

CLIENT ALERT

Unanimous Commission Ends Department of Energy’s Rulemaking Proceeding

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Introduction

On January 8, 2018, the Federal Energy Regulatory Commission (the “**Commission**”) issued a unanimous order with three concurrences that terminated the Department of Energy’s Notice of Proposed Rulemaking (“**DOE NOPR**”). On September 29, 2017, the DOE proposed that the Commission require certain regional transmission organizations (“**RTOs**”) and independent system operators (“**ISOs**”) 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”).¹ The DOE NOPR stated that eligible reliability and resilience resources must be: (1) 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 on-site. The proposal would have benefited coal and nuclear generation.

The Commission terminated the DOE NOPR proceeding because it concluded that the record was insufficient to meet the specific legal requirements of Section 206 of the Federal Power Act (“**FPA**”). The Commission repeatedly stressed, however, that it takes the resilience of the grid very seriously and opened a new proceeding in which “the resilience of the bulk power system is the principal focus,”² reiterating at least 17 times in its 18-page order its ongoing commitment to “address[ing] the resilience of the bulk power system” or articulating the same sentiment by some similar phrasing.³

¹ Grid Reliability and Resilience Pricing, RM 18-1, 162 FERC 61,012 (Jan. 8, 2018), available [here](#) (hereinafter “**Order**”).

² Order ¶ 16 n.25.

³ *Id.* ¶ 1.

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The Commission’s Analysis

The Commission stated that it had “no choice but to terminate” the DOE NOPR docket because the required showings under FPA Section 206 had not been met.⁴ Section 206 has two prongs: showing that (1) the existing RTO/ISO tariffs are unjust, unreasonable, unduly discriminatory or preferential; and (2) the proposed remedy is just, reasonable, and not unduly discriminatory or preferential. The DOE NOPR, the Commission concluded, failed on both counts.

Prong 1: Showing that the existing RTO/ISO tariffs are unjust, unreasonable, unduly discriminatory or preferential

The Commission concluded that there was inadequate record support for a finding that the existing RTO/ISO tariffs are unjust and unreasonable. In particular, the Commission noted that “extensive comments submitted by the RTOs/ISOs do not point to any past or planned generator retirements that may be a threat to grid resilience.”⁵ The Commission also disagreed that records in other dockets supplied adequate support for the DOE NOPR.⁶

Prong 2: The remedy proposed is shown to be just, reasonable, and not unduly discriminatory or preferential

The Commission explained that the second prong also was not met. The Commission observed that the DOE NOPR would allow all eligible resources to receive a cost-of-service rate regardless of need or cost to the system, but that such an outcome was not supported by the record as just and reasonable and was inconsistent with the Commission’s “very limited” use of “out-of-market arrangements.”⁷ In addition, the Commission pointed out that “the Proposed Rule’s on-site 90-day fuel supply requirement would appear to permit only certain resources to be eligible for the rate, thereby excluding other resources that may have resilience attributes.”⁸ The Commission noted that the record before it failed to establish why this would not be unduly discriminatory or preferential.

Although the Commission for these reasons “had no choice but to terminate” the DOE NOPR proceeding, it did not dismiss the DOE’s resilience concerns. The Commission opened a new proceeding to address the issue of resilience.

⁴ *Id.* ¶ 16.

⁵ *Id.* ¶ 15.

⁶ *Id.* ¶ 16 n.25.

⁷ *Id.* ¶ 16.

⁸ *Id.* ¶ 16.

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The New Proceeding

The Commission asked the RTOs/ISOs to set the stage for addressing resilience in a more holistic manner. As the Commission explained, “[a]lthough the Proposed Rule focuses on one possible aspect of grid resilience – secure onsite fuel – we conclude that a proper evaluation of grid resilience should not be limited to that single issue, and should instead encompass a broader consideration of resilience issues, including wholesale electric market rules, planning and coordination, and NERC standards.”⁹ The Commission articulated three goals for the new proceeding:

- to develop a common understanding among the Commission, the 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.

The Commission therefore directed each RTO and ISO to submit specific information regarding the resilience of its respective region within 60 days, including their responses to a voluminous set of questions posed to them by the Commission.¹⁰ The RTO/ISO submissions should “explain how they currently address resilience of the bulk power system within their footprints, and . . . highlight any specific or unique resilience challenges faced by the regions,” as well as “potential paths forward for addressing any identified gaps or exposure on the resilience of the bulk power system.”¹¹ Other interested parties may submit reply comments within 30 days of the ISO/RTO filings.

The Three Concurrences

The mere fact that there were three concurrences to the Commission’s Order is unusual and noteworthy. Commissioners Cheryl LaFleur and Richard Glick were critical of the DOE NOPR and emphasized their commitment to fuel and technology neutrality and market-based solutions. Commissioner Neil Chatterjee reiterated his concern over bulk power system resilience and stated that his preference would have been to issue a show cause order to each RTO/ISO so as to explore providing interim compensation for certain generation resources that might otherwise retire.¹²

⁹ *Id.* ¶ 19.

¹⁰ *Id.* at ¶ 18.

¹¹ *Id.* at ¶ 20.

¹² Chatterjee Concurrence to Order at 3.

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It is also interesting to note that questions remain on the relationship between reliability and resilience and the extent to which market rules and reliability standards already address resilience concerns. The Commission noted that “there seems to be a general consensus that grid reliability and grid resilience are related but separate concepts” and defined resilience in the Order as “[t]he 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.”¹³ Commissioner LaFleur, by contrast, expressed the view in her concurrence that resilience should be understood as “an element of reliability” that “has already informed much of the Commission’s work on both market rules and reliability standards.”¹⁴

How resilience is conceptualized may matter. If market rules and reliability standards already address resilience concerns, there would appear to be less need for the Commission to act. Conversely, if resilience is conceptualized as a new and distinct issue, the Commission may have greater flexibility to depart from past decisions while meeting its obligation under the Administrative Procedure Act to engage in reasoned decision-making. It will be interesting to see how the Commission determines the relationship between resilience and reliability and how that determination affects the outcome of the new proceeding.

In addition, the Commission appears open to considering policies that help the grid transition to the future. Commissioner Glick, for example, observed that technologies such as “energy storage, distributed generation, and demand response, have in many respects contributed to the resilience of the bulk power system,” but asked market participants to identify and describe other technologies and resources that could improve the resilience of the grid.¹⁵ Looking to the future, he emphasized the importance of exploring new ways to improve resilience on a technology-neutral basis. Commissioner LaFleur expressed a similar desire to look to the future, not to the past. She criticized the DOE NOPR for in effect seeking “to freeze yesterday’s resources in place indefinitely, rather than adapting resilience to the resources that the market is selecting today or toward which it is trending in the future.”¹⁶

Conclusion

The DOE NOPR was very controversial. With the Commission having rejected the NOPR, the action now turns to the RTOs/ISOs, which have 60 days to examine grid resilience and to report to the Commission. Interested entities then have 30 days to file reply comments. The Commission appears open to persuasion as to the correct policy direction to take with respect to enhancing the resilience and reliability of the grid. Market participants should continue to monitor the proceeding carefully, consider participating in RTO/ISO discussions, review RTO/ISO submissions, and perhaps comment

¹³ Order at ¶ 23.

¹⁴ LaFleur Concurrence to Order at 1.

¹⁵ Glick Concurrence to Order at 2.

¹⁶ LaFleur Concurrence to Order at 4.

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on the submissions to ensure that the Commission is well informed. Those with an interest in shaping broad policy views of the new Commission have an opportunity to try to do so via the new proceeding.

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