

INSIGHTS

DOE Proposes FERC Action to Preserve and Compensate Baseload Generation Resources

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Pursuant to its authority under Section 403 of the Department of Energy Organization Act, on September 29, 2017, the Department of Energy (“DOE”) issued a Notice of Proposed Rulemaking (“NOPR”) directing the Federal Energy Regulatory Commission (“FERC”) to take prompt action to help prevent further retirements of baseload generation resources located within the centralized markets operated by FERC-jurisdictional Regional Transmission Organizations (“RTO”) and Independent System Operators (“ISO”). The NOPR comes just over one month after issuance of a report by DOE staff on electricity markets and reliability that found that significant changes in the electric industry, such as low natural gas prices and the growth of renewables, are contributing to the premature retirement of coal-fired and nuclear baseload generation.^[1]

In the NOPR, DOE finds that coal-fired and nuclear generation facilities play a critical role in maintaining the reliability and resiliency of the electric grid, particularly during stressed grid conditions. DOE notes that coal-fired generation resources that were scheduled for retirement and nuclear generation facilities played a critical role in maintaining reliability during the Polar Vortex when fuel limitations rendered many gas-fired generation resources unavailable. The Polar Vortex occurred early in 2014 when extreme weather events caused challenges for the electricity industry. DOE points out that coal-fired and nuclear generation facilities are particularly effective in protecting against system supply chain disruptions because these units tend to maintain significant on-site fuel storage. While DOE recognizes that FERC has been engaged in an extended effort to improve price formation practices in organized markets, DOE considers it to be increasingly apparent that FERC-jurisdictional organized markets are not accurately valuing the reliability and resiliency benefits provided by traditional baseload resources.

Noting that the “the continued loss of fuel-secure generation must be stopped,” the NOPR directs FERC to issue a final rule requiring RTOs and ISOs to revise their tariffs to establish a rate for purchases of electric energy from “eligible reliability and resiliency resource[s]” that ensures that such resources recover their fully allocated costs, including operating and fuel expenses, costs of capital and debt, and a fair return on equity. For purposes of the NOPR, “eligible reliability and resiliency resource” is defined as any resource located within an RTO/ISO market that:

- Is able to provide essential energy and ancillary reliability services (including voltage support, frequency services, operating reserve, and reactive power);

- Has a *90-day fuel supply on-site* enabling it to operate during an emergency, extreme weather conditions, or a natural or man-made disaster;
- Is in compliance with all applicable federal, state and local environmental laws, rules, and regulations; and
- Is not subject to cost of service rate regulation by any state or local regulatory authority.

The NOPR leaves a number of questions unanswered regarding how it might be implemented in practice if adopted by FERC. For example, while it is clear that the proposal is intended to provide financial support for coal-fired and nuclear generators providing “essential energy and ancillary reliability services,” the proposal does not make clear if all generators meeting the criteria should be considered “essential” or if the determination of whether a generator is essential should involve a generator-by-generator assessment. The NOPR also does not address the manner in which these requirements would be incorporated into RTO/ISO market structures and the degree of flexibility that would be afforded to each RTO/ISO and its stakeholders in crafting any resulting tariff revisions.

The NOPR sets out a highly expedited timeframe for consideration and action. Specifically, the NOPR:

- establishes a deadline for comments on the proposal of 45 days after publication in the Federal Register, unless FERC issues a notice within 2 days of publication of the NOPR establishing an alternative comment deadline;
- directs FERC to either: (1) take final action within 60 days from the date of publication of the NOPR in the Federal Register; or (2) issue a Final Rule adopting the NOPR as an interim final rule, effective immediately, subject to further modification after consideration of any responsive comments;
- directs FERC to make any final rule in this proceeding effective 30 days following its publication in the Federal Register; and
- proposes that each RTO/ISO be required to submit a compliance filing within 15 days of the effective date of the final rule, with any tariff revisions made to comply with the final rule becoming effective 15 days following the submission of the compliance filing.

DOE’s decision to issue a NOPR directing FERC to revise its regulations is unusual but not unprecedented. Although FERC is organizationally under the umbrella of DOE, it is an independent agency. Therefore, Section 403 of the Department of Energy Organization Act authorizes the Secretary of Energy to propose rules and regulations related to matters within FERC’s jurisdiction and obligates FERC to “consider and take final action on any [such] proposal . . . in accordance with such reasonable time limits as may be set by the Secretary.”

DOE previously relied on this authority when issuing several NOPRs in the 1970s and 1980s concerning FERC’s policies respecting the use, pricing, and transportation of natural gas and oil, including emergency measures designed to address oil shortages.^[2] In those cases, FERC generally adopted DOE’s proposals, with some modification and after soliciting comments from interested parties.^[3] The recent NOPR, however, appears to represent the first time that DOE has exercised its authority to direct changes to FERC’s policies respecting the sale or

transmission of electric energy or capacity pursuant to the Federal Power Act. It is certainly the first one relating to RTOs and ISOs.

Given factors such as the varying interests of the affected stakeholder groups and the current market structures of RTOs and ISOs for compensating generators, the NOPR should result in a material amount of comments for FERC to consider. FERC is coming off the non-quorum period and is focused on the backlog of orders that need to be issued now that it has a quorum. Also, two of the three current Commissioners are brand new and two others are expected to join shortly. It typically takes some time for a FERC Commissioner to get fully up to speed. Given the ambitious schedule set out in the NOPR, particularly in these circumstances it will be interesting to see how FERC acts to process this NOPR.

[1] For more on DOE's report, see <http://www.energylegalblog.com/blog/2017/09/14/call-focus-strengthening-grid-resilience-and-reliability-doe-staff-report-offers>.

[2] See, e.g., *Transportation Certificates for Natural Gas*, 44 Fed. Reg. 17,644 (1979) (proposing rule establishing procedure for the issuance of one year certificates of public convenience and necessity authorizing the transportation of natural gas purchased to displace fuel oil); *Ceiling Prices; Old Gas Pricing Structure*, 50 Fed. Reg. 48,540 (1985) (proposing modifications to policies respecting pricing of natural gas pursuant to the Natural Gas Policy Act of 1978).

[3] See, e.g., *Transportation Certificates for Natural Gas for the Displacement of Fuel Oil*, Order No. 30, FERC Stats. & Regs. ¶ 30,054 (1979) (adopting rule authorizing transportation of natural gas by interstate pipelines to direct purchasers for one-year period); *Ceiling Prices; Old Gas Pricing Structure*, Order No. 451, FERC Stats. & Regs. ¶ 30,701 (1988) (final rule adopting modified version of DOE proposal to revise price ceiling applicable to natural gas sales pursuant to the Natural Gas Policy Act of 1978).