

## REPORT OF THE FINANCE AND TRANSACTIONS COMMITTEE

The following developments concerning finance and transactions occurred during the year 2017.

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### I. FEDERAL COURT VACATES AND REMANDS FERC ORDERS ON REVISED RETURN ON EQUITY METHODOLOGY

On April 17, 2017, the U.S. Court of Appeals for the D.C. Circuit issued a decision in a case challenging several related Federal Energy Regulatory Commission (FERC or the Commission) orders that modified the methodology FERC uses in making rate of return on equity (ROE) determinations in electric utility rate proceedings.<sup>1</sup> For multiple reasons, discussed below, the Court vacated FERC's orders and remanded the case back to the Commission.<sup>2</sup>

The appeal stems from a complaint proceeding at FERC where the ROE component of rates charged by New England Transmission Owners (NETOs) under ISO New England Inc.'s open access transmission tariff was challenged by a group of consumer-side stakeholders (Customers) as being unjust and unreasonable under section 206 of the Federal Power Act (FPA).<sup>3</sup> In FERC's order on the complaint, Opinion No. 531, FERC adopted a new two-step discounted cash flow (DCF) approach to the ROE determination (for electric utilities), which takes into account both short-term and long-term equity growth projections.<sup>4</sup> Employing the two-step DCF methodology, FERC produced a narrower zone of reasonableness, 7.03% to 11.74%, than the one from which the NETOs' previously Commission-

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1. *Maine v. FERC*, 854 F.3d 9 (D.C. Cir. 2017).  
 2. *Id.*  
 3. *Id.* at 30.  
 4. *Opinion No. 531*, 147 F.E.R.C. ¶ 61,234 at PP 36-37 (2014).

approved ROE was derived, 7.30% to 13.10%.<sup>5</sup> Also addressed in the appeal was whether FERC deviated from its standard practice when it established the NETOs' just and reasonable ROE at the midpoint of the upper half of the zone of reasonableness instead of the overall midpoint of the zone of reasonableness.<sup>6</sup>

The *Emera* petitioners were made up of two groups: the NETOs, who challenged whether the Commission satisfied its FPA section 206 burden when it found NETOs' pre-existing 11.14% base ROE unjust and unreasonable, even when that return fell within the zone of reasonableness determined for the proxy group; and Customers, who challenged whether substantial evidence supported the Commission's determination to depart from its general policy of using the midpoint of the zone of reasonableness, and place NETOs' base ROE at the midpoint of the upper half of the zone.<sup>7</sup>

Unlike the burden of persuasion under section 205 of the FPA, which rests with the filing utility and applies only to a proposed rate, FPA section 206 requires FERC to determine whether an existing rate is "unjust, unreasonable, unduly discriminatory or preferential" and, if so, only then "may FERC exercise its section 206 authority to impose a new rate."<sup>8</sup> On brief in *Emera*, FERC argued that its determination of a new just and reasonable ROE for NETOs, 10.57%, "was 'sufficient' by itself to prove that the existing base ROE was unjust and unreasonable."<sup>9</sup> However, the Court held that "FERC did not meet the first requirement of section 206 that it demonstrate the unlawfulness of [NETOs' existing] base ROE."<sup>10</sup>

In supporting its position that FERC did not satisfy its FPA section 206 burden, NETOs argued that "the established zone of reasonableness is 'coextensive' with the statutory just and reasonable standard, and therefore, FERC must accept as just and reasonable all ROEs within the [DCF's] zone of reasonableness."<sup>11</sup> The Court rejected that argument, clarifying that, although "[t]he zone of reasonableness informs FERC's selection of a just and reasonable rate . . . [t]he fact that a rate falls within [that zone] does not establish that the rate is *the* just and reasonable rate for the utility at issue."<sup>12</sup> The Court further repeated that "[a]bsent procedural or methodological flaws, the court may only set aside a rate that is outside a zone of reasonableness."<sup>13</sup> The Court elaborated that, "while showing that the existing rate is entirely outside the zone of reasonableness may illustrate that the existing rate is unlawful . . . that is not the *only* way in which FERC can satisfy its burden under section 206."<sup>14</sup> The Court continued "[w]hether a rate, even one

5. *Id.* at P 9.

6. *Maine*, 854 F.3d at 27.

7. *Id.* at 16.

8. *Id.* at 21 (quoting 16 U.S.C. § 824e (2005)).

9. *Id.* at 22.

10. *Id.*

11. *Maine*, 854 F.3d at 23.

12. *Id.*

13. *Id.* (quoting *Pac. Gas & Elec. Co. v. FERC*, 306 F.3d 1112, 1116 (D.C. Cir. 2002)).

14. *Id.* at 24.

within the zone of reasonableness, is unlawful depends on the particular circumstances of the case.”<sup>15</sup> The Court held however, that “FERC failed to make such a finding in this case.”<sup>16</sup>

According to the Court, FERC’s conclusion that a single ROE analysis showing that 10.57% was a just and reasonable ROE for NETOs satisfied both burdens under section 206 was flawed.<sup>17</sup> The FERC held in Opinion No. 531-B that it could satisfy its dual section 206 burden through “a single ROE analysis . . . that generates an ROE that both is below the existing ROE (thus demonstrating that the existing ROE is excessive) and that also is a just and reasonable ROE (thus demonstrating what the new ROE should be).”<sup>18</sup> Here, the Court found that this conclusion “relied on [FERC’s] assumption that all ROEs other than the one FERC identifies as the utility’s just and reasonable ROE are *per se* unlawful in a section 206 proceeding.”<sup>19</sup> The Court explained that such a conclusion is contradicted by its precedent that “the zone of reasonableness creates a broad range of potentially lawful ROEs rather than a single just and reasonable ROE, meaning that FERC’s finding that 10.57% was a just and reasonable ROE, standing alone, ‘did not amount to a finding that every other rate of return was not.’”<sup>20</sup> The Court reiterated that “FERC bore the burden of making an explicit finding that the existing ROE was *unlawful* before it was authorized to set a new *lawful* ROE;” further pointing out that FERC did not explain, under the circumstances, how the existing ROE was unjust and unreasonable.<sup>21</sup> Despite the deference it affords FERC in ratemaking determinations, the Court repeated that “the Commission’s decision must actually be the result of reasoned decision-making to receive that deference.”<sup>22</sup> Because FERC failed to make a predicate finding regarding the existing base ROE, it “acted arbitrarily and outside of its statutory authority in setting a new base ROE for [NETOs].”<sup>23</sup>

With respect to the issue of the placement of the ROE within the zone of reasonableness, the Court similarly found that “FERC failed to provide any reasoned basis for selecting 10.57% as the new base ROE.”<sup>24</sup> The Court found that, although FERC supported its finding that “9.39% was too low of a rate to satisfy the *Hope* and *Bluefield* capital attraction standards . . . it never explained how its ultimate placement of the base ROE at 10.57% [i.e., the midpoint of the upper half of the zone of reasonableness], was appropriate.”<sup>25</sup> The Court acknowledged that FERC has discretion to make pragmatic adjustments to a utility’s ROE based on the particular circumstances of a case, but that such discretion may not exceed FERC’s statutory authority, which requires that there be “a rational connection between the record evidence and its placement of the base ROE.”<sup>26</sup>

15. *Id.* at 23.

16. *Maine*, 854 F.3d at 24.

17. *Id.* at 22, 26.

18. Opinion No. 531-B, 150 F.E.R.C. ¶ 61,165 at P 32 (2015).

19. *Maine*, 854 F.3d at 26 (internal citation omitted).

20. *Id.*

21. *Id.* (emphasis in original).

22. *Id.* at 27.

23. *Id.*

24. *Maine*, 854 F.3d at 30.

25. *Id.* at 28.

26. *Id.* at 27.

The Court stated that FERC determined that because of “unusual capital market conditions,” the “mechanical application’ of the midpoint of the DCF zone of reasonableness” may not “satisf[y] the *Hope* and *Bluefield* capital attraction standards.”<sup>27</sup> Thus, “FERC turned to ‘alternative benchmark methodologies’ and ‘additional record evidence’” for estimating ROE to inform its placement of the base ROE.<sup>28</sup> In light of this other evidence, the Court stated that FERC merely concluded that the 9.39% derived from the midpoint of the zone of reasonableness was too low and that NETOs were entitled to a higher ROE than what the midpoint yielded, not that 10.57% was the just and reasonable base ROE for NETOs.<sup>29</sup> In light of the fact that FERC must adequately explain how the evidence it relied on supports the conclusion it reached, “FERC’s reasoning is unclear . . . [because] [o]n the one hand, it argued that the alternative analyses supported its decision to place the base ROE above the midpoint, but on the other hand, it stressed that none of these analyses were used to select the 10.57% base ROE.”<sup>30</sup> Despite FERC’s finding of the alternative benchmark analyses (with their separate zones of reasonableness and midpoints) to be informative, the Court states that “FERC never explained how these analyses justified a 10.57% base ROE, and, in fact, [FERC] stressed that it did *not* rely on those analyses in setting the base ROE.”<sup>31</sup> According to the Court, although these analyses may have justified an upward adjustment to the base ROE, “they did not justify the specific placement of the base ROE at 10.57%.”<sup>32</sup> Finally, the Court found insufficient FERC’s explanation that it “traditionally looked to the central tendency” to set an ROE because in the two cases FERC cited in support, a utility’s “ROE was set at the midpoint of the upper half of the zone of reasonableness” because it was deemed to have been “more risky” than proxy group in the DCF analysis, which was not the case with NETOs, who were found to be of “comparable risk” to the proxy group.<sup>33</sup>

For these reasons, the Court vacated and remanded the relevant Commission orders for further proceedings.<sup>34</sup>

## II. BRIEF OVERVIEW OF IMPACT OF TAX REFORM ON U.S. RENEWABLE POWER INVESTMENTS

On December 22, 2017, U.S. President Trump signed into law “An Act to Provide for Reconciliation Pursuant to Titles II and V of the Concurrent Resolution on the Budget for Fiscal Year 2018” (Act).<sup>35</sup> While it is too early to discern the full impact of tax reform on the renewable energy industry, some notable highlights include the following.

27. *Id.* at 28.

28. *Id.*

29. *Maine*, 854 F.3d at 29.

30. *Id.*

31. *Id.* (emphasis in original).

32. *Id.*

33. *Id.* at 28-30 (internal citations omitted).

34. *Maine*, 854 F.3d at 30.

35. An Act to Provide for Reconciliation to Titles II and V of the Concurrent Resolution on the Budget for Fiscal Year 2018, H.R. Res. 1, 115th Cong., 131 Stat. 2054 (2017).

The Act preserves the existing Production Tax Credit (PTC) and the Investment Tax Credit (ITC) available to solar and wind projects and maintains the current timeline for phasing out these tax credits.<sup>36</sup> The 2.4 cents/kWh inflation-adjusted PTC for wind is applicable to projects that have begun construction prior to 2020 with step-downs applying to projects that have begun construction after 2016.<sup>37</sup> The 30% ITC for solar is applicable to projects that have begun construction prior to 2020 with annual step-downs beginning in 2020 until 2022, where the tax credit would stay at 10% indefinitely.<sup>38</sup>

Under the Act, starting in fiscal tax year 2018, the corporate income tax rate will be reduced from 35% to 21%.<sup>39</sup> As Fitch Ratings reports, “[the existing tax equity] structure allows investors with significant tax liabilities to use a renewable energy project’s non-cash tax benefits, such as tax credits and depreciation, and also take the majority of cash distributions until they achieve their targeted return levels. Lower taxes will lower the value of the tax credits and depreciation to investors. . . .”<sup>40</sup>

The Act imposes a lower “Base Erosion and Anti-Abuse Tax” (BEAT) rate in the 2018 tax year and carves out 80% of PTC and ITC through 2025 from the calculation of the BEAT obligation.<sup>41</sup> BEAT was enacted to prevent multinational corporations from using cross-border payments to shift income over to affiliates in lower-taxed countries.<sup>42</sup> Under BEAT, at the end of each year, such corporations would need to quantify (i) a minimum percentage of their taxable income (i.e., 5% in 2018, 10% from 2019 through 2025, and 12.5% thereafter; with banks subject to rates that are one percentage point higher), adding back in certain cross-border payments (excluding payments for derivatives in the ordinary course of business) and (ii) their tax liability, excluding any tax credits (with carve-outs for Research and Development credits and 80% of ITC and PTC, to the extent accrued prior to 2026).<sup>43</sup> Any positive difference between (i) and (ii) is collected as an additional tax.<sup>44</sup>

Commencing in the 2018 tax year, the Act limits interest deductions on debt.<sup>45</sup> To the extent a company’s net interest expense exceeds 30% of its adjusted taxable income, interest deductions are prohibited.<sup>46</sup> “Adjusted Taxable Income” for this purpose means income without regard to interest expense, interest income,

36. *Id.*

37. *Id.*

38. *Id.*

39. Act, *supra* note 35, § 13001.

40. *Fitch: Renewables Could Be Hurt By US Corporate Tax Reduction* (Dec. 19, 2017), FITCH RATINGS, <https://www.fitchratings.com/site/pr/10015276>.

41. Act, *supra* note 35, § 13001.

42. *2017 Tax Reform: Checkpoint Special Study on Foreign Income, Foreign Persons Tax Changes in the “Tax Cuts and Jobs Act,”* THOMSON REUTERS, <https://tax.thomsonreuters.com/media-resources/news-media-resources/checkpoint-news/daily-newsstand/2017-tax-reform-checkpoint-special-study-on-foreign-income-for-foreign-persons-tax-changes-in-the-tax-cuts-and-jobs-act> (last visited March 19, 2018).

43. Act, *supra* note 35, § 13001.

44. *Id.*

45. *Id.*

46. Act, *supra* note 35, §§ 13301(a)(j)(1)(A), 13301(a)(j)(1)(B).

net operating losses, and for taxable years beginning before January 1, 2022, depreciation, amortization and depletion.<sup>47</sup> The limit on interest deductions will not apply to businesses with average gross receipts of \$25 million or less.<sup>48</sup>

The Act allows the full cost of equipment acquired and put into service after September 27, 2017 to be written off immediately rather than depreciated over time.<sup>49</sup> Full expensing will end in December 2022, with allowed depreciation phasing down at the rate of 20% a year through 2026.<sup>50</sup>

### III. GREEN BANK DEVELOPMENTS IN 2017

#### A. *Green Banks Expand and Achieve Clean Energy Financing Milestones in 2017*

Countries, states, and now local governments have in recent years established institutions to use financing techniques and structures to leverage public dollars and increase private investment in clean energy technologies.<sup>51</sup> These institutions—known generally as “Green Banks”—have helped to shift government incentive programs such as rebates and grants to financing programs that are self-sustaining.<sup>52</sup> Specifically, a Green Bank has been defined as a “public or quasi-public . . . institution[] that finances the deployment of renewable energy, energy efficiency, and other clean energy . . . projects in partnership with private lenders” and is “capitalized with public funds,” which are then used to “offer loans, leases, credit enhancements [and] other financing services” to close gaps in the private capital markets for clean energy projects.<sup>53</sup> Through the use of such financing services, these Green Banks typically help to close financing gaps and spur investment in mature, commercially viable technologies by effectively reducing risk for private investors.<sup>54</sup>

At least four nations outside of the United States, as well as five states and now one county within the United States, have all established some type of Green Bank.<sup>55</sup> In the United States alone, Green Banks have driven over \$2 billion in clean energy technology and infrastructure investments.<sup>56</sup> Globally, investments driven by Green Banks have exceeded \$26 billion.<sup>57</sup> These Green Banks have collectively driven approximately three dollars of private investment for each dol-

47. *Id.* § 13301(a)(j)(8)(A).

48. *Id.* § 13102(a)(2)(6)(A)(i).

49. *Id.* § 13102(a)(2)(6)(A)(i).

50. *Id.* § 13102(a)(2)(6)(A)(ii)-(v).

51. *Id.* at 4.

52. *Growing Clean Energy Markets with Green Bank Financing White Paper*, COAL. FOR GREEN CAPITAL, <http://coalitionforgreencapital.com/greenbankwhitepaper> (last visited Mar. 20, 2018).

53. *Green Bank 101*, COAL. FOR GREEN CAPITAL, <http://coalitionforgreencapital.com/whats-a-green-bank-html> (last visited Mar. 20, 2018); *Green Banks*, CLEAN ENERGY SOLUTIONS CTR., <https://cleanenergysolutions.org/instruments/green-banks> (last visited Mar. 20, 2018).

54. *Growing Clean Energy Markets with Green Bank Financing White Paper*, *supra* note 52, at 2.

55. *Id.* at 2-3.

56. *Id.* at 11.

57. *U.S. Green Bank Transactions Exceed \$2 Billion Mark*, COAL. FOR GREEN CAPITAL (Feb. 24, 2017), <http://coalitionforgreencapital.com/2017/02/24/us-green-bank-transactions-exceed-2-billion-mark>.



lar of public funding and driven greater levels of investment of clean energy technologies that have reduced more carbon emissions than traditional rebate or grant incentives.<sup>58</sup>

As discussed below, Green Banks continued to gain momentum in 2017 at virtually all levels of government—an established state Green Bank has reached profitability a year ahead of schedule, a county has capitalized the first county-level Green Bank, and a city mayor has announced plans to create the first Green Bank at the city-level.<sup>59</sup>

### *B. New York Green Bank Achieves Profitability, Aims to Raise Additional \$1 Billion*

The New York Green Bank launched in 2014 to drive private investment and accelerate the deployment of clean energy technologies in New York State.<sup>60</sup> With an authorized capitalization that will reach \$1 billion, the New York Green Bank has already provided construction and longer-term post-construction financing and investment, financing to enable developers to aggregate smaller distributed assets into portfolios at scale, and credit enhancements.<sup>61</sup> During its 2016-2017 fiscal year, the New York Green Bank reached a critical milestone by generating \$2.7 million in positive net income and did so a year ahead of schedule.<sup>62</sup> This net income will be re-invested for future transactions and demonstrates that Green Banks can provide attractive investment opportunities and become self-sustaining.<sup>63</sup>

As of the third quarter of 2017, the New York Green Bank has a \$440.9 million investment portfolio that will support clean energy projects in New York State with total project costs between \$1.31 and \$1.59 billion.<sup>64</sup> The New York Green Bank's investments are estimated to reduce greenhouse gas emissions by between 5.5 and 7.4 million metric tons, and the New York Green Bank has an active pipeline of potential investments of \$519 million scheduled to close.<sup>65</sup> The success in New York generated interest from pension funds, insurance companies and other institutional investors wishing to invest in sustainable infrastructure projects.<sup>66</sup> As a result of this interest, Governor Andrew M. Cuomo announced that in the fall of 2017 the New York Green Bank would raise at least an additional \$1 billion from

58. *Global Green Bank Impact: \$25.9 Billion and Counting*, COAL. FOR GREEN CAPITAL (May 2, 2017), <http://coalitionforgreencapital.com/2017/05/02/green-banks-total-investment-2016>.

59. *Growing Clean Energy Markets with Green Bank Financing White Paper*, *supra* note 52, at 1.

60. *NY Green Bank's Path to Profitability*, COAL. FOR GREEN CAPITAL (Aug. 28, 2017), <http://coalitionforgreencapital.com/2017/08/28/ny-green-banks-path-profitability>; D.C. DEP'T OF ENERGY & ENV'T, DC GREEN BANK (2017).

61. *Growing Clean Energy Markets with Green Bank Financing White Paper*, *supra* note 52, at 12.

62. N.Y. STATE, GOVERNOR CUOMO ANNOUNCES MAJOR MILESTONE REACHED BY NY GREEN BANK WITH \$2.7 MILLION IN PROFITS (2017).

63. *Id.*

64. STATE OF NEW YORK, NY GREEN BANK, METRICS, REPORTING & EVALUATION QUARTERLY REPORT No. 13 (2017).

65. *Id.*

66. N.Y. STATE, GOVERNOR CUOMO ANNOUNCES NY GREEN BANK TO RAISE AT LEAST \$1 BILLION FROM PRIVATE SECTOR TO ACCELERATE CLEAN ENERGY SOLUTIONS AND COMBAT CLIMATE CHANGE (2017).

the private sector to expand the availability of financing for clean energy projects.<sup>67</sup> These funds would potentially be used to invest in projects outside of New York State and to establish new Green Banks across the country.<sup>68</sup> On December 1, 2017, the New York Green Bank issued a new Request for Proposals seeking advisory and other services with respect to this initiative.<sup>69</sup>

### C. *Montgomery County, Maryland Capitalizes First County Green Bank*

In 2016, Montgomery County, Maryland designated the Montgomery County Green Bank (“MCGB”), a publicly-chartered nonprofit corporation, as the county’s official Green Bank.<sup>70</sup> This designation of the MCGB made Montgomery County the first county in the United States to establish such an institution.<sup>71</sup> In 2017, the MCGB received the first funds associated with its planned capitalization of approximately \$14.1 million.<sup>72</sup> These funds were made available as a condition of the Maryland Public Service Commission’s approval of the settlement agreement approving the merger between Exelon Corporation and Pepco Holdings, Inc., which involved Montgomery County’s local electric utility.<sup>73</sup>

### D. *D.C. Mayor Announces Plan to Create First City Green Bank*

In March 2017, the Mayor of the District of Columbia, Muriel E. Bowser, announced her intention to make the District of Columbia the first city in the United States to establish a Green Bank.<sup>74</sup> She is calling for an allocation of \$7 million to establish the D.C. Green Bank and hopefully spur additional investment in clean energy technologies.<sup>75</sup> Mayor Bowser subsequently introduced the District of Columbia Green Finance Authority Establishment Act of 2017, which is currently working through the legislative process.<sup>76</sup> The legislation is in part the result of an analysis that identified nearly \$3 billion in clean energy investment opportunities in the District of Columbia, primarily with respect to rooftop and community solar installations and investments in energy and water efficiency.<sup>77</sup> In addition to the District of Columbia, several states are also exploring the possi-

67. N.Y. STATE, NY GREEN BANK ANNOUNCES NEW REQUEST FOR PROPOSALS SEEKING ADVISORY AND OTHER SERVICES IN RAISING THIRD PARTY CAPITAL (2017).

68. *Governor Cuomo Announces NY Green Bank to Raise at Least \$1 Billion*, *supra* note 66.

69. *NY Green Bank Announces New Request for Proposals*, *supra* note 67.

70. *Nation’s First Local Green Bank Designated in Montgomery County, MD*, COAL. FOR GREEN CAPITAL (Aug. 3, 2016), <http://coalitionforgreencapital.com/2016/08/03/montgomery-county-green-bank>.

71. *Id.*

72. Presentation of Tom Deyo, CEO, Montgomery Cty. GreenBank, to Gov’t Finance Officer Ass’n (Jan. 19, 2018).

73. *Id.*

74. DEP’T OF ENERGY & ENV’T, *Mayor Bowser Announces Plan to Establish DC Green Bank* (Mar. 15, 2017), <https://doee.dc.gov/release/mayor-bowser-announces-plan-establish-dc-green-bank>.

75. Aaron C. Davis, *D.C. Mayor Proposes ‘Green Bank’ to Fund Emissions-Cutting in Nation’s Capital*, WASH. POST (Mar. 15, 2017), [https://www.washingtonpost.com/local/dc-politics/dc-mayor-proposes-green-bank-to-fund-emissions-cutting-in-nations-capital/2017/03/15/ee5c786e-08fa-11e7-b77c-0047d15a24e0\\_story.html?utm\\_term=.ce03402aa873](https://www.washingtonpost.com/local/dc-politics/dc-mayor-proposes-green-bank-to-fund-emissions-cutting-in-nations-capital/2017/03/15/ee5c786e-08fa-11e7-b77c-0047d15a24e0_story.html?utm_term=.ce03402aa873).

76. Press Release from Dep’t of Energy & Env’t (Apr. 25, 2017).

77. COAL. FOR GREEN CAPITAL, DISTRICT OF COLUMBIA GREEN BANK REPORT 34, 59 (2017).



bility of establishing a Green Bank, including Nevada, which recently passed legislation directing the Nevada Governor's Office of Energy to establish a Green Bank.<sup>78</sup>

#### IV. FERC STAFF ISSUES 2017 REPORT ON ELECTRICITY TRANSMISSION INVESTMENT METRICS

On October 6, 2017, FERC staff issued a report that presented updated results for all but one of the metrics included in its 2016 report, and results for several new metrics designed to assess electricity transmission investment patterns to determine whether additional FERC action would be required to facilitate more transmission development in the United States.<sup>79</sup> The FERC has long had the goal of ensuring that its policies encourage investment in transmission while maintaining just and reasonable rates as required by the Federal Power Act.<sup>80</sup> In Order No. 1000, FERC undertook to improve its policies regarding transmission planning and cost allocation.<sup>81</sup> In its 2016 report, FERC concluded that it was difficult to assess whether investment in sufficient transmission infrastructure to meet the nation's electricity needs was occurring and whether the investments that were being made are more efficient or cost-effective, and so it attempted to develop metrics to help assess the effectiveness of its policies in achieving its goals.<sup>82</sup>

The metrics in the 2017 Staff Report fall into three broad categories: (1) those designed to measure Order No. 1000 key goals; (2) those designed to indicate whether appropriate levels of transmission infrastructure exist in a particular region; and (3) those designed to allow analysis of FERC policy changes through a comparison of key values before and after changes take place.<sup>83</sup> The Staff Report presents the results for each metric and FERC staff analysis.<sup>84</sup> The Staff Report concludes, among other things, that in those transmission planning regions that have competitive transmission development processes, non-incumbent participation has been substantial.<sup>85</sup> Staff also concludes in at least certain parts of the country transmission investment is helping to reduce congestion.<sup>86</sup> Finally, the report concludes that employing a load-weighted transmission investment metric to compare transmission infrastructure development in each North American Electric Reliability Corporation (NERC) region of the United States did not significantly change the results presented in the 2016 report.<sup>87</sup>

#### V. FERC ISSUES ORDER REGARDING TAX EQUITY INVESTMENTS IN PUBLIC UTILITIES

On October 4, 2017 FERC determined that certain types of tax equity investments in public utilities expressly do not constitute voting securities for purposes

78. *Nevada Governor Signs Green Bank Bill*, COAL. FOR GREEN CAPITAL (June 6, 2017), <http://coalition-forgreencapital.com/2017/06/06/nevada-governor-signs-green-bank-bill-clean-energy-fund>.

79. FERC, 2017 TRANSMISSION METRICS STAFF REPORT 3 (2017).

80. *Id.* at 6.

81. *Id.*

82. FERC, TRANSMISSION METRICS: INITIAL RESULTS STAFF REPORT 6 (2016).

83. FERC, TRANSMISSION METRICS STAFF REPORT 6 (2017).

84. *Id.* at 3.

85. *Id.* at 52.

86. *Id.*

87. *Id.*

of FPA section 203, which governs corporate activities and transactions by public utilities.<sup>88</sup> The order granted the December 2016 petition of a group of tax equity investors—the Ad Hoc Renewable Energy Financing Group (the “Ad Hoc Group” or “Petitioners”)—seeking relief from what the Petitioners viewed as ambiguous, and hence burdensome, FERC oversight.<sup>89</sup> The FERC order specified criteria for tax equity transactions involving FERC-jurisdictional energy projects that would not need to obtain advance authorization under FPA section 203(a)(1).<sup>90</sup>

Petitioners stated the order would eliminate the need for project developers and financiers to make costly “abundance of caution” filings at project inception or later (such as upon change in status filings under section 205 governing wholesale electricity sales and market based rate authority).<sup>91</sup> Petitioners further argued that the regulatory relief would represent a substantial benefit to renewable energy projects, particularly welcome at a time when renewable energy incentives under the tax code were beginning to taper.<sup>92</sup>

Tax equity financing has formed a crucial source of capital for renewable energy projects in the U.S. for many years. In recent years, tax equity transaction volume in the U.S. has exceeded \$10 billion annually.<sup>93</sup> This is because the prevalence of tax incentives—tax credits and accelerated depreciation—in renewable energy economics means that developers are frequently not positioned to absorb them efficiently.<sup>94</sup> Third-party tax equity investors, typically banks, have frequently been called upon to monetize the tax incentives.<sup>95</sup> Per tax law, this has required that tax equity investors hold passive ownership stakes in the projects.<sup>96</sup> Petitioners claimed the tax equity ownership nexus has raised concerns about the status of tax equity investors as affiliates of public utilities for purposes of FERC oversight and associated filings.<sup>97</sup>

The October 2017 FERC order on section 203 was an extension of a prior ruling regarding section 205 (“*AES Creative Resources*”).<sup>98</sup> In the earlier AES case, affiliates of the AES Corporation sought a waiver for the requirement that tax equity investors in various of its renewable energy projects be treated as public utility affiliates.<sup>99</sup> AES argued both that the affiliate reporting requirements would “create a disincentive for wind power development” and that the tax equity ownership stakes were passive and therefore did not trigger affiliate status.<sup>100</sup> On the latter point, AES pointed out that prior FERC orders had asserted “a company is

88. *Ad Hoc Renewable Energy Financing Group*, 161 F.E.R.C. ¶ 61,010 at P 7 (2017).

89. *Id.* at P 8.

90. *Id.* at P 7.

91. *Ad Hoc Renewable Energy Financing Group*, Petition for Declaratory Order at PP 26-28, Docket No. EL17-26-000 (filed Dec. 9, 2016).

92. *Id.* at 26.

93. ANTON COHEN ET AL., U.S. RENEWABLE ENERGY BRIEF: THE TAX EQUITY INVESTMENT LANDSCAPE 3 (2017).

94. Solar Energy Indus. Ass’n, *Depreciation of Solar Energy Property in MACRS*, <https://www.seia.org/initiatives/depreciation-solar-energy-property-macrs> (last visited Mar. 13, 2018).

95. David K. Burton et al., *NREL’s Wind Finance Report Highlights*, TAX EQUITY TIMES (Sept. 29, 2017), <https://www.taxequitytimes.com/2017/09/nrels-wind-finance-report-highlights>.

96. *Id.*

97. *Ad Hoc Renewable Energy Financing Group*, *supra* note 88, at PP 2-3.

98. *See generally id.*

99. *Id.* at P 4.

100. *AES Creative Resources, L.P.*, 129 F.E.R.C. ¶ 61,239 at PP 8-9.

an affiliate of another company if it directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with, the other company.”<sup>101</sup> By contrast, AES’ tax equity investments were structured with third parties and with only enough equity attributes to comport with safe harbor provisions under tax law, otherwise having the characteristics of debt.<sup>102</sup> Because its tax equity partners did not exert management control over the renewable energy projects, AES argued that they were not affiliates.<sup>103</sup>

Invoking the interconnectedness between sections 203 and 205, AES also acknowledged the potential argument that section 205 change in status filings should be bound by prior elections to seek approval under section 203 for tax equity investments, as if they did exert control.<sup>104</sup> AES argued, however, that such “abundance of caution” filings were made only because the Commission had “not provided a bright-line definition of control for purposes of section 203,” and should thus have no bearing on subsequent section 205 filings.<sup>105</sup>

The FERC agreed in *AES Creative Resources* that the AES tax equity partners were not public utility affiliates.<sup>106</sup> The decision was based on FERC’s regulations defining an affiliate in terms of minimum thresholds of voting securities.<sup>107</sup> Finding that this term was defined in neither the Federal Power Act nor the Commission regulations, FERC adopted the definition of “voting securities” established in the Public Utility Holding Company Act of 2005: “any security presently entitling the owner or holder thereof to vote in the direction or management of the affairs of a company.”<sup>108</sup>

Importantly, FERC relied on precedent distinguishing “between rights that give an investor the ‘authority to manage, direct, or control the activities’ of a company and rights that give investors ‘only those limited rights necessary to protect their . . . investments.’”<sup>109</sup> The FERC concluded that the terms of AES’ tax equity structures did not constitute control, but were instead confined to consent rights over matters including additional debt, asset liens, sales or transfers of assets, mergers or consolidations, major unbudgeted expenditures, settlement of claims, and reduction of insurance coverage (much the same as lenders might require).<sup>110</sup>

Petitioners stated the same ambiguity that existed in the context of tax equity transactions under FPA section 205 applies to FPA section 203.<sup>111</sup> This, Petitioners stated, had led to “abundance of caution” filings under section 203.<sup>112</sup> To address this uncertainty, the Ad Hoc Group requested that “the Commission extend the holding in *AES Creative Resources*” to apply to FPA section 203 as well as

101. *Id.* at P 11.

102. *Id.* at P 10.

103. *Id.* at P 8.

104. *Id.* at P 11.

105. 129 F.E.R.C. ¶ 61,239 at P 13.

106. *Id.* at P 21.

107. *Id.* at P 23.

108. *Id.* at P 24.

109. *Id.* at P 25 (internal citations omitted).

110. 129 F.E.R.C. ¶ 61,239 at P 26.

111. *Ad Hoc Renewable Energy Financing Group*, *supra* note 88, at P 3.

112. *Id.*

section 205.<sup>113</sup> In addition to reiterating the Commission's logic as applied to section 205, the Ad Hoc Group noted that separate Commission precedent in section 203 settings had suggested that consent rights such as those identified in *AES Creative Resources* did not comprise control, nor had the Commission equated limited partnership interests in public utilities to "voting securities."<sup>114</sup>

The FERC granted the petition of the Ad Hoc Group, finding "that the tax equity interests in public utilities or public utility holding companies identified in *AES Creative Resources* do not constitute voting securities for purposes of FPA section 203."<sup>115</sup>

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113. *Id.* at P 8.

114. *Id.* at P 6.

115. *Id.* at P 17.

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