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Energy ADVISORY ■

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FERC to Expedite Final Rule on Grid Reliability and Resilience Pricing

On September 28, 2017, the U.S. Department of Energy released a Notice of Proposed Rulemaking (NOPR) directing the Federal Energy Regulatory Commission (FERC) to issue a final rule on grid reliability and resilience pricing. Under the proposal, FERC will "impose rules on Commission-approved independent system operators (ISOs) and regional transmission organizations (RTOs) to ensure that certain reliability and resilience attributes of electric generation resources are fully valued." A letter from the Secretary of Energy to FERC's commissioners accompanied the NOPR. The Department of Energy released the NOPR under Section 403 of the Department of Energy Organization Act ("DOE Act"), a provision it has rarely invoked in recent years. This rulemaking is being undertaken on an expedited schedule, with initial comments due by October 23 and reply comments due by November 7.

The NOPR proposes new regulations that would require ISOs and RTOs to amend their tariffs to provide specific rates for "grid reliability and resiliency resources" for the purchase of electric energy from these resources and the recovery of costs and a return on equity for those resources dispatched during grid operations.

The rate for eligible resources required by the NOPR is intended to fully compensate each resource for the benefits and services it provides to grid operations, including reliability, resiliency, and on-site fuel assurance, and to ensure that each resource recovers its fully allocated costs and a fair return on equity. Compensable costs also include operating and fuel expenses and costs of capital and debt.

To qualify as a grid reliability and resiliency resource, certain criteria must be met, including:

- Being an electric generation source physically located within a FERC-approved ISO or RTO.
- Being able to provide essential energy and ancillary reliability services.
- Having a 90-day fuel supply on site to allow it to function during an emergency, extreme weather conditions, or a natural or man-made disaster.
- Complying with all applicable environmental laws, rules, and regulations.
- Not being subject to state or local cost of service rate regulation.

The Secretary of Energy highlights the importance of traditional baseload generation with on-site fuel storage that can withstand major fuel supply disruptions caused by natural and man-made disasters. In support of the NOPR, the Department of Energy cites, among other sources, its August 2017 Staff Report to the Secretary on Electricity Markets and Reliability. The NOPR also cites portions of the DOE Staff Report warning of serious risks from premature retirements of fuel-secure resources, including coal and nuclear resources.

The NOPR also notes the grid-reliability problems during the 2014 polar vortex. During that weather-related emergency, a number of fuel-secure plants scheduled for retirement were called upon to meet consumers' need for electricity. The NOPR states that, had these units been unavailable, 65 million people within the PJM Interconnection RTO would have been affected through blackouts or interruptions in electric service.

The Department of Energy further notes that in recent years, FERC has established an extensive record on price formation in ISOs and RTOs. This includes initiating a proceeding evaluating price formation in energy and ancillary services markets operated by ISOs and RTOs, which led to subsequent proceedings involving reforms to settlement intervals and shortage pricing and raising existing caps on energy market offers. Additionally, FERC has issued multiple NOPRs relating to price formation. The Department of Energy states that while FERC has developed an extensive record on ISO and RTO price formation, the fundamental challenge of maintaining a resilient electric grid has not yet been addressed—namely, the retirement of traditional baseload power plants. The retirement of these plants are distorting the markets, and the Department of Energy believes FERC must act.

The NOPR also cites recent severe weather events, including Hurricanes Harvey, Irma, and Maria, to support the urgency for FERC to act now. The Department of Energy urges FERC to act before the upcoming 2017–2018 winter season to prevent a potential grid failure resulting from the loss of fuel-secure generation. Because of these circumstances, the development and implementation of the final rule was proposed to be held on an expedited schedule. The Secretary of Energy directed FERC to meet the following deadlines:

- Within 60 days of publication in the *Federal Register*, FERC is required to consider and take final action on the NOPR.
- Alternatively, FERC is urged to issue an interim final rule, effective immediately, with a provision for later modifications after considering public comments.
- Any final rule shall take effect within 30 days of publication in the *Federal Register.*
- Each ISO and RTO subject to the rule will be required to submit a compliance filing within 15 days of the effective date of the final rule with either tariff changes or a demonstration of how the ISO or RTO already complies with the final rule. Any tariff changes submitted to comply with the final rule must become effective no more than 15 days after compliance filings are due.

Notice Inviting Comments

On October 2, 2017, FERC issued a Notice Inviting Comments in Docket No. RM18-1-000. This notice invited interested persons to submit comments on the NOPR by October 23, 2017, and reply comments by November 7, 2017.

Request for Comments on Certain Issues

On October 4, 2017, the FERC's Office of Energy Policy and Innovation issued a series of questions relating to the NOPR designed to assist FERC staff in understanding the implications of the proposed rule. The Office of Energy Policy and Innovation requested that commenters address these questions in their comments. The questions fall into different categories, including the need for reform, eligibility requirements for resources, the implementation of the proposed rule, and the rates involved, among others.

Energy Industry Associations Request Additional Time

On October 2, 2017, a diverse group of energy industry associations that are not traditional allies filed a joint motion with FERC opposing the issuance of an interim rule, requesting a longer comment period, asking for a technical conference, and opposing other timeframes found in the Secretary of Energy's letter to FERC. In its motion, the associations asserted that the requirements for issuing an interim rule relating to grid resiliency pricing had not been satisfied.

The associations claimed that this NOPR is one of the most significant energy industry proposed rules in decades. Given its importance, the associations requested that FERC provide at least 90 days for initial comments, as well as afford an opportunity for reply comments. The associations also advocated for FERC to convene a technical conference before the comment deadline. Holding a conference would allow affected parties the opportunity to better understand key aspects of the proposed regulations, leading to the submission of more meaningful comments. The associations also took issue with the other NOPR timeframes outlined in the Secretary's letter.

On October 3, 2017, the associations filed an additional joint motion with FERC, requesting an extension for the NOPR comment period and an expedited ruling on this motion. The associations claimed that the timeframe provided for comments in the October 2, 2017, Notice Inviting Comments is too short for stakeholders to submit careful analysis on this rulemaking. An extension of time for comments would permit more meaningful public input, allowing for more detailed and carefully considered comments to ensure FERC makes a reasoned decision. The associations also recommend a 90-day initial comment period on the NOPR and a 45-day reply period.

If you have any questions or would like additional information, please contact your Alston & Bird attorney or any member of our Energy Group.

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