFCIRC/153) establishes that safeguards apply from the point at which the source leaves the plant or process stage, and do not apply to the mining of ore, ore processing or yellowcake.⁴³ Conversely, the Euratom Treaty provides that the “Commission shall satisfy itself that” in member states, “ores; source materials and special fissionable materials are not diverted from their intended uses as stated.”⁴⁴ As a result of this provision, Euratom requires member states to keep detailed records of ores and to allow experts access to processing facilities.⁴⁵ In 2005, Euratom updated the application of its safeguards requirements by publishing Commission Regulation No. 302/2005, requiring member states to report basic technical information regarding ore extraction operations and clarifying that reporting requirements include maintaining accounting records of “the quantities of the ore extracted, with the average uranium and thorium content, and the stock of extracted ore at the mine [. . .] [and] details of shipments, stating the date, consignee and quantity in each case.”⁴⁶ While IAEA safeguards were applied across Euratom member states pursuant to an agreement between the two agencies in 1973, Euratom can be said to have safeguards requirements that apply more broadly to front-end fuel cycle mining activities than those implemented by the IAEA.⁴⁷

Recent Developments in Greenland’s Uranium Mining and Export Legal Regime

In January 2016, Denmark and Greenland signed four agreements establishing a framework for uranium mining and export: a cooperation agreement related to foreign defense and security issues; a declaration on safeguarding nuclear materials; a

⁴² Bent Ole Gram Mortensen, *The Quest for Resources—The Case of Greenland*, 15 J. OF MIL. & STRATEGIC STUD. 93, 112 (2013).

⁴³ *The Structure and Content of Agreements Between the Agency and States Required in Connection with the Treaty of the Non-Proliferation of Nuclear Weapons*, 34(c), IAEA INFCIRC/153 (June, 1972), <http://www.iaea.org/sites/default/files/publications/documents/infcircs/1972/infcirc153.pdf>.

⁴⁴ *Treaty establishing the European Atomic Energy Community*, ch. VII-Safety Control, art. 77, (Mar. 25, 2957), available at <http://www.cvce.eu/en/recherche/unit-content/-/unit/3cb9e142-6ac4-4184-8794-fc3cf619cf33/7c899bfd-8af1-4afa-aa30-e1c29c515c4f/Resourc.es>.

⁴⁵ Cindy Vestergaard, *Greenland, Denmark and the Pathway to Uranium Supplier Status*, 2 THE EXTRACTIVE INDUS. & SOC’Y 153 (2015), <https://www.google.com/url?sa=t&rct=j&q=&esrc=&source=web&cd=2&ved=0CCgQFjAB&url=http%3A%2F%2Fwww.sciencedirect.com%2Fscience%2Farticle%2Fpii%2FS2214790X14000690&ei=slpnVOGhAuLasATPm4K4Bw&usq=AFQjCNEhkmuauP4LFT9sgFSN9vhXbw&sig2=IDw1Szlf7laV3o8GVTqS4g&bvm=bv.79142246,d.cWc&cad=rja>.

⁴⁶ *On the application of Euratom safeguards*, ch. V-Specific Provisions, art. 24, Ore Producers, No. 302/2005 (Feb. 8, 2005), available at http://eur-lex.europa.eu/resource.html?uri=cellar:48e4f5fc-d06b-4069-ab40-8c47a3e6a1bb.0005.02/DOC_1&format=PDF.

⁴⁷ *The Text of the Agreement Between Belgium, Denmark, the Federal Republic of Germany, Ireland, Italy, Luxembourg, the Netherlands, the European Atomic Energy Community and the Agency in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons*, IAEA INFCIRC/193 (Sep. 14, 1973), available at <https://www.iaea.org/publications/documents/infcircs/text-agreement-between-belgium-denmarkfederal-republic-germany>.

declaration on dual-use materials; and an agreement on safeguarding nuclear mining safety.⁴⁸ The agreements required implementing legislation, passed in May 2016, which included the stipulation that uranium would only be exported to NPT signatory states, that Greenland obtain prior consent from Copenhagen before exporting uranium to a country other than Denmark, and that countries importing Greenland's uranium were responsible for managing waste and other products that resulted from reprocessing.⁴⁹ Moreover, Greenland agreed to follow the reporting rules and accounting and control requirements of Euratom Regulation No. 302/2005.⁵⁰ The Greenlandic Department of Industry, Labour and Trade will cooperate with the Danish Emergency Management Agency to establish a common electronic accountancy system and inspectors from both nations, as well as the IAEA, have access to facilities and materials subject to safeguards.⁵¹ Greenland hence agreed to meet Denmark's recommendations regarding nonproliferation safeguards, and Denmark continues to assume responsibility for international safeguards to ensure the peaceful use of Greenland's uranium.⁵²

Conclusion

Legal hurdles that had hampered Greenland's ability to move forward since lifting the moratorium on uranium mining have been addressed through recent agreements passed to satisfy safety and environmental issues, as well as Denmark's nonproliferation requirements.

Notwithstanding the uncertainty associated with forecasting uranium demand, the market for U₃O₈ is predicted to rise significantly both in the short and long term, and it is hoped that Greenland will be able to contribute to that market in the future.

⁴⁸ *Denmark and Greenland confirm uranium agreements*, WORLD NUCLEAR NEWS (Feb. 2, 2016), <http://www.world-nuclear-news.org/UF-Denmark-and-Greenland-confirm-uranium-agreements-0202164.html>.

⁴⁹ Cindy Vestergaard and Gry Tomasen, *Uranium in Greenland: Clarifying Competences*, ARTIC JOURNAL (Feb. 1, 2016), <http://arcticjournal.com/opinion/2118/clarifying-competences>.

⁵⁰ Cindy Vestergaard and Gry Tomasen, *Danish-Greenlandic declaration on nuclear safeguards*, DANISH INSTITUTE FOR INTERNATIONAL STUDIES (Feb. 9, 2016), <http://www.diis.dk/en/research/danish-greenlandic-declaration-on-nuclear-safeguards>.

⁵¹ *Id.*

⁵² Cole Latimer, *Greenland gives greenlight for yellowcake export*, AUSTRALIAN MINING (June 8, 2016), <https://www.australianmining.com.au/news/greenland-gives-greenlight-for-yellowcake-export/>.



FERC Proposes Reforms to Its Large Generator Interconnection Procedures and Announces Review of Its Market Power Analysis

By Donna J. Bobbish

In the last quarter of 2016, FERC announced two proceedings that have the potential to affect the future development and financing of, and investment in, electric power projects in the United States. The first proceeding is a proposed rulemaking concerning revisions to the interconnection procedures for large generating facilities, and the second is a notice of inquiry concerning FERC's intention to review the way it analyzes market power when it considers applications submitted under Sections 203 and 205 of the Federal Power Act (FPA).

FERC's Interconnection NOPR

In December, FERC issued a Notice of Proposed Rulemaking (NOPR) proposing to revise its interconnection regulations, the pro forma Large Generator Interconnection Procedures (LGIP) and the pro forma Large Generator Interconnection Agreement (LGIA) that establish the terms and conditions under which Large Generating Facilities, which are generating facilities having a capacity of more than 20 MW, are interconnected to the interstate transmission grid.⁵³ Revisions to FERC's regulations resulting from the Interconnection NOPR could make it easier for Large Generating Facilities to apply for and obtain interconnection to the grid.

The Interconnection NOPR is the result of a 2015 petition for rulemaking submitted by the American Wind Energy Association (AWEA) requesting changes to FERC's interconnection rules and procedures. AWEA argued that FERC's current interconnection process often results in "complex, time consuming technical disputes about... interconnection feasibility, cost and cost responsibility" with delays that "undermine the ability of new generators to compete."

In the Interconnection NOPR, FERC found that the current process for interconnecting Large Generating Facilities can create uncertainty for interconnection customers with respect to both the costs and timing of interconnection. FERC also found that the process for a transmission provider, such as a regional transmission organization (RTO) or independent system operator (ISO), to conduct required interconnection studies may result in uncertainty and inaccurate information. Finally, FERC found that the potential for discriminatory interconnection processes exists as new technologies, such as electricity storage technologies, enter the power generation sphere.

FERC's Interconnection NOPR proposes four reforms to improve certainty in the interconnection process: specifically, FERC would revise the pro forma LGIP to require transmission providers that conduct cluster studies to conduct restudies on a scheduled, periodic basis, such as annually, semi-annually, quarterly or a set number of days after completion of a cluster study; remove from the pro forma LGIA the limitation that interconnection customers may only exercise the option

⁵³ *Reform of Generator Interconnection Procedures and Agreements*, Notice of Proposed Rulemaking, Docket No. RM17-8-000, 157 FERC ¶ 61,212 (Dec. 15, 2016) (the "Interconnection NOPR").

to build transmission providers' interconnection facilities and stand-alone network upgrades if the transmission owner cannot meet the dates proposed by the interconnection customer; modify the pro forma LGIA to require mutual agreement between the transmission owner (generally a public utility that is a member of the RTO or ISO) and interconnection customer to opt to initially self-fund the costs of the construction of network upgrades; and require that RTOs and ISOs establish dispute resolution procedures for interconnection disputes.

FERC also proposes five reforms to improve transparency in the interconnection process: specifically, FERC would require transmission providers to outline and make public a method for determining contingent facilities in their LGIPs and LGIAs based upon specified guiding principles; require transmission providers to list in their LGIPs and on their Open Access Same-Time Information System (OASIS) sites the specific study processes and assumptions for forming the networking models used for interconnection studies; require congestion and curtailment information to be posted in one location on each transmission provider's OASIS site; revise the definition of "Generating Facility" in the pro forma LGIP and LGIA to explicitly include electric storage resources; and create a system of reporting requirements for aggregate interconnection study performance.

In the Interconnection NOPR, FERC also proposes five reforms to enhance interconnection processes by making use of underutilized existing interconnections: specifically, FERC would allow interconnection customers to limit their requested level of interconnection service below their generating facility capacity; require transmission providers to allow for provisional agreements so that interconnection customers can operate on a limited basis before completing the full interconnection process; require transmission providers to create a process for interconnection customers to utilize surplus interconnection service at existing interconnection points; require transmission providers to establish a separate procedure to allow transmission providers to assess and, if necessary, study an interconnection customer's technology changes, such as incorporation of a newer turbine model, without a change to the interconnection customer's queue position; and require transmission providers to evaluate their methods for modeling electric storage resources for interconnection studies and report to FERC why and how their existing practices are or are not sufficient.

FERC also is seeking comment on whether any of its proposed reforms also should be applied to small generating facilities (generating facilities having a generating capacity of less than 20 MW) and implemented in the pro forma Small Generator Interconnection Procedures (SGIP) and pro forma Small Generator Interconnection Agreement (SGIA).

Comments on the Interconnection NOPR must be filed with FERC no later than March 14, 2017.

FERC's Market Power NOI

At the end of September, FERC issued a Notice of Inquiry (NOI) announcing its intention to consider whether and, if so, how it should revise its current approach to identifying and assessing market power in its review of utility mergers and other transactions under Section 203 of the Federal Power Act (FPA) and applications for market-based rate authority under Section 205 of the FPA.⁵⁴ Revisions to FERC's regulations resulting from the Market Power NOI may require applicants for market-based rate authority, and applicants for approval of public utility mergers and other transactions subject to FERC jurisdiction to provide additional information and analyses in their applications.

⁵⁴ *Modifications to Commission Requirements for Review of Transactions Under Section 203 of the Federal Power Act and Market-Based Rate Applications Under Section 205 of the Federal Power Act*, Notice of Inquiry, Docket No. RM16-21-000, 156 FERC ¶ 61,214 (Sept. 22, 2016).

Section 203 of the FPA

Section 203 of the FPA requires public utilities to seek prior authorization for public utility mergers and for the disposition, consolidation, and acquisition of facilities subject to FERC jurisdiction. FERC authorizes such transactions upon a finding that the proposed transaction is “consistent with the public interest” and “will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company.” In determining whether a proposed transaction is “consistent with the public interest,” FERC generally considers whether the proposed transaction will have an adverse effect on competition in the relevant market(s), an adverse effect on rates and an adverse effect on regulation.

With respect to competition, applicants seeking Section 203 authorization can demonstrate that the transaction does not result in any increase in the amount of generation capacity owned or controlled by it and its affiliates in the relevant markets, or the transaction results in a “*de minimis*” change in its ownership or control of generation in the relevant markets. An applicant that cannot make either demonstration must submit a Competitive Analysis Screen with its application.

Section 205 of the FPA

Section 205 of the FPA requires that rates charged by public utilities must be “just and reasonable.” Historically, “just and reasonable” rates meant rates that were cost-based. However, FERC will authorize sales of electric energy, capacity and ancillary services at negotiated, “market-based” rates under Section 205 of the FPA if the applicant shows that it and its affiliates do not have, or have adequately mitigated, horizontal and vertical market power in the relevant market(s). For purposes of making this showing, FERC has established two indicative screens. The first screen, the wholesale market share screen, measures whether an applicant has a dominant position in the relevant market by analyzing the amount of uncommitted capacity (MW) it owns or controls, relative to the uncommitted capacity in the entire market. If an applicant’s share of the relevant market is less than 20 percent during all seasons, it passes the market share screen. The second screen, the pivotal supplier screen, evaluates an applicant’s potential to exercise market power based on its uncommitted capacity at the time of annual peak demand in the relevant market. An applicant will pass this screen if its wholesale load is less than the uncommitted capacity of its competing suppliers in the relevant market.

In the NOI, FERC indicated that it is considering whether it should establish a simplified analysis for certain transactions, subject to Section 203 of the FPA transactions that are unlikely to raise market power concerns; add a supply curve analysis to its analysis of transactions under Section 203 of the FPA evaluations; improve its single pivotal supplier analysis in reviewing market-based rate applications and require that a similar pivotal supplier analysis be included in Section 203 applications; add a market share analysis to review of Section 203 transactions; modify how capacity associated with long-term power purchase agreements should be attributed to Section 203 transactions; and require submission of applicant merger-related documents.

FERC also indicated that it is considering whether there are existing blanket authorizations granted under Section 203 of the FPA that may be overly broad or otherwise no longer appropriate, and whether there are classes of transactions subject to Section 203 of the FPA for which further blanket authorizations or expedited review would be appropriate.

Comments on the NOI were filed in late November. Among those providing comments were the US Department of Justice and the Federal Trade Commission (DOJ/FTC) and a group of Market Power Experts who have submitted market power studies and testimony in proceedings before FERC and DOJ’s Antitrust Division.

DOJ/FTC recommended that FERC add a supply curve analysis to its examination of mergers under Section 203 of the FPA; account for transmission constraints when defining a geographic market to assess market power; make its Section 205 market power analysis under Section 205 of the FPA as consistent as possible with its Section 203 competitive effects analysis under Section 203 of the FPA, particularly with respect to defining geographic markets; account for incremental acquisitions in its merger analysis under Section 203 of the FPA; take a more flexible approach to assessing the competitive effects of power purchase agreements (PPAs); and require that applicants under Section 203 submit certain merger-related documents after ensuring that it can protect confidential information from public disclosure.

The experts' comments generally were opposed to the comments submitted by DOJ/FTC. The Experts observed that the Market Power NOI "contemplates analyses that, at times have been part of the antitrust review process at DOJ," and recommended that FERC not adopt such analyses, because they are the result of the different laws enforced by FERC and DOJ, which have different standards and burdens of proof. Specifically, the experts recommended that FERC not adopt an additional market share screen for applications under Section 203 of the FPA because the current market share screens utilized by FERC are economically superior; FERC not adopt a supply curve analysis requirement because it is too simplistic to provide probative value; FERC not adopt a pivotal supplier analysis for Section 203 applications because the existing screens are superior; FERC not change its existing policy under which existing long-term PPAs in effect prior to a transaction are assigned to the buyer pre-transaction, even if the buyer is then entering into a transaction to buy the underlying asset; and not require submission of merger-related documents because the Commission already has superior information, and the merger-related documents have not been instrumental to electric industry market power analyses at DOJ.

A group of Fund Management Parties also submitted comments in response to the NOI, arguing that the NOI "proposes to impose substantial burdens by needlessly modifying what are well-established, well-understood policies and processes." The Fund Management Parties also argued that FERC had not demonstrated any need to change its currently effective market power analysis and asked FERC not to formally propose or consider any of the proposals discussed in the NOI without a formal rulemaking proceeding.

After considering the comments submitted in response to the NOI, FERC may decide to propose specific revisions to its regulations through a NOPR, issue a statement of policy or take no further action.



LNG Update: Jordan Cove LNG Export Facility

By Donna J. Bobbish

In early December, the FERC denied requests for rehearing of its March 11, 2016 Order denying the applications of Jordan Cove Energy Project, L.P. (“Jordan Cove”) to site, construct and operate an LNG export terminal in Coos Bay Oregon (“Jordan Cove LNG Terminal”) and Pacific Connector Gas Pipeline, LP (“Pacific Connector”) to construct and operate an approximately 232-mile interstate natural gas pipeline originating at the Oregon/California border and terminating at the Jordan Cove LNG Terminal (“Pacific Connector Pipeline”).⁵⁵

Under the Natural Gas Act, FERC authorizes the construction and operation of interstate natural gas pipelines and on-shore LNG terminals. FERC’s March 11 Order surprised industry observers because it denied authorization for a proposed LNG export project for the first time since FERC began considering large-scale LNG export projects in 2012. FERC found Pacific Connector, which would supply natural gas from western Canada and the US Rocky Mountain region to the Jordan Cove LNG Terminal, failed to demonstrate a need for the Pacific Connector Pipeline outweighing the potential harm to the economic interests of landowners whose property rights might be taken by Pacific Connector’s exercise of eminent domain. Having denied Pacific Connector’s application, FERC also denied Jordan Cove’s application because the Jordan Cove LNG Terminal is not feasible without a pipeline to transport natural gas to the terminal.⁵⁶

Pacific Connector and Jordan Cove filed requests for rehearing of FERC’s March 11 Order, as did the State of Wyoming and the Wyoming Pipeline Authority.

Pacific Connector and Jordan Cove asked FERC to stay the March 11 Order and reopen the record to permit the submission of two long-term agreements executed by Jordan Cove for the export of LNG from the Jordan Cove LNG Terminal, and three precedent agreements for long-term transportation service executed by Pacific Connector. According to Jordan Cove, the agreements executed by Pacific Connector together accounted for 77 percent of the capacity of the Pacific Connector Pipeline. Pacific Connector and Jordan Cove argued that the agreements, which were executed after FERC issued the March 11 Order, are sufficient evidence of market need to support approval of the Pacific Connector Pipeline and the Jordan Cove LNG Terminal.

In its joint request for rehearing, Wyoming argued that in the March 11 Order, FERC failed to consider the benefits of the Pacific Connector Pipeline to the Wyoming economy and should have allowed Pacific Connector and Jordan Cove more time to demonstrate market support for the Pacific Connector Pipeline and the Jordan Cove LNG Terminal.

In its December 9 Order, FERC denied the requests to reopen the record and denied rehearing of the March 11 Order. FERC held that Pacific Connector and Jordan Cove had failed to demonstrate “extraordinary circumstances” to support reopening the record over the need for finality in FERC’s decisions. FERC observed that before filing its rehearing request,

⁵⁵ *Jordan Cove Energy Project, L.P., et al.*, “Order Denying Rehearing,” 157 FERC ¶ 61,194 (2016) (“December 9 Order”).

⁵⁶ *Jordan Cove Energy Project, L.P., and Pacific Connector Gas Pipeline, LP*, “Order Denying Applications for Certificate and Section 3 Authorization,” 154 FERC ¶ 61,190 (2016) (“March 11 Order”).

Pacific Connector had every opportunity to demonstrate market need for the Pacific Connector Pipeline, but had failed to do so over a three-and-a-half-year period, during which FERC staff had issued four data requests seeking such information.

FERC stated that under its policy for authorizing interstate natural gas pipeline projects, Pacific Connector could have relied on a variety of relevant factors to demonstrate need, including precedent agreements, demand projections, potential cost savings to consumers or a comparison of projected demand with the amount of capacity currently serving the market. However, Pacific Connector failed to show any evidence of market demand for its project that would satisfy the factors listed in the Certificate Policy Statement.

FERC reiterated that its denial of Pacific Connector's certificate application is "without prejudice to Jordan Cove and/or Pacific Connector submitting a new application . . . should the companies show a market need for these services in the future." FERC expressed its concern that Pacific Connector and Jordan Cove submitted evidence of market demand within 30 days of the March 11 Order, yet failed to provide such evidence after receiving four data requests during a three-and-a-half-year period. FERC stated that it "expects that the Applicants will submit evidence of market need as part of their initial application, or in a timely manner in response to staff data requests, so that the Commission can appropriately consider such evidence as part of the certificate application."

Wyoming argued that FERC should have considered the benefits of the Pacific Connector Project on the State of Wyoming, including increased natural gas production, employment and tax and royalty income. In response to Wyoming's arguments on rehearing, FERC stated that generalized claims of need for the Pacific Connector Pipeline, including a generalized statement of benefits to Wyoming, do not outweigh the risk of Pacific Connector's exercise of eminent domain on landowners and communities. FERC also found that the issue of whether the export of LNG from the Jordan Cove LNG Terminal will cause economic harm or benefit is not within the purview of FERC in determining whether to authorize pipeline facilities under the Natural Gas Act.

Pacific Connector, Jordan Cove and Wyoming have the right to seek judicial review of FERC's orders. However, on December 15, Jordan Cove announced in a press release that it will file a new application for the Pacific Connector Pipeline and the Jordan Cove LNG Terminal. When it does, it may not be starting from square one with respect to environmental review of the projects. In the December 9 Order, FERC indicated that it "may use portions of the existing record, i.e. the September 2015 Final Environmental Impact Statement, to process that filing."⁵⁷

Pacific Connector and Jordan Cove may have reason to be optimistic about the reception their new application will receive after January 20, 2017. Since becoming President on January 20, Donald Trump has the ability over the next several months to appoint four new FERC commissioners, including three from his party, and to designate the new FERC Chairman from among those new commissioners. In a September 22, 2016 speech in Pittsburgh, then-Republican presidential candidate Trump claimed that the Obama Administration had "blocked or abandoned" several energy transportation projects, including "a \$6.8 billion liquid natural gas export facility," presumably a reference to FERC's denial of authorization for the Jordan Cove LNG Terminal and the Pacific Connector Pipeline.

Jordan Cove and Pacific Connector have not indicated when they will file a new application with FERC. However, with the resignation of former FERC Chairman Norman Bay as of February 3, 2017, FERC will now have only two commissioners and, consequently, does not have a quorum necessary to vote on proposed orders. FERC will not have the ability to act on a

⁵⁷ December 9 Order at n.28.

new application filed by Jordan Cove and Pacific Connector until President Trump nominates, and the Senate confirms, at least one new FERC commissioner.

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