LATEST DECISION FROM FERC HIGHLIGHTS POTENTIAL FOR STATE ACTION ON RESOURCE ADEQUACY

Hodgson Russ Renewable Energy Alert
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Late in the eve before the Labor Day weekend, the Federal Energy Regulatory Commission ("FERC") rejected changes proposed by the New York Independent System Operator ("NYISO") to improve its buyer-side mitigation ("BSM") rules.[1] The proposed improvements to the so-called "Part A" and "Part B" tests would have made it easier for resources receiving direct incentives and related state support – such as wind, solar, and battery storage – to pass those tests and avoid the price floor requirements in the capacity market. The changes were recommended not only by the NYISO's Market Monitor but were easily approved by a supermajority of NYISO stakeholders, even including generator groups that have consistently supported the FERC's recent slew of BSM orders.

The FERC's rejection of these consensus recommendations not only represents a set-back to the operation of the Part A and B tests, but the Commission's stated rationale represents continued resistance to the NYISO's attempts to plan for the evolution of the State's resource mix required by the Climate Leadership and Community Protection Act ("CLCPA"). The Commission's express rejection of even the recognition of a state's policy as a rationale for tariff amendments may turn many observers' eyes to the New York State Public Service Commission's ("PSC's") ongoing "Resource Adequacy" proceeding, which we discussed previously here. In the Resource Adequacy proceeding, the State is considering the potential of "taking back" from the NYISO authority to control the contracting for its energy capacity resources.

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This decision from the FERC has been roundly decried. The Spokesperson for the New York Department of Public Service stated, "Long standing FERC policy and precedent respected state's rights. But this constitutionally protected idea apparently means nothing to this administration." Richard Dewey, CEO of the NYISO, was more understated but nevertheless clearly taken aback, stating, "We worked closely with market participants on a design we felt addressed FERC's jurisdictional obligations and New York's right to implement renewable energy policies," and "We're reviewing the order to assess next steps…." According to the Natural Resource Defense Counsel, "this decision is a stunning example of overreach from Washington, further proof that the FERC-regulated wholesale capacity markets are fundamentally flawed."

I. The NYISO Proposal

On April 30, 2020,[2] the NYISO filed proposed four revisions to its Market Administration and Control Area Services Tariff (Services Tariff) to enhance Part A of the mitigation exemption test under the NYISO's BSM rules. The BSM rules provide an exemption from mitigation when a resource passes either the Part A or Part B tests. A new resource entering into the market is exempt from a capacity offer price floor under the Part A test if the forecasted capacity prices in the first year of operation is higher than the default offer floor. A new entrant is exempt under Part B if the forecasted capacity prices in the first three years of operation are higher than the net Cost of New Entry (CONE) of the new resource.

The NYISO proposed to: (1) reverse its application of the mitigation test to conduct the Part A test before the Part B test; (2) establish two separate three-year study periods; (3) apply the Part A test for each year of the three-year study period; and, most importantly, (4) put public policy resources ahead of non-public policy resources in Part A evaluations, effectively pushing renewables – which are more likely to secure permits, siting permissions, firm off-takers, and financing than non-public policy resources – to the front of the line. According to the NYISO, the revisions are necessary to reflect the resource investments and retirement decisions that are expected to take place in New York as the grid transitions to the one required under the CLCPA.

II. FERC's Resounding "No"

FERC was not persuaded. The NYISO's proposed changes, the Commission said, would unduly discriminate against non-public policy resources – the same resources that the NYISO argued would be less likely to come online in New York now that the State has prioritized siting of renewables under the Accelerated Renewable Energy growth and Community Benefit Act. "While NYISO's filing makes references to certain New York state laws, regulations and policies that it argues will drive the composition of New York state's resource mix, we disagree that the prevalence of public policy resources in the future composition of New York state's resource mix means they are not similarly situated to nonpublic policy resources for purposes of the Part A test."

The decision elicited a heated dissent and statement from Commissioner Glick, available here, who saw the NYISO's proposal as "a set of minor, but eminently reasonable changes" intended to reflect the commercial and regulatory realities in New York. "Today's order is just the latest in the Commission's ever-growing compendium of attempts to block the effects of state resource decisionmaking. To achieve that end, the Commission has perverted NYISO's buyer-side market power mitigation rules into a mind-boggling series of unnecessary and unreasoned obstacles aimed at stalling New York's efforts to transition the state toward its clean energy future."

This warning cry from a FERC Commissioner may add to the fire under the PSC, the efforts of which to evaluate an alternative capacity market construct are ongoing. In May, the Brattle Group presented the PSC with qualitative and quantitative analyses for resource adequacy structures in New York. The studies were presented at a technical conference on July 10, 2020, and on July 20, 2020 the PSC issued a notice soliciting comments on the potential resource adequacy structures addressed in the studies. Those comments will be due the third week of September.

III. What's Next?

While the PSC said it will seek to overturn the FERC's ruling, it may well also seek to move its own Resource Adequacy proceeding forward. Now, even more than ever, the signal from the FERC is clear, and the ball is in the PSC's court. With the PSC's comment period regarding the Brattle analysis ending soon, an Order could be tee'd up this fall or winter. But the State may hold fire until after the November election results, understanding that if Commissioner Glick becomes Chair of the FERC and a President Biden can nominate new commissioners – Commissioner McNamee is already serving on an expired term and Chairman Chatterjee's term ends June 30, 2021 – then the State may be able to achieve its goals without upending the existing NYISO role regarding energy capacity needs.

If you have any questions regarding how this latest decision might impact your organization's activities, contact Noah Shaw (518.736.2924), Dan Spitzer (716.848.1420) or Sarah Main (518.433.2424).

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[1] *See* FERC Order Rejecting Tariff Revisions, 172 FERC ¶ 61,206, Docket No. ER20-1718-001, available at https://elibrary.ferc.gov/eLibrary/filedownload?fileid=15618621.

[2] The filing was subsequently amended on July 9, 2020.