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FERC, Energy Industry Responds to DOE Coal, Nuclear Mandate

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Dealing a blow to the Trump administration's push for immediate action on grid resilience, the Federal Energy Regulatory Commission ("FERC") terminated its docket addressing the Proposed Rule on Grid Reliability and Resilience Pricing submitted to FERC by the Secretary of Energy late last year and initiated a new administrative proceeding to "evaluate the resilience of the bulk power system in the regions operated by regional transmission organizations ("RTOs") and independent system operators ("ISOs")." The order was accompanied by three concurring opinions, which as explained below demonstrate the challenging discussions ahead on the topic of resilience.

On September 28, 2017, the US Department of Energy ("DOE") proposed a rule (Notice of Proposed Rulemaking, or "NOPR") to be brought forward by the FERC with the stated goal of improving grid resilience. According to DOE Secretary Rick Perry, the basis to implement new rules was to ensure that reliability characteristics of specific electric generation resources are sufficiently valued. In the NOPR, DOE emphasized the role of 'fuel-secure resources' in mitigating disruptions to the US power grid. Namely, DOE highlighted the Polar Vortex of 2014 and ostensibly other future natural disasters or significant events that could produce widespread energy outages. Further, the domestic shift to natural gas in the past several years—largely attributed to market forces and not regulatory intervention or policy instruments—has changed the composition of the electricity sector. In light of this trend, DOE cited the retirements of coal and nuclear plants as jeopardizing the availability of fuel-secure generation. The NOPR suggested providing for full cost recovery of eligible generation units possessing certain reliability characteristics with the capacity to store ninety days' worth of fuel on-site. Implicitly, and as supported by the rationale furnished by DOE in the NOPR, the eligible generation units would be coal and nuclear facilities.

Despite the truncated comment period—ending on November 7—for such a potentially expansive rule, over 1,000 combined comments were filed at FERC. The range of parties spanned across the energy industry, forming uncommon alliances. For instance, a group of trade associations comprised of the oil, natural gas, wind, solar, and energy efficiency sectors filed substantive comments opposing the proposed rule. Among a number of issues raised in the comments, the group pointed to a specific plan set forth by one utility that would result in preferential payments—incurring far higher costs than those currently provided to power plants—under a Reliability Must Run contract. The group considers this potential intervention a "bailout" out of debt for those utilities that would qualify to guarantee long-term operation. Notably, the region that would be most affected by the proposed rulemaking—PJM—filed comments opposing the NOPR and emphasizing that its markets are reliable and resilient. Other parties, notably coal and nuclear interests, generally supported the NOPR.

Ultimately, FERC voted unanimously (5-0) to terminate the proposed rulemaking proceeding on January 8, 2018, concluding that the record in the proceeding was insufficient to support requiring changes to the RTO/ISO tariffs or allowing eligible resources to receive cost-of-service payments. For reference, the FERC order may be found here. In place of the rulemaking proceeding, FERC opened an administrative docket to "explore resilience issues in the RTOs/ISOs." FERC identified three goals for the new proceeding:

- to develop a common understanding among the Commission, industry, and others of what resilience of the bulk power system means and requires;
- to understand how each RTO and ISO assesses resilience in its geographic footprint; and
- to use this information to evaluate whether additional Commission action regarding resilience is appropriate at this time. While noting that the examination of resilience would be a FERC priority, the order also ticked through the many ways in which FERC believes it has already acted to support bulk power system resilience. Thus, it is likely that the new proceeding will result in more technical and limited adjustments, rather than broad market reform contemplated by the terminated rulemaking docket.

As an initial step, the order directs RTOs and ISOs to submit information regarding specific issues of interest identified by the Commission within 60 days. In particular, FERC sought comment on its 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") and insight into how RTOs/ISOs assess and mitigate threats to resilience today. In so doing, FERC explicitly recognized that regional differences among RTOs/ISOs likely impact approach to resilience.

Three of the five commissioners filed concurring opinions, reflecting the difficulty in reaching uniform agreement on this issue. Commissioner LaFleur wrote to express "serious concerns" about both the lack of record demonstrating a need for a rulemaking to support resilience and the nature of the proposed remedy itself, which she noted "would address the issue not through market rules but through out-of-market payments to certain designated resources." Commissioner LaFleur also sought to put the issue of resilience in the context of "continual change and progress" in the energy industry, noting that she is a "strong supporter of competitive markets" and that "[r]esource turnover is a natural consequence of markets, and the reduced prices that result from greater competition are a benefit to customers, not a problem to solve, unless reliability is compromised." Rather than "freeze yesterday's resources in place indefinitely," Commissioner LaFleur would see the Commission "continue to focus its efforts not on slowing the transition from the past but on easing the transition to the future."

Commissioner Glick's concurring statement echoed and amplified these same themes, asserting that "[t]he Proposed Rule had little, if anything, to do with resilience, and was instead aimed at subsidizing certain uncompetitive electric generation technologies." Commissioner Glick would see RTOs/ISOs "consider how best to mitigate these challenges *within* their markets and *without* prejudging what technology or fuel-type provides the best solution." He also noted "it is important to consider the advantages that newer technologies, such as distributed energy resources, energy storage, and micro-grids, may offer in addressing resilience challenges to the bulk power system."

Commissioner Chatterjee also concurred "with the expectation that it is only the first step in a more systematic effort by the Commission, over the near and long term, to ensure the resilience of the nation's bulk power system." Consistent with his support in advance of the order for "interim solutions" prior to contemplating a more substantial cost recovery framework, Commissioner Chatterjee "voice[d his] concerns regarding bulk power system resilience in the interim period prior to the conclusion of the proceeding we initiate today." He continued to advocate "the prudence of considering, as soon as practicable, whether interim measures may be needed to avoid near-term bulk power system resilience challenges that could result from the rapid, unprecedented changes in our generation resource mix." Commissioner Chatterjee would have required RTOs/ISOs to either submit "tariff revisions to provide interim compensation for existing generation resources that may provide necessary resilience attributes and are at risk of retirement before the conclusion of the proceeding established today" or show cause why they should not be required to do so. Given the statements of Commissioners LaFleur and Glick strongly supporting a focus on new technologies and technology-neutral approach to resilience, however, Commissioner Chatterjee will need the support of both Commissioner Powelson and Chairman McIntyre to pursue an interim solution. This may be a difficult proposition, given Powelson's earlier statements evidencing a wary reaction to the Proposed Rule in general.

While unlikely to produce a meaningful challenge, parties are eligible to file requests for rehearing of the order by February 7. Given that DOE has tacitly acknowledged that FERC is still contemplating the broader issue, parties aligned with the coal and nuclear industries may be less encouraged to enter a protracted legal battle over this order.

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