FEDERAL ENERGY REGULATION

Legal News™

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OCTOBER 9, 2007

Legal News is part of our ongoing commitment to providing legal insight to our Energy clients and our colleagues.

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FERC Approves Request to Repay Generators for Network Facilities Constructed to Enable Interconnection to Two Midwest Transmission Companies

Last month the Federal Energy Regulatory Commission (FERC) approved an application by ITC Transmission, Michigan Electric Transmission Company (METC), and the Midwest Independent Transmission System Operator (Midwest ISO) to repay generators interconnecting with their systems for the full cost of network upgrades necessary to enable those interconnections. Previously, generators interconnecting to the ITC Transmission and METC systems were required to bear half the costs of most network upgrades along with other costs of interconnection.

Under the newly approved policy, generators will be fully reimbursed for the costs of network upgrades necessary to enable their interconnection with the ITC Transmission and METC systems, provided the generators meet certain eligibility requirements. In FERC's words, "a network upgrade is considered part of the interconnected transmission system, benefiting all customers," and as such the costs of these upgrades will be paid by the customers of ITC Transmission and METC. It is anticipated that FERC's order will remove a significant barrier to entry for new generation, including wind and other renewable resources, and will promote a more competitive energy market.

Wind Advocacy Group Highlights Interconnection Problems and Lack of RTO/ISO Authority and Independence in FERC Wholesale Electric Markets Initiative

In June, the FERC announced an Advanced Notice of Proposed Rulemaking (ANOPR) to improve the operation of organized wholesale electric markets operated by Regional Transmission Organizations (RTOs) and Independent System Operators (ISOs). The ANOPR focused on reforms in four areas: (1) price-responsive demand, (2) long-term contracting, (3) market monitoring and (4) responsiveness of RTOs and ISOs to customers and other stakeholders. The American Wind Energy Association (AWEA) submitted comments to FERC in which it requested that FERC address two specific problems in these markets: (1) interconnection queue logjams and (2) insufficient RTO/ISO authority and independence.

In order to alleviate interconnection queue logjams, AWEA proposes several solutions including project clustering in which transmission plans are developed simultaneously to serve multiple projects, reviewing the status of projects in queue to ensure the queue contains only active projects

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and provision of adequate resources for RTOs and ISOs to facilitate their studies. In terms of insufficient RTO/ISO authority and independence, AWEA points to contractual duties of ISOs to maximize transmission owners' revenues, the inability of ISOs and RTOs to set transmission capacity and order transmission construction and frequent departures of transmission owners as issues that undermine RTO and ISO authority and independence in these markets. To combat these problems, AWEA requests that FERC thoroughly review proposed departures of transmission owners and that FERC expand the authority of RTOs and ISOs.

Although AWEA's comments are beyond the scope of the four issues that FERC identified in the ANOPR, FERC may be willing to expand the scope of the ANOPR due to FERC's strong support of the renewable energy sector.

The Ninth Circuit Directs FERC to Reconsider Its Decision Not to Order Refunds for Sales in the Pacific Northwest During the Western Energy Crisis

The U.S. Court of Appeals for the Ninth Circuit recently rebuked FERC in connection with a series of orders issued in 2003 in which the Commission held that refunds are not required for sales made into Pacific Northwest markets during the 2000-2001 Western energy crisis. This decision is the latest in a series of rulings by the Ninth Circuit that vacate FERC decisions that resulted in less refunds than those claimed by the utility purchasers in California and the Pacific Northwest.

The court rejected FERC's ruling that sales in the Pacific Northwest to the California Energy Resources Scheduling (CERS) division of the California Department of Water Resources were outside the scope of the Pacific Northwest refund proceeding. CERS acted on behalf of the California utilities as the creditworthy entity to purchase energy needed to meet retail demand. Some of CERS' purchases for consumption in California were physically made in the Pacific Northwest. FERC found that energy consumed in California was beyond the scope of the Pacific Northwest investigation. The Ninth Circuit rejected this ruling, finding that the critical consideration is where title passed to the CERS, which it found was in the Pacific Northwest. The court concluded that FERC must include the CERS transactions when it determines whether refunds are warranted for spot market sales into the Pacific Northwest.

The court also told FERC to consider whether evidence of market manipulation undermined the Commission's finding that Pacific Northwest markets were functional and competitive during the energy crisis. The court held that, given the close interrelation of the California and Pacific Northwest markets, FERC's failure to consider the market manipulation evidence was arbitrary and capricious.

Notably, the court did not reach the central issue in the case, namely FERC's ruling that it would be inequitable to impose refunds for sales in the Pacific Northwest due to the significant presence of governmental entities in those markets, over whom FERC lacks jurisdiction to impose refunds. Although FERC remains free on remand to continue to rely on the equitable considerations as a basis not to impose refunds, the Ninth Circuit somewhat ominously stated that the Commission's consideration of these issues should be made in light of the recent decisions of the Ninth Circuit that, as noted, overturned FERC rulings reducing that amount of refunds claimed by the purchasers.

In a related development, the U.S. Supreme Court last month granted two petitions for certiorari to consider the Ninth Circuit's decision in cases involving attempts to abrogate long-term contracts entered into during the energy crises. The FERC refused to upset these contracts, reasoning that the proponents of abrogation failed to satisfy the stringent Mobile-Sierra "public interest" standard. The Ninth Circuit, however, interpreted the public interest standard as granting FERC far more latitude to abrogate contracts than under FERC's interpretation. The sellers under these contracts sought Supreme Court review and were able to obtain the four votes necessary to grant certiorari notwithstanding that Chief Justice Roberts and Justice Breyer recused themselves and did not participate. This may suggest that the Supreme Court is poised to vacate the Ninth Circuit's rulings, leaving some parties to suggest that the Ninth Circuit now may be more circumspect in its ongoing review of the other FERC proceedings arising out of the energy crisis and less likely to second guess the Commission.

FERC Creates Office of Electric Reliability and Energy Innovations Sector

FERC recently announced the creation of two new units — the Office of Electric Reliability and the Energy Innovations Sector — demonstrating its growing commitment to the issues of reliability, demand response, renewable energy, energy efficiency, and advanced technologies in relation to the transmission grid and wholesale markets.

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The creation of the Office of Electric Reliability is a part of FERC's effort to create mandatory and enforceable reliability standards and a strong reliability regime in accordance with the authority granted to FERC in the Energy Policy Act of 2005. The Office of Electric Reliability, formerly a division within the Office of Energy Markets and Reliability, will continue to focus on the development and implementation of mandatory and enforceable reliability standards for the users, owners and operators of the nation's bulk power system. The Office's duties will include helping process the reliability-related FERC filings, and reviewing the Electric Reliability Organization's assessments of the adequacy and reliability of the bulk power system for each region. Among other things, the creation of this new office shows the growing importance of FERC's role in connection with the reliability of the nation's bulk power system.

FERC also announced the creation of a new Energy Innovations Sector in recognition of the importance of demand response, renewable energy, global warming and advanced technologies in the development of energy markets. The Energy Innovations Sector will be a unit within the Office of Energy Market regulation that will provide expertise to promote and manage FERC's activities with regard to demand response, energy efficiency, distributed generation, renewable energy issues, greenhouse gas emission policies, and advanced technologies relevant to the transmission grid and wholesale markets. The Energy Innovations Sector also will supply technical support and policy recommendations for FERC to better integrate demand response, energy efficiency and renewable energy into wholesale electric markets and reliable transmission service. The creation of this new unit also is designed to ensure that the issues such as demand response and renewable energy will be considered by the Commission in the creation of its reliability, open access, and wholesale market design policies.

These new developments demonstrate, among other things, that issues such as reliability, renewable energy, energy efficiency, and conservation will continue to play an increasingly important role in the Commission's decisions in the future.

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