

FERC Terminates DOE's Proposed Grid Resiliency Rulemaking Effort and Opens Its Own Investigation

In an [order issued](#) Monday, January 8, 2018, the Federal Energy Regulatory Commission unanimously terminated the rulemaking proceeding it previously initiated in response to a directive issued last fall by U.S. Department of Energy Secretary Rick Perry. That "resilience directive" gave the Commission 60 days to halt the "premature retirements" of power plants that have 90 days of fuel on site. Instead of following the DOE directive, the Commission opened its own investigation of the resilience and reliability of the bulk power system (BPS). The Commission's order rebuffed calls for short-term relief from operators of coal and nuclear plants, siding instead with numerous commentators who argued that allowing proposals in the DOE directive could radically transform energy markets and the utility industry.

Proposed Rule

Secretary Perry submitted his proposal, termed the Grid Resiliency Pricing Rule, 82 Fed. Reg. 46,940 (Oct. 10, 2017) (Proposed Rule), to the Commission on September 29, 2017. The Proposed Rule directed the Commission to consider requiring Commission-approved independent system operators (ISOs) and regional transmission organizations (RTOs) to establish a tariff mechanism providing for: (1) the purchase of energy from an eligible "reliability and resilience resource;" and (2) the recovery of costs and a return on equity for such resources (i.e., a "resilience rate"). Eligible reliability and resilience resources must: (1) be located in an RTO/ISO with an energy and capacity market; (2) be able to provide essential reliability services; and (3) have a 90-day fuel supply onsite. Importantly, the 90-day onsite fuel supply requirement would essentially limit eligible resources to only coal-fired and nuclear power plants in most parts of the country. Covered RTOs/ISOs would have to pay the owners of eligible resources for their "operating and fuel expenses, costs of capital and debt, and a fair return on equity and investment," effectively giving owners of these plants a market-backed guarantee that their plants will be profitable for many years to come, regardless of market conditions. As the basis for these requirements, the Proposed Rule cited: (1) significant retirements of baseload generation, particularly coal and nuclear resources; (2) the 2014 Polar Vortex, which the Proposed Rule states exposed problems with the resilience of the grid; and (3) a growing recognition that regulated wholesale power markets are not adequately pricing resiliency attributes of fuel-secure power.

The Commission's Order

After summarizing the evolution of the electric power industry and its efforts to address reliability and resiliency, the Commission moved to the substance of the Proposed Rule. Under section 206 of the Federal Power Act, the Commission must make a threshold determination "that the existing RTO/ISO tariffs are unjust, unreasonable, unduly discriminatory or preferential" before it can require RTOs/ISOs to implement tariff changes. In the same vein, "any remedy proposed under FPA section 206 must be shown to be just, reasonable, and not unduly discriminatory or preferential."

The Commission found that "[n]either the Proposed Rule nor the record in this proceeding has satisfied the threshold statutory requirement of demonstrating that the RTO/ISO tariffs are unjust and unreasonable." Furthermore, "the Proposed Rule would allow all eligible resources to receive a cost-of-service rate regardless of need or cost to the system" without showing "that such an outcome would be just and reasonable." Accordingly,

the Commission terminated the rulemaking proceeding on the Proposed Rule.

In addition, the Commission acknowledged that although it has undertaken efforts to address the resilience of the BPS, resilience remains an important issue that warrants the Commission's continued attention. To that end, the Commission initiated a new proceeding to further explore grid resilience in a broader context through gathering information from RTOs/ISOs that will inform whether additional action by the Commission or the RTOs/ISOs is warranted. First, the Commission provided and sought comment on a definition of resilience: "The ability to withstand and reduce the magnitude and/or duration of disruptive events, which includes the capability to anticipate, absorb, adapt to, and/or rapidly recover from such an event."

Next, the Commission posed 19 questions to obtain comments on how individual RTOs and ISOs currently evaluate the resilience of their systems and to highlight unique resilience challenges in the regions. Finally, the Commission posed additional questions seeking comment on how RTOs and ISOs evaluate options to mitigate risks to grid resilience. The order provides 60 days for RTOs and ISOs to submit responses, as well as 30 days for other interested parties to submit reply comments.

Three of the five commissioners issued concurring statements on the order. Commissioner Neil Chatterjee, who had spoken favorably about the DOE proposal several months ago, wrote in a concurrence that although his preference was for short-term subsidies, the order represented a "positive step forward in addressing these critical issues." Commissioners Cheryl LaFleur and Richard Glick also authored separate concurrences, while Chairman Kevin McIntyre and Commissioner Richard Powelson signed onto the order without additional comment.

Implications of the Order

The Commission's order represents a firm rejection of one avenue of the Trump administration's efforts to revive coal-fired and nuclear power plants, largely keeps questions of grid resiliency with RTOs and ISOs, and signals stability for energy markets and the utility industry going forward.

During the presidential campaign, then-candidate Trump often touted the benefits of coal-fired and nuclear power plants and vowed to take action to boost their prospects; the Proposed Rule represents the administration's most concrete step to that end. Even as four of the five commissioners are Trump appointees, the independent Commission rejected the secretary's proposal, finding it unsupported by the record. Thus, any assistance to coal and nuclear from the administration must come some other way.

The Commission's decision also represents some deference to regional grid operators. The so-called ISO/RTO Council, composed of the regional grid operators subject to FERC's jurisdiction, was highly critical of the Proposed Rule, as were individual operators. They urged the Commission to reject the DOE proposal, arguing that it was the wrong way to address any concerns over grid reliability and how to value it in wholesale power markets. It will be interesting to see how the regional operators respond to the questions posed by the Commission in its request for comments.

Finally, the order means that traders, utilities and consumers can breathe a sigh of relief. The Commission cited numerous comments noting that several billion dollars of additional costs would be passed on to consumers if the Proposed Rule were to come into effect. Markets and utilities would also have had to quickly adapt to the new regulatory landscape. To the extent the Commission determines that changes are needed to address grid resilience, those changes can now be implemented in a measured manner.

Authors



[Pamela J. Anderson](#)

Partner

PJAnderson@perkinscoie.com [425.635.1417](tel:425.635.1417)

Explore more in

[Energy Infrastructure & Clean Technology](#) [Environment, Energy & Resources](#)

Related insights

Update

[Ninth Circuit Rejects Mass-Arbitration Rules, Backs California Class Actions](#)

Update

[CFPB Finalizes Proposed Open Banking Rule on Personal Financial Data Rights](#)