

Northeast Public Power Association Legislative Update



October 2018

McNamee Named for FERC

On Oct. 3, President Trump nominated Bernard McNamee to fill the open seat on the Federal Energy Regulatory Commission (FERC). McNamee currently heads the Department of Energy (DOE) Office of Policy and was previously Deputy General Counsel for Energy Policy; earlier in his career he practiced energy law and served four Attorneys General. He is seen as a decisive vote in favor of action on the Administration's efforts to rescue coal and nuclear plants, particularly with respect to organized markets. Robert Powelson, who vacated the seat in August, was an outspoken critic of those plans. McNamee may face opposition from both market advocates and environmental champions during his confirmation process.

High-Profile Hearing Examines Allegations Against SCOTUS Nominee

On Sept. 27, the Senate Judiciary Committee heard testimony from Dr. Christine Blasey Ford, a woman who has alleged that Supreme Court nominee Brett Kavanaugh assaulted her at a party when both were minors, and from Kavanaugh himself. The hearing ranged from intensely emotional to highly technical, with both witnesses visibly distraught. The Judiciary Committee approved Kavanaugh's nomination Sept. 28, but Sen. Jeff Flake (R-AZ) conditioned future support on completion of a one-week FBI probe to examine the allegations further.

FERC Plans Conference on Winter Reliability

FERC has announced plans for an Oct. 18 technical conference to examine winter reliability issues. The conference will be staff-led and will focus on testimony from the RTOs on their efforts to ensure reliable and economic system performance during the 2018-2019 winter season. For RTOs that are not winter-peaking, remarks will focus on efforts to prepare for other seasons that may challenge the region's reliability.

Courts Uphold State Public Policy Programs in Organized Market Regions

Two Circuit Courts have upheld state programs aimed at supporting specific generation resources in organized markets. On Sept. 13, the U.S. Circuit Court of Appeals for the Seventh Circuit upheld an Illinois program that provides a contract-based Zero Emissions Credit to nuclear plants. On Sept. 28, the U.S. Circuit Court of Appeals for the Second Circuit upheld a similar program in the state of New York. Both courts rejected claims that the Federal Power Act preempts state public policies that may have an effect on market prices. The courts found that the state programs were aimed at public policy objectives other than suppressing wholesale prices, even if they may have the effect of driving those prices down.

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Congress Passes \$854B Minibus Appropriations Bill

On Sept. 26, the House of Representatives voted in favor (361-61) of a FY19 “minibus” appropriations package that included funding for several areas of government, including defense. Also included in the package was a Continuing Resolution (CR) through Dec. 7 allowing funding to continue at FY18 levels for any agency not receiving FY19 appropriations by the end of the fiscal year. Of note, the Low-Income Home Energy Assistance Program (LIHEAP) is funded at \$3.69 billion, roughly \$50 million more than in FY18. President Trump signed the measure, despite earlier rhetoric decrying the lack of funding for his priority, border security.

FCC Asserts Authority Over Municipal Pole Attachments

The Federal Communications Commission (FCC) on Sept. 26 issued an order limiting the fees local authorities can charge wireless providers to attach 5G facilities to public assets, including electric poles owned by municipal entities. The order, approved by a 4-0 vote, represents a reinterpretation of public rights-of-way and wireless service section under the Communications Act. The Commission asserts these sections allow it to prevent fees and delays that undermine the deployment of wireless services. The order requires municipalities to process pole attachment applications within 60 days for existing poles and 90 days for new structures. A separate provision of the Communications Act provides not-for-profit electric utilities an exemption from federal pole attachment regulations and therefore the order’s legality is likely to be challenged, which could delay its implementation.

Congress Tees Up FAA Reauthorization, Disaster Recovery and Reform Act

On Sept. 22, congressional leaders reached an agreement on the pending Federal Aviation Administration (FAA) Reauthorization bill. The final agreement includes several provisions relating to drones, including requiring the FAA to begin a process to establish drone “no-fly” zones over critical electric infrastructure. The agreement also directs FAA to test ways to integrate drone use beyond-the-visual-line-of-sight, nighttime operations, and operations over people – considerations important for the effective application of drones by electric utilities. Of interest to utilities, the bill also includes a provision that would prevent FEMA from de-obligating (or “clawing back”) emergency disaster funding more than three years after disbursement.

Water Resources Bill Moving Through Congress

A “pre-conferenced” version of the Water Resources Development Act (WRDA) was unveiled Sept. 10 by House and Senate committee leaders as a compromise package that ironed out differences between the chamber’s respective bills, and is expected to become law before the November election. The bill contains several important hydropower provisions not in prior versions: it grants FERC authority to extend start of construction deadlines for licensed projects up to 10 years, increases the maximum capacity for small conduit hydro up to 40 megawatts, sets a two-year deadline on the permitting process for non-powered dams and closed loop systems, and ensures licensees will be given credit during the relicensing process for “early action” investments. The bill will also allow entities who experience a rate hike due to inaction by FERC to appeal the Commission to rehear the issue.

House Energy Panel Conducts Oversight of the DOE’s New Cyber Office

On Sept. 27, the House Energy and Commerce Subcommittee on Energy held an oversight hearing on the Department of Energy’s (DOE) Office of Cybersecurity, Energy Security, and Emergency Response (CESER). Karen Evans, the recently confirmed Assistant Secretary of this office, was the only witness. In her testimony she walked members of the committee through the legal authority DOE possesses as the sector specific agency for energy and described several of the ongoing information sharing efforts between industry and government entities designed to mitigate cyber risk. She described to members that she would like to “cultivate an ecosystem of resilience” within the electric sector and that she was not confident utilities could presently withstand a sophisticated cyber attack.

