

XVI. State Regulatory

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A. INTRODUCTION

As the first chair of the State Regulatory Committee, I am pleased to present our first contribution to the Section’s *Recent Developments* report for 2014. As a committee in formation, we are still exploring the ways in which we can add a new and useful dimension to legal developments not already scrutinized by the fine work of our other committees. In that effort, I solicit the views of all Section members and in particular those who focus on state regulatory agencies and might wish to join our committee as founding members. We aspire to a membership that reflects a range of states, industries, and regulatory perspectives.

In this first report, we chose to divide our discussion by state, and we have been admittedly selective in deciding what matters to bring to the attention of our readers. Rather than find something to say about commissions in every

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state, we looked for decisions and events of consequence regardless of where they occurred. We were searching for situations where state commissions broke new ground in terms of expanding their jurisdiction, demanding new standards of utility conduct or new benchmarks by which to evaluate such conduct, or launching (or terminating) mandated programs and services. Our standard for a reportable development is one that (1) represents a new problem, opportunity, or action for state regulators; and (2) has the potential of being replicated across multiple jurisdictions.

B. STATE COMMISSION DEVELOPMENTS

In the past year, several state commissions exercised their power to issue large monetary sanctions for a range of infractions, especially anything related to public safety, and followed the lead of the U.S. Securities and Exchange Commission and other federal agencies in signaling that they may not approve settlements that do not include explicit admissions of violations of law. This will have implications for utility exposure to civil liability as well as possible debarment from participation in state and federally funded programs. State commissions are the focal point for service disruption concerns; they are expecting technological advancements such as smart meters to permit a marked improvement in the predictability of service restoration estimates. We also report on how some commissions are responding to demands by utilities and large customers to lower costs by reducing conservation programs while others are prepared to stay the course.

1. California

On April 4, 2013, the California Public Utilities Commission (CPUC) approved a settlement agreement fining Pacific Gas & Electric (PG&E) \$390,000 for the conduct of a senior PG&E manager who attempted to spy on anti-smart meter advocacy organizations by signing on to their online chat rooms using a false identity.¹ On November 26, 2012, three parties filed a joint motion for adoption of a settlement agreement: the Consumer Protection and Safety Division (now known as the Safety and Enforcement Division), PG&E, and The Utility Reform Network (TURN). Notably, four parties opposed the settlement.

The non-settling parties demanded an evidentiary hearing. However, the CPUC approved the settlement without an evidentiary hearing, stating “speculation that something new might be discovered at hearing is an insufficient reason to hold one,” and noting that evidentiary hearings are not an appropriate discovery tool and should not be demanded as a substitute for discovery.² The CPUC noted that the settlement was appropriate due to the extent of the conduct re-

1. Decision Approving Settlement, as Modified by Settling Parties, Decision 13-04-012, Investigation 12-04-010, 2013 Cal. PUC LEXIS 120 (Cal. Pub. Util. Comm’n Apr. 4, 2013).

2. *Id.* at *20–21.

maintaining in dispute and the fundamental question of whether the action of PG&E's employee, i.e., the use of a false name to gain access to several private online discussion groups, was a violation of the Public Utilities Code.³ Accordingly, the CPUC approved the settlement agreement without an evidentiary hearing.

In its order denying a rehearing, the CPUC noted the difference in third party rights between enforcement and other administrative proceedings.⁴ The CPUC stated that intervening parties in an enforcement investigation are not vested with the same procedural rights as the real parties in interest, i.e., the staff and the respondent. The CPUC gives the staff wide prosecutorial discretion, including whether and on what terms to settle a case prior to or after an evidentiary hearing.⁵

On September 19, 2013, the CPUC created a new subclass of charter-party carriers called transportation network companies.⁶ It declared that companies such as Lyft, SideCar, and UberX are charter party passenger carriers subject to CPUC jurisdiction. The CPUC determined that a transportation network company is a company that "provides prearranged transportation services for compensation using an online-enabled application (app) or platform to connect passengers with drivers using their personal vehicles."⁷ The decision imposes a number of safety and reliability requirements that transportation network companies must enforce upon drivers who utilize their software. Organizations representing taxicabs, which are regulated in California at the city or county level, have sought an application for rehearing of the decision, as have Lyft and UberX. The taxicabs claim these are essentially taxi services and should be regulated at the local level while Lyft and UberX argue they are only providing software services and are not subject to the CPUC's jurisdiction.

On December 19, 2013, the CPUC fined PG&E \$14.35 million for violating Rule 1.1⁸ by failing to promptly notify the CPUC of a "material misstatement of fact in a pleading" relating to a natural gas pipeline and "by mischaracterizing the correction" as a "routine and non-substantive correction."⁹ The errors, which include mischaracterizing a particular section of pipe as seamless, were discovered in October 2012 but not reported until July 3, 2013, with an errata filing

3. *Id.* at *43-44.

4. Order Denying Rehearing of Decision 13-04-012, Decision 14-01-038, Investigation 12-04-010, 2014 Cal. PUC LEXIS, *4 (Cal. Pub. Util. Comm'n Jan. 16, 2014).

5. *Id.* at *7.

6. Decision Adopting Rules and Regulations to Protect Public Safety While Allowing New Entrants to the Transportation Industry, Decision 13-09-045, Rulemaking 12-12-011, 2013 Cal. PUC LEXIS 504 (Cal. Pub. Util. Comm'n Sept. 19, 2013).

7. *Id.* at *102.

8. Cal. PUC Rule 1.1 ("Any person who signs a pleading or brief, enters an appearance, offers testimony at a hearing, or transacts business with the Commission, by such act represents that he or she is authorized to do so and agrees to comply with the laws of this State; to maintain the respect due to the Commission, members of the Commission and its Administrative Law Judges; and never to mislead the Commission or its staff by an artifice or false statement of fact or law.").

9. Final Decision Imposing Sanctions for Violations of Rule 1.1 of the Commission's Rules of Practice and Procedure, Decision 13-12-053, Rulemaking 11-02-019, 2013 Cal. PUC LEXIS 749 (Cal. Pub. Util. Comm'n Dec. 19, 2013).

instead of a motion to reopen the proceeding or a petition for modification. The CPUC imposed the maximum fine of \$50,000 per day for both the uncorrected “false statement of fact” and for submitting a misleadingly titled and factually incomplete document. This is another major punitive action against PG&E that has its origins in the San Bruno gas explosion in 2010 that killed eight people and destroyed thirty-eight homes. Of broader application, the decision stated that intent to mislead is not required for a Rule 1.1 violation; the presence or absence of intent will be determined from the circumstances and the penalty amount set accordingly.

2. Connecticut

On July 12, 2013, Connecticut’s Department of Energy and Environmental Protection (DEEP) announced a new initiative to make permitting of combined heat-and-power (CHP) systems faster and easier by not requiring a permit under Connecticut’s air pollution regulations if the CHP meets certain criteria.¹⁰ The CHP must have a capacity of less than 10 MW; there are also restrictions to limit emissions of air pollutants, including nitrogen oxides, particulate emissions, and carbon monoxide.¹¹

On July 24, 2013, the governor’s office and DEEP announced funding for nine microgrid pilot projects,¹² reportedly the nation’s first statewide microgrid pilot program. The microgrid pilot program is designed to keep critical buildings powered during electric grid outages. The microgrids are expected to provide power for critical facilities and town centers, including hospitals, police stations, public shelters, and water treatment plants,¹³ despite large-scale outages. The microgrids will be able to connect and disconnect from the electrical grid to enable operation in both grid-connected or island mode.¹⁴

3. Florida

On August 28, 2013, the Florida Public Service Commission (Florida PSC) approved a new Natural Gas Vehicle Transportation Service tariff, continuing its previous initiatives to create a natural gas infrastructure.¹⁵ Under the new tariff system, three utilities, Florida Public Utilities Company (FPUC), FPUC–

10. Press Release, Connecticut Department of Energy and Environmental Protection, DEEP Announces New Program to Facilitate Permitting for Combined Heat-and-Power Systems (CHP) (July 12, 2013), *available at* <http://www.ct.gov/deep/cwp/view.asp?A=4380&Q=528194>; *see* Conn. Agencies Regs. § 22a-174-3d.

11. Conn. Agencies Regs. § 22a-174-3d(c).

12. Press Release, Office of Governor Dannel P. Malloy, Gov. Malloy Announces Nation’s First Statewide Microgrid Pilot (July 24, 2013), *available at* <http://www.governor.ct.gov/malloy/cwp/view.asp?A=4010&Q=528770>.

13. Conn. Agencies Regs. § 22a-174-3d(a)(2).

14. CONN. GEN. STAT. § 16-243y(a)(5).

15. Joint petition of Florida Public Utilities Company, Florida Public Utilities-Indiantown Division and the Florida Division of Chesapeake Utilities Corporation for approval of Commercial Natural Gas Service Programs, Order No. PSC-13-0395-PAA-GU in Docket No. 130135-GU, 2013 Fla. PUC LEXIS 245 (Fla. Pub. Serv. Comm’n Aug. 28, 2013).

Indiantown Division, and the Florida Division of Chesapeake Utilities Corporation, will install mains, meters, and associated equipment “necessary to deliver natural gas to the customer’s compression and fueling equipment.”¹⁶ FPUC is the only one of the three utilities that will provide both distribution service and transportation service; accordingly, FPUC “also developed a tariff for retail distribution for natural gas vehicles.”¹⁷ Under the transportation service, “customers purchase natural gas through a pool manager and the utility only transports the customer-purchased natural gas from the utility’s interface with a major interstate pipeline . . . to the customer’s meter on its distribution system.” Under the distribution service, “the customer buys natural gas from the utility.”¹⁸

Additionally, the Florida PSC approved the utilities’ proposal “for a commercial refueling station” and a “\$100 monthly customer charge and \$.01711 per therm energy charge.”¹⁹ This charge will recover the estimated associated annual cost of such a station and “includes a return on investment based on FPUC’s weighted average cost of capital, operations and maintenance expense, [and] Commission-approved depreciation rates, and taxes.”²⁰ In approving the program, the Florida PSC relied on research performed by the three utilities that these revisions and tariffs “will better facilitate service for commercial customers that wish to obtain natural gas as a vehicle fuel” and allow for such services to not be cost-prohibitive.²¹

On October 1, 2013, the Florida PSC approved a request by Peoples Gas System for modification of its Natural Gas Vehicle Service (NGVS) tariff where new customers will be able to take service under the new NGVS-2 tariff to further facilitate natural gas vehicle owners’ access to natural gas fuel.²² In addition to the new tariff, the Florida PSC approved three “facility options to provide for customer choice while allowing [Peoples] to recover its cost to provide these options.”²³ These facility options include: (1) Peoples-provided facilities on customer’s premises, where customers compress and dispense the natural gas themselves thus avoiding the dispensing fee; (2) limited access facilities located on Peoples’ premises, where customers contract with the natural gas utility provider to locate a natural gas compression and fueling station on Peoples’ property; and (3) facilities located on Peoples’ premises, including service to the general public.²⁴ Different charges apply under each option to recoup associated costs, such

16. *Id.* at *4.

17. *Id.* at *5.

18. *Id.*

19. *Id.* at *5–6.

20. *Id.*

21. *Id.* at *4.

22. Request for approval of tariff modification related to natural gas vehicles and fueling facilities by People’s Gas System, Order No. PSC-13-0446-PAA-GU in Docket No. 130197-GU, 2013 Fla. PUC LEXIS 280 (Fla. Pub. Serv. Comm’n Oct. 1, 2013).

23. *Id.* at *6.

24. *Id.* at *6–9. Previously, the CPUC issued an order granting the Southern California Gas Company’s (SoCalGas) proposal for a Compression Services Tariff (CST) to “design, construct, own, operate and maintain natural gas compression facilities to serve the Natural Gas Vehicle refueling

as dispensing fees or a monthly facilities charge.²⁵ The Florida PSC also approved a “tariff provision that would allow [the natural gas utility provider] to enter into a special contract [subject to the Florida PSC’s approval] with a government agency or commercial customer that has volumes greater than 100,000 therms per year” that includes “negotiated rates and charges set above incremental cost.”²⁶

4. Hawaii

On May 31, 2013, the Hawaii Public Utilities Commission (Hawaii PUC) responded to ratepayer complaints regarding high electric rates and poor customer service by decreasing the base electric rates of Maui Electric Company, Limited (MECO) by \$7.7 million, resulting in an \$8 million refund to ratepayers although the refund will be tempered by tariff adjustments.²⁷ The Hawaii PUC originally approved a revenue increase of over \$13 million in an interim decision on May 21, 2012. However, after the Hawaii Legislature in 2013 passed Senate Bill 120 (Act No. 37 of 2013) expressing concern over the increasing cost of electricity, the Hawaii PUC modified the rate increase from its interim decision. The Hawaii PUC, citing the legislative action, decreased the authorized revenue increase to \$5 million and ordered a refund of the amount collected in excess of the increase with interest.²⁸

Additionally, the Hawaii PUC lowered MECO’s return on equity from 10 percent to 9 percent. A downward adjustment of 0.5 percent was due to lower interest rates. The remaining adjustment was due to “MECO’s inability to address certain apparent system inefficiencies,” including wind energy curtailment issues. The Hawaii PUC noted that a number of studies completed several years ago proposed specific operational changes and options to MECO’s operations; however, MECO did not adequately nor sufficiently plan for necessary modifications to its existing operations to better integrate wind energy generation.²⁹ The Hawaii PUC noted that in 2012, MECO estimates that it curtailed over 15,000 MW hours of wind energy, approximately 1 percent of its system energy

station, Combine Heat and Power and peak plant markets.” Southern California Gas Company Requests Approval of a Compression Service Tariff, Resolution G-3482, 2013 Cal. PUC LEXIS 738, *2 (Cal. Pub. Util. Comm’n Dec. 19, 2013). Similarly, the Florida PSC approved a tariff to fund fueling stations to increase natural gas vehicle owners’ access to natural gas as a fuel. As part of its order, the CPUC required SoCalGas to “use established methodologies identical to those used in general rate cases, . . . set the price of [the natural gas dispensing] service, and . . . ensure that the customer bears the cost of the services provided.” *Id.* at *5. The Florida PSC’s order contemplates similar concepts, tying the tariff associated with natural gas dispensing to the facility option and type of service performed. However, in California the utility did not ask permission to and was not authorized to build or operate the actual vehicle fueling facilities.

25. Request for approval of tariff modification related to natural gas vehicles and fueling facilities by People’s Gas System, 2013 Fla. PUC LEXIS 280, at *6–9.

26. *Id.* at *8–9.

27. Maui Electric Co., Ltd., Decision and Order No. 31288, Docket No. 2011-0092, 2013 Haw. PUC LEXIS 250 (Haw. Pub. Util. Comm’n May 31, 2013).

28. *Id.* at *36–38, 165.

29. *Id.* at *128–32.

requirements. With an additional wind farm expected to shortly become available, MECO is expected to curtail 54,429 MW hours of wind generation annually. Without “significant operational upgrades,” MECO states that its regulating reserve requirements will increase wind energy curtailment.³⁰

In the MECO rate order, the Hawaii PUC attached its “observations and perspectives” on how to regulate investor-owned electric utilities “to set a course that is mutually beneficial to utility shareholders and utility ratepayers.”³¹ The Hawaii PUC cited concern that the increasing capital investments of MECO and its affiliates provided an increased rate base and profits with little or limited customer value. The Hawaii PUC noted that “attractive financial returns are not an entitlement by virtue of being a regulated utility.” The Hawaii PUC added that it will be providing more regulatory scrutiny and oversight of utility expenditures, operations, and investments over MECO and its affiliated utilities in Hawaii until “there is evidence of an acceptable course correction” from poor performance.³²

5. Idaho

No longer facing a peak-hour deficit in the summer months, the Idaho Public Utilities Commission (IPUC) examined whether to continue or modify three voluntary demand response programs offered by Idaho Power Company in 2013. Idaho Power sought to limit its FlexPeak Management Program³³ and “temporarily suspend” its A/C Cool Credit³⁴ and Irrigation Peak Rewards³⁵ demand response programs for 2013 because its 2013 Integrated Resource Plan did not project peak-hour loads for the summer months to exceed its generation resources until 2016.³⁶ The company proposed to suspend or limit the programs for 2013, allowing a collaborative effort with stakeholders to reassess and propose changes to the programs prior to the 2014 summer season.³⁷ Previously, Idaho Power faced capacity deficits in the summer months and demand response programs were developed to delay the need for new supply-side resources.³⁸ The

30. *Id.* at *131.

31. *Id.* at *172–79.

32. *Id.* at *178–79.

33. The FlexPeak Management Program is a voluntary demand response program targeting industrial and large commercial customers that are capable of reducing their electrical energy loads for short periods during summer peak load days.

34. The A/C Cool program allows the utility to periodically cycle the central air conditioning units of participating residential customers from June through August in exchange for a monthly billing credit to the ratepayer during the summer months.

35. The Peak Rewards program allows the utility to turn off the irrigation pumps of participating irrigation customers for a limited number of hours from June through August.

36. Application, Idaho Power Company, Case No. IPC-E-12-29, Idaho Pub. Util. Comm’n (Dec. 21, 2013), <http://www.puc.idaho.gov/fileroom/cases/elec/IPC/IPCE1229/20121221APPLICATION.PDF>; *In the Matter of the Application of Idaho Power Company for Approval of Its Agreement with EnerNOC to Implement and Operate a Voluntary Commercial Demand Response Program*, Case No. IPC-E-13-04, Order No. 32805, 2013 Idaho PUC LEXIS 70 (Idaho Pub. Util. Comm’n May 9, 2013).

37. *Id.* at *5.

38. *Id.* at *3.

elimination of near-term peak-hour deficits was attributed to the impact of the recent recession.³⁹

The IPUC approved the temporary suspension of the A/C Cool Credit and Peak Rewards program and limited the FlexPeak Management Program for 2013, contemplating a series of workshops to discuss the future of the programs.⁴⁰ Idaho Power estimated the 2013 suspension and program limitations would save over \$12 million in monetary incentives that it would normally be making to the program participants.

After a series of workshops, the IPUC approved resumption of all three demand response programs in 2014. The IPUC decreased incentive payments to irrigation and residential customers while increasing program dispatch requirements.⁴¹ The IPUC noted that “[i]t is important to continue the DR programs to ensure that sufficient, reliable DR resources exist to meet anticipated deficits in 2016 and 2017.”⁴²

6. Illinois

The Illinois Commerce Commission (ICC) on January 28, 2014, ordered Commonwealth Edison Company (ComEd) and Ameren Illinois Company (Ameren Illinois) to integrate smart devices, such as smart phones and electronic thermostats, into their energy efficiency and demand response programs.⁴³ ComEd and Ameren Illinois filed energy efficiency and demand-response plans with the ICC. As part of that approval, the ICC ordered both Ameren Illinois and ComEd to develop a comprehensive plan for smart meters to interact with smart devices, such as smart thermostats, plugs, power strips, and so forth.⁴⁴ The ICC believes smart meters could provide greater energy reduction and management if they are paired with smart devices.

7. Maryland

On November 12, 2013, as a result of the EmPOWER Maryland program, the five largest electric utilities serving Maryland⁴⁵ collectively reported customer

39. *Id.* at *4.

40. *In the Matter of* the Application of Idaho Power Company for Authority to Temporarily Suspend Its A/C Cool Credit and Irrigation Peak Rewards Demand Response Program, Case No. IPC-E-12-29, Order No. 32776, 2013 Idaho PUC LEXIS 53 (Idaho Pub. Util. Comm’n Apr. 2, 2013); *In the Matter of* the Application of Idaho Power Company for Approval of Its Agreement With EnerNOC to Implement and Operate a Voluntary Commercial Demand Response Program, 2013 Idaho PUC LEXIS 70 at *6–7.

41. *In the Matter of* the Continuation of Idaho Power Company’s A/C Cool Credit, Irrigation Peak Rewards, and FlexPeak Demand Response Programs for 2014 and Beyond, Case No. IPC-E-13-14, Order No. 32923, 2013 Idaho PUC LEXIS 151, at *6 (Idaho Pub. Util. Comm’n Nov. 12, 2013).

42. *Id.* at *5.

43. Commonwealth Edison Co., ICC Docket No. 13-0495, Final Order (Jan. 28, 2014); Ameren Illinois Co., d/b/a/ Ameren Illinois, ICC Docket No. 13-0498, Final Order (Jan. 28, 2014).

44. ICC Docket No. 13-0498, Final Order at 79; ICC Docket No. 13-0495, Final Order at 81.

45. The five largest utilities are the Potomac Edison Company, Baltimore Gas & Electric Company, Delmarva Power & Light Company, Potomac Electric Power Company, and Southern Maryland Electric Cooperative.

savings of 2,729,390 MWh of electricity and 1,097 MW of peak demand reduction through the second quarter of 2013.⁴⁶ Together these utilities have achieved 50 percent of the 2015 EmPOWER Maryland energy savings goal and 52 percent of the 2015 EmPOWER Maryland peak demand reduction goal.⁴⁷ Although these numbers demonstrate progress, they have fallen below the projections set by the utilities in their 2012–14 plans.⁴⁸ The Maryland Public Service Commission (Maryland PSC) issued its November 12, 2013, order granting additional funding as a demonstration of “continued commitment” to the EmPOWER Maryland program.⁴⁹

On February 27, 2013, the Maryland PSC ordered utility companies to improve the resiliency and reliability of electric utility distribution infrastructure after reviewing the performance of Maryland utilities before, during, and after the June 29, 2012, Derecho storm.⁵⁰ The storm caused approximately 32 million hours of service interruption and left approximately 992,000 customers without power at its peak.⁵¹ The utilities were directed to submit plans to accelerate reliability improvements to their distribution systems as well as detailed studies of their respective distribution systems to determine what infrastructure and operational investments are needed to reduce the number and duration of service interruptions after a major outage event.⁵² The Maryland PSC found “a significant and unsatisfactory disconnect exists between the public’s expectations of distribution system reliability . . . and the ability of the present-day electric distribution systems to meet those expectations.” The Maryland PSC directed utilities to assess what elements of their systems need to be enhanced or hardened to restore services to customers within a specified time frame.

The Maryland PSC proposed both short- and long-term changes to increase resiliency. For short-term changes, the Maryland PSC required filing of plans outlining improvement measures implementable in the next five years as well as a cost-benefit analysis.⁵³ As part of long-term changes, the Maryland PSC directed utilities to perform and submit “detailed and comprehensive studies of their respective distribution systems to determine what infrastructure or operational investments would be needed in order to reduce the number and duration of service interruptions after a Major Outage Event.”⁵⁴ The Maryland PSC em-

46. *In the Matter of Potomac Edison Co. d/b/a Allegheny Power’s Energy Efficiency, Conservation and Demand Response Programs pursuant to the EmPOWER Maryland Energy Efficiency Act of 2008*, Order No. 85987 for Cases 9153, 9154, 9155, 9156 & 9157, 2013 Md. PSC LEXIS 44 (Md. Pub. Serv. Comm’n Nov. 12, 2013).

47. *Id.* at *2–3.

48. *Id.* at *3.

49. *Id.* at *3–4.

50. *Electric Service Interruptions in the State of Maryland Due to the June 29, 2012, Derecho Storm*, Order No. 85385, Case No. 9298, 2013 Md. PSC LEXIS 11 (Md. Pub. Serv. Comm’n Feb. 27, 2013), as amended by orders issued June 4, 2013, and Sept. 30, 2013.

51. *Id.* at *13–14.

52. *Id.* at *5–6.

53. *Id.* at *30–31.

54. *Id.* at *6. The Code of Maryland Regulations defines a “major outage event” as an event during which “(i) [m]ore than 10 percent or 100,000, whichever is less, of the electric utility’s Maryland

phasized that these changes would need to be effective in reducing service outages “to a level deemed acceptable by residential, business and industrial customers,” even in the case of large-scale events affecting over 40 percent or 400,000 customers.⁵⁵ Additionally, the Maryland PSC ordered the utilities to perform a cost-benefit analysis that considers both “the economic and environmental costs” of instituting changes to create such a sufficiently durable and resilient system.⁵⁶ The Maryland PSC advised that the utilities’ assessment should include a “review of available and emerging technologies that might be used for innovative solutions to outages,” such as “additional automation technology on the distribution system to reroute power.”⁵⁷

The utilities must also assess how and what locations or elements of their systems need to be enhanced to ensure restoration of service to at least 95 percent of their customers within specified time periods, the maximum of which is four days, as well as the increase in electric rates associated with developing and implementing such enhancements.⁵⁸ The Maryland PSC also asked for proposed regulations to include major outage event data in the service quality and reliability standards that hold utility companies to “objective service restoration standards on an annual basis.”⁵⁹ Thus, data occurring during such major outage events would be included in system-average interruption duration index and system-average interruption frequency index figures.⁶⁰

The Maryland PSC also ordered the utility companies to perform a three-part analysis of their distribution system staffing, including an historical analysis, a detailed analysis of staffing use during the derecho storm, and an analysis of major outage event preparedness based on current staffing levels.⁶¹ Under the historical analysis, the staffing levels of the last fifteen years, broken down by function, will be analyzed, including the maximum levels of staffing, number of staff deployed during a major outage event occurring in the last two years, and costs for major outage events during which staff were deployed.⁶² Staff use during the derecho storm will be analyzed to determine the effectiveness of current staff levels, including analysis of the average number of outages restored by field personnel, number of field personnel required to restore outages, and various personnel actually used to restore outages.⁶³

customers experience a sustained interruption of electric service; and (ii) [r]estoration of electric service to any of these customers takes more than 24 hours; or . . . [when the] federal, State, or local government declares an official state of emergency in the utility’s service territory and the emergency involves interruption of electric service.” MD. CODE REGS. § 20.50.01.03(27).

55. Electric Service Interruptions in the State of Maryland Due to the June 29, 2012 Derecho Storm, 2013 Md. PSC LEXIS 11, at *32.

56. *Id.* at *32.

57. *Id.* at *32–33.

58. *Id.* at *33–34.

59. *Id.* at *36–37.

60. *Id.*

61. *Id.* at *38.

62. *Id.* at *38–39.

63. *Id.* at *39–40.

Finally, in response to complaints, the Maryland PSC ordered utilities to develop and employ communication improvement plans.⁶⁴ The Maryland PSC believed such improvements were

necessary in order to, among other things, provide a means for reporting downed wires without delay; eliminate inconsistencies between telephonic and website messages; improve outage maps on websites in order to communicate available and useful outage information in as much detail as is feasible . . . without jeopardizing home security; provide timely and accurate information as to restoration efforts that are underway . . . via telephone, mobile application and website.⁶⁵

The Maryland PSC declined to directly address the issue of prioritization of restoration and was “unwilling to direct [utility companies] to choose between one very deserving special needs customer and another for restoration priority.”⁶⁶ Instead, the Maryland PSC stated the “larger and more appropriate concern, in [the Maryland PSC’s] view, is to improve the overall restoration time *to all customers* by improving Maryland’s electric distribution system to a greater restoration design level.”⁶⁷ Addressing the regulation of estimated time of restoration (ETR), the Maryland PSC noted the frustration from missing or incorrect ETRs during the derecho storm.⁶⁸ The Maryland PSC suggested that the utilities communicate less precise ETRs or give a range of time “that is specific enough to be useful, but broad enough to convey its estimated nature.”⁶⁹ The Maryland PSC ordered its staff to draft proposed regulations for establishing and updating ETRs.

8. Mississippi

Entergy Corporation (Entergy) and ITC Holdings Corporation (ITC) called off a \$1.78 billion asset-for-stock deal a few days after the Mississippi Public Service Commission’s (Mississippi PSC) December 10, 2013, rejection of the proposal to transfer ownership and control of Entergy’s high voltage transmission system to ITC.⁷⁰ The Mississippi PSC cited, in part, likely increased customer rates and the loss of state rate-setting authority over the power lines once they were transferred to FERC jurisdiction. The Mississippi PSC noted that FERC has approved higher rates of return for interstate transmission as a means to spur increased investment in transmission projects. FERC had approved the Entergy and ITC proposal on June 20, 2013.

64. *Id.* at *42–43.

65. *Id.*

66. *Id.* at *44–45.

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

68. *Id.* at *50.

69. *Id.* at *50–51.

70. See Entergy Mississippi, Inc., Docket No. 2012-UA-358, 2013 Miss. PUC LEXIS 184 (Miss. Pub. Serv. Comm’n Dec. 10, 2013).

9. Missouri

On May 14, 2013, the Missouri Court of Appeal held that the Missouri Public Service Commission (Missouri PSC) properly excluded from the rate base transmission costs incurred by KCP&L Greater Missouri Operations Co. (KCP&L-GMO) to bring power from a generating facility, even though the Missouri PSC did allow recovery of the power costs from the plant.⁷¹ The generating facility in question, Crossroads Energy Center, is a 300 MW simple-cycle natural gas-fired generation plant located in Mississippi. KCP&L-GMO convinced the Missouri PSC that Crossroads' power costs could be lower than local generation because its source of natural gas fuel was lower than the fuel sources used by the local generation facilities.

The utility, KCP&L-GMO, asserted that the disallowance unlawfully “traps” transmission costs incurred under a federally approved rate. In its decision, the court cited *Nantahala Power & Light Company v. Thornburg*, stating “[t]he filed rate doctrine requires ‘that interstate power rates filed with FERC or fixed by FERC must be given binding effect by state utility commissions determining intrastate rates.’”⁷² Again citing *Nantahala*, the court stated that “the filed rate doctrine prohibits a state regulatory commission from ‘trapping’ FERC-approved costs by preventing a distributor from fully recovering those costs from its retail customers.”⁷³

However, the court rejected KCP&L-GMO's trapped costs argument, agreeing with the Missouri PSC that its decision “had nothing to do with whether the transmission rates charged by Entergy to transport power from Crossroads in Mississippi to Missouri are just and reasonable, and therefore does nothing to call a FERC-approved Entergy tariff into question.”⁷⁴ The court reasoned that by allowing the generation from Crossroads into the rate base but not the transmission costs, the Missouri PSC permitted KCP&L-GMO to “take advantage of revenue opportunities,” but KCP&L-GMO had to “bear the burden of getting that energy to Missouri.”⁷⁵ The court concluded “[i]t was not the *amount* of Crossroads transmission costs that the [Missouri PSC] disallowed; it was the concept of requiring ratepayers to pay for any of the Crossroads transmission costs in the first place.”⁷⁶

At the time this article went to press, KCP&L-GMO's petition for a writ of certiorari is pending before the U.S. Supreme Court.

10. New Jersey

On March 4, 2014, a deadly gas pipeline explosion killed one person, injured seven utility workers, and damaged or destroyed fifty-five units near a New Jersey

71. State *ex rel.* KCP&L Greater Mo. Operations Co. v. Missouri Pub. Serv. Comm'n, 408 S.W.3d 153 (Mo. Ct. App. 2013).

72. *Id.* at 164 (citing *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 962 (1986)).

73. *Id.* (citing *Nantahala*, 476 U.S. at 970).

74. *Id.*

75. *Id.*

76. *Id.* at 165 (emphasis in original).

condominium complex.⁷⁷ The explosion reportedly occurred after Public Service Electric and Gas Company (PSE&G) crews were investigating a gas main inadvertently struck by a construction crew an hour before the explosion. The gas lines were marked but the accuracy of those mark-outs is in dispute. Reports on the blast from the Occupational Health and Safety Administration and the New Jersey Board of Public Utilities are not expected until fall 2014.

11. New York

On March 12, 2014, a gas explosion killed eight people, injured more than forty-eight, and demolished two buildings in East Harlem.⁷⁸ The two buildings housed fifteen apartments, a church, and a piano store.⁷⁹ The National Transportation Safety Board announced on March 18, 2014, that it found a leak in a cast iron gas main, parts of which date back to 1887, near the explosion site.⁸⁰ Media reports indicate that a gas leak was reported to Consolidated Edison, the operator of the gas line, approximately fifteen minutes before the explosion occurred. The utility crews reportedly arrived after the explosion.⁸¹ The cause of the explosion has not been determined at the time this article went to press.⁸²

On December 26, 2013, concluding that “the time has arrived for a fundamental refocus,” the New York Public Service Commission (NYPSC) instituted “broad restructuring of distribution utility regulation” of electric utilities, beginning with changes implemented for 2014–2015.⁸³ The NYPSC identified five guiding policy objectives it wishes to achieve “in the near term and in this more comprehensive inquiry and redesign” and that “are intended to serve [the NYPSC’s] overall mission of ensuring economic, efficient reliable electric service while reducing emission including greenhouse gases.”⁸⁴ First, the NYPSC

77. Paresh Dave, *Body Found in Rubble of New Jersey Condo Gas Explosion; 7 Injured*, L.A. TIMES, Mar. 4, 2014, <http://www.latimes.com/nation/nationnow/la-na-nn-new-jersey-condo-gas-explosion-death-20140304,0,364176.story?axzz2xajekomY>; Alex Zdan, *Crews Dig for Clues in Ewing Gas Explosion*, TIMES OF TRENTON, Mar. 22, 2014, http://www.nj.com/mercer/index.ssf/2014/03/crews_dig_for_clues_in_ewing_gas_explosion.html.

78. Preliminary Report Pipeline DCA14MP002, National Transportation Safety Board. (Mar. 31, 2014), available at https://www.nts.gov/doclib/reports/2014/Manhattan_NY_Pipeline_Preliminary_Report.pdf.

79. Chris France Scani & Anna Hiatt, *New York City Gas Explosion Subject of Federal Probe*, REUTERS, Mar. 13, 2014, <http://www.reuters.com/article/2014/03/13/us-usa-newyork-collapse-idUSBREA2B11D20140313>.

80. Press Release, National Transportation Safety Board, NTSB Issues Investigative Update for East Harlem, N.Y., Gas Explosion (Mar. 18, 2014), <https://www.nts.gov/news/2014/140318b.html>; *Pipe Pieces from NYC Explosion Sent to Washington*, MIAMI-HERALD, Mar. 31, 2014, <http://www.miamiherald.com/2014/03/31/4030761/pipe-pieces-from-nyc-explosion.html>.

81. Ray Sanchez, *Nine Still Missing After Manhattan Explosion Leaves at Least 4 Dead, 63 Hurt*, CNN, Mar. 13, 2014, <http://www.cnn.com/2014/03/12/us/manhattan-building-explosion/>.

82. In terms of deaths, people injured, and property destroyed, the New York City explosion is similar to the 2010 San Bruno explosion in California.

83. Proceeding on Motion of the Commission Regarding an Energy Efficiency Portfolio Standard, Order Approving EEPs Program Changes in CASE 07-M-0548, 2013 N.Y. PUC LEXIS 487, *2–3, 66 (N.Y. Pub. Serv. Comm’n Dec. 26, 2013).

84. *Id.* at *33.

wants to encourage customer knowledge and tools that support effective management of their total energy bill.⁸⁵ By focusing on consumer needs and knowledge, the NYPSC believes it will be able to “determine if regulation and the markets are effective at delivering [the NYPSC’s] policy objectives.”⁸⁶ Second, the NYPSC wants to support market animation and leverage of ratepayer contributions.⁸⁷ The NYPSC believes that “developing sustainable robust markets that support continued innovations in all areas and animate private financing” will help to support energy efficiency measures and renewable resource deployment “rather than continued dependency on rate payer or other forms of government financing.”⁸⁸ Third, the NYPSC wants to accomplish system wide efficiency.⁸⁹ The NYPSC noted that new developments in demand management technologies will provide opportunities to “substantially increase system wide efficiency, support business model innovation and private financing of clean energy deployment and, as a result reduce energy costs and the production of greenhouse gases.”⁹⁰ Fourth, the NYPSC wants to support fuel and resource diversity.⁹¹ The NYPSC believes that a “[s]uccessful market and regulatory design requires maintenance of fuel and resource diversity as a critical outcome measurement.”⁹² Fifth, the NYPSC wants to increase system reliability and resiliency because “[a]ssurance of a secure, reliable and resilient electric system remains and . . . is growing in importance as a critical feature of [New Yorkers’] daily lives and the development of [New York’s] economy.”⁹³

Additionally, the NYPSC called for proposals for comprehensive proceedings “structured in a manner that allows for timely implementation of a revised energy efficiency structure beginning in 2016.”⁹⁴ Specifically, the NYPSC requested that a proposal be made in early 2014 to address issues such as: (1) the “role of the distribution utilities in enabling system wide efficiency and market based deployment of distributed energy resources and load management”; (2) “[w]hat changes can and should be made in the current regulatory, tariff, and market design and incentive structures in New York” to align policy objectives and utility interests; and (3) what “further changes . . . need to be made to energy efficiency delivery,” including changes such as ensuring no implementation gaps occur or identifying market players instrumental to effectuating NYPSC policies.⁹⁵

85. *Id.*

86. *Id.*

87. *Id.* at *33–34.

88. *Id.*

89. *Id.* at *34–35.

90. *Id.*

91. *Id.* at *35.

92. *Id.*

93. *Id.*

94. *Id.* at *36.

95. *Id.* at *36–37.

To effect such goals, the NYPSC adopted several program changes to streamline the energy efficiency portfolio standards (EEPS) for 2014–15,⁹⁶ including (1) eliminating the requirement that program administrators seek approval “for changes to incentive levels” before instituting such changes; (2) eliminating the requirement that program administrators seek authorization from the Director of the Office of Energy Efficiency and the Environment (OEEE) “to reallocate budgets and targets within customer sectors” to provide the “same flexibility for all program administrators”; (3) eliminating the requirement that program administrators “obtain approval from or provide notification to the Director of OEEE to borrow from future” program funding; (4) eliminating certain reporting requirements within each of the program’s cycles, such as “monthly scorecard reporting, annual reporting, and OEM reporting” to “reduce the administrative burden without forgoing the information necessary to properly monitor” such programs; (5) temporarily eliminating payback testing while developing regulatory guidance for its potential reimplementation; and (6) eliminating the requirement of prescreening prescriptive measures with fixed dollar amount rebates.⁹⁷

To further the initiative encouraging the use of electric vehicles in New York, the NYPSC declared on November 22, 2013, that it does not have jurisdiction over publicly available electric vehicle charging stations.⁹⁸ Recently, automobile industry advocates and charging station operators have been seeking clarification in states across the country regarding regulation of various electric and natural gas fuels.⁹⁹ Although denying jurisdiction, the NYPSC believes its “regulations and policies promote the continuing evolution of the market for [plug-in electric vehicles] and for supporting services, while maintaining the safety and reliability of New York’s electric grid.”¹⁰⁰

The NYPSC declared it did not have jurisdiction over charging stations under New York’s Public Service Law (PSL) because they “are not used for or in connection with or to facilitate the generation, transmission, distribution, sale or furnishing of electricity for light heat or power” and thus are not “electric plants.”¹⁰¹ Accordingly, charging station owners or operators also do not fall within the NYPSC’s jurisdiction under the PSL.¹⁰² Although the NYPSC does not have any direct regulatory power over electric vehicle charging stations, it maintains some peripheral regulatory power by maintaining the ability to respond to “changes in the market in which Charging Stations operate” and by

96. *Id.* at *54–65.

97. *Id.*

98. *In the Matter of Electric Vehicle Policies, Declaratory Ruling on Jurisdiction over Publicly Available Electric Vehicle Charging Stations* in CASE 13-E-0199 (N.Y. Pub. Serv. Comm’n Nov. 22, 2013).

99. For example, the CPUC recently approved SoCalGas’s proposal to implement a tariff to costs of delivering compressed natural gas to customers but not providing vehicle fueling services. Southern California Gas Company Requests Approval of a Compression Service Tariff, Resolution G-3482, 2013 Cal. PUC LEXIS 738, *2–3 (Cal. Pub. Util. Comm’n Dec. 19, 2013).

100. *In the Matter of Electric Vehicle Policies*, supra note 98, at *1.

101. *Id.* at *3–4.

102. *Id.* at *4–5.

maintaining “continuing jurisdiction over the transactions between electric distribution utilities and the owners and operators of Charging Stations.”¹⁰³ Additionally, the NYPSC explained that its lack of jurisdiction under the PSL did not affect other governing bodies’ possible regulatory requirements for “the safe installation of electric vehicle charging equipment.”¹⁰⁴ For example, the NYPSC noted that municipalities like New York City rely on the National Electric Code’s requirements and have permitting and inspection requirements for installing such equipment to ensure its safe installation. The National Institute of Standards and Technology also continues to develop oversight guidelines for charging service devices, such as meters.¹⁰⁵

On July 29, 2013, in response to failures during Superstorm Sandy, New York Governor Andrew Cuomo signed legislation that restructured utility operations on Long Island.¹⁰⁶ Previously the Long Island Power Authority (LIPA), a government-owned corporation, contracted out grid operations but managed day-to-day operations, such as storm response, outage restoration, budgeting, maintenance, and infrastructure improvements. Since January 1, 2014, PSEG Long Island LLC, a wholly owned indirect New York subsidiary of Public Service Enterprise Group Inc., has been running utility operations. This legislation brings utility service in Long Island under the oversight of a special office of the Department of Public Service.¹⁰⁷ The Long Island office will be responsible for reviewing LIPA operations and recommending rate changes to the restructured LIPA board. LIPA will be a holding company with a smaller staff and board.

In April 2013, the New York State Office of Emergency Management initiated a series of meetings among the NYPSC’s staff, the electric utilities, and the National Guard to discuss the National Guard’s role in restoring power after a storm event or disaster.¹⁰⁸ The discussions resulted in a procedure for requesting National Guard support and deployment, which is now codified in each of the utilities’ emergency plans.

On March 29, 2013, the governor of New York signed into law PSL § 65(15), requiring the “chief executive officer of each combination gas and electric corporation” to annually certify to the NYPSC that the utility has “internal controls, policies and procedures designed to ensure compliance with the requirements” of applicable state laws, rules, regulations, orders and procedures, including the requirement to provide safe and adequate service.¹⁰⁹

103. *Id.*

104. *Id.* at *5, n.9.

105. *Id.*

106. Press Release, Governor’s Press Office, Governor Cuomo Signs Legislation Restructuring Utility Operations on Long Island (July 29, 2013), <https://www.governor.ny.gov/press/07292013-restructure-utility-operations-on-long-island>; see N.Y. Pub. Serv. Law § 3-b.

107. See N.Y. Pub. Serv. Law § 3-b(3).

108. See Order Approving Electric Emergency Plans, Case 13-E-0550 (N.Y. Pub. Serv. Comm’n Mar. 28, 2014).

109. N.Y. Pub. Serv. Law § 65(15).

12. Ohio

On July 2, 2012, the Public Utilities Commission of Ohio (PUCO) approved a bifurcated system for the recovery of capacity costs.¹¹⁰ The PUCO ordered the utility (AEP Ohio) to charge only retail generation suppliers (serving customers in AEP Ohio's service territory) Reliability Pricing Model (RPM) capacity auction clearing prices. However, the PUCO allowed AEP Ohio to charge its distribution customers the difference between the RPM capacity price and AEP Ohio's full "embedded costs" for capacity. The PUCO held that such a system offered a balanced approach by providing the utility with recovery of its actual costs of providing capacity while also promoting retail electric competition. The case is currently on appeal to the Ohio Supreme Court.

On February 13, 2014, the PUCO denied a similar application filed by Duke Energy Ohio (DEO).¹¹¹ The PUCO denied relief on the grounds that it had already agreed to compensate DEO for over \$100 million in charges for capacity, among other services, in DEO's so-called Electric Security Plan (ESP), which sets the terms and conditions for DEO's provision of capacity for all retail customers in DEO's service territory. The PUCO held that DEO's application contravened the terms of the ESP and that DEO failed to meet its burden of proof. The PUCO also found that even if DEO had met its burden, the doctrines of *res judicata* and collateral estoppel would preclude its approval of DEO's application. The impact of PUCO's decision in this case is demonstrated by DEO's subsequent announcement that it would sell its Midwest generation fleet.

On August 7, 2013, the PUCO reviewed FirstEnergy Ohio's costs in procuring renewable energy credits (RECs) pursuant to Ohio statutory renewable energy mandates.¹¹² The mandates called for 50 percent of all renewable energy to come from resources in Ohio. Although the renewable energy mandates went into effect within a year of the statute's enactment, the utilities were able to satisfy their renewable energy benchmarks through a series of competitive requests for proposal designed and run by an independent third party expert. The companies were able to receive force majeure relief for certain solar benchmarks. Although the PUCO determined that the RFPs produced competitive and therefore market prices, it held that certain purchases of RECs were not proven to be prudent, resulting in an order for a refund of over \$43 million. The order was stayed by the Ohio Supreme Court and is currently on appeal.

110. Ohio Power Co., 298 P.U.R.4th 233 (Ohio Pub. Util. Comm'n July 2, 2012), *reh'g denied*, Case No. 2929-EL-UNC (Ohio Pub. Util. Comm'n Dec. 12, 2012).

111. Duke Energy Ohio, Inc., Case No. 12-2400-EL-UNC, 2014 Ohio PUC LEXIS 23 (Ohio Pub. Util. Comm'n Feb. 13, 2014).

112. Ohio Edison Co., Case No. 11-5201-EL-RDR, 2013 Ohio PUC LEXIS 159 (Ohio Pub. Util. Comm'n Aug. 7, 2013), *reh'g denied*, Case No. 11-5201-EL-RDR (Dec. 18, 2013).

13. Pennsylvania

On December 19, 2013, the Pennsylvania Supreme Court struck down portions of the controversial Pennsylvania Oil and Gas Act (Act 13),¹¹³ requiring municipalities to permit oil and gas drilling in all zoning districts.¹¹⁴ Part of that law permits the Pennsylvania Public Utility Commission (PPUC) to issue orders determining whether a local ordinance violates Act 13 or the Municipalities Planning Code. This provision was challenged on the assertion that the PPUC is an executive agency that is unconstitutionally exercising judicial power. The Pennsylvania Supreme Court rejected this argument, holding that the PPUC would be exercising executive powers duly granted to it by the Pennsylvania General Assembly. The Pennsylvania Supreme Court also upheld a provision of Act 13 granting the PPUC the ability to issue a written advisory opinion upon request by a municipality regarding whether a proposed local ordinance would violate Act 13 or the Municipalities Planning Code. However, given that the court found that these powers relate to enforcement of the sections of the Act it found invalid, the court enjoined the application or enforcement of both of these PPUC powers.

On March 21, 2014, Sunoco Pipeline, L.P. (SPLP) filed a petition with the PPUC asking, in part, for the PPUC to declare SPLP a public utility corporation.¹¹⁵ SPLP is developing the Mariner East pipeline project, which is expected to increase pipeline infrastructure for transporting shale gas and associated natural gas liquids in the Marcellus Shale. If SPLP is a public utility corporation, the PPUC will be able to consider whether an exemption from zoning, subdivision, and land development ordinances is appropriate for SPLP's pipeline development project. After setting forth the reasons it is a public utility in Pennsylvania, SPLP asked the PPUC to find that the buildings for SPLP's Mariner East project are "reasonably necessary for the convenience or welfare of the public"¹¹⁶ and exempt from local zoning, subdivision, and land development ordinances under section 619 of the Pennsylvania Municipalities Planning Code.

113. Pennsylvania Oil and Gas Act, 58 PA. CONS. STAT. §§ 3201–04 (Lexis 2014).

114. *Robinson Twp. v. Commonwealth*, 2013 Pa. LEXIS 3068 (Pa. 2013).

115. *Petition of Sunoco Pipeline L.P.*, Docket No. P-2014-2411966 (Pa. Pub. Util. Comm'n Mar. 21, 2014).

116. *Id.* at 11.