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FERC Upholds June 2018 PJM Minimum Offer Price Rule Order Thwarting State Subsidies

On April 16, 2020, the Federal Energy Regulatory Commission (FERC) issued two orders[1] denying rehearing and offering some clarity on the PJM Interconnection, LLC (PJM) Minimum Offer Price Rule (MOPR), a construct that potentially prevents new capacity-market sellers from depressing prices by offering at reduced prices to clear a capacity auction. The April Orders relate to FERC's June 2018 order,[2] which found that out-of-market payments[3] support the operation of certain generation resources ranging from small solar and wind facilities to large nuclear plants and threaten the competitiveness of PJM's capacity market. *See* GT Alert, "FERC Orders Sweeping, Expedited Changes to PJM Capacity Market, Rehearing Requests Filed." The June 2018 Order determined that PJM's open-access transmission tariff is unjust and unreasonable because the MOPR failed to address the price-distorting impact posed by out-of-market support.[4]

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[1] PJM Interconnection, LLC, 171 FERC ¶ 61,034 (April 16, 2020) (Docket Nos. EL16-49-001, EL 18-178-001, ER18-1314-002 (consolidated)) and 171 FERC ¶ 61,035 (April 16, 2020) (Docket Nos. EL16-49-002, and EL 18-178-002 (consolidated)) (collectively, the "April Orders"). Commissioner Glick dissented from both orders.
[2] 163 FERC ¶ 61,236 (2018) ("June 2018 Order").
[3] Out-of-market payments include, for example, state mandatory zero-emissions credits (ZEC) programs and Renewable Portfolio Standards (RPS) programs. FERC determined that such out-of-market payments to generators, such as ZEC and RPS, allowed resources to submit below-cost, non-competitive offers that would have a suppressive effect on auction prices, causing PJM's capacity market not to reflect supply and demand fundamentals. June 2018 Order, at p. 2.
[4] June 2018 Order at pp. 32-106.

In December 2019, FERC directed PJM to adopt multiple changes to address price distortions before allowing the capacity auctions to resume, including[5]:

- Adopting an expanded MOPR that applies to all new and existing, internal and external resources that receive, or are entitled to receive, state subsidies that participate in the capacity market, regardless of resource type, with certain exemptions[6];
- Exempting from the MOPR certain state-subsidized resources, including *existing* (a) renewable resources participating in state RPS programs; (b) demand-response, energy efficiency or storage resources; and (c) self-supply resources. Thus, most existing resources that have already cleared a capacity auction, particularly those resources FERC has affirmatively exempted in prior orders, will continue to be exempt from review;
- Providing guidance regarding exemptions, such as (a) a new or existing resource that does not otherwise qualify for an exemption may seek a unit-specific exemption, and (b) the expanded MOPR only applies to state-subsidized resources so that resources with federal subsidies will not be subject to the MOPR;
- Defining subsidies as: "A direct or indirect payment, concession, rebate, subsidy, non-bypassable consumer charge, or other financial benefit that is (1) a result of any action, mandated process, or sponsored process of a state government, a political subdivision or agency of a state, or an electric cooperative formed pursuant to state law, and that (2) is derived from or connected to the procurement of (a) electricity or electric generation capacity sold at wholesale in interstate commerce, or (b) an attribute of the generation process for electricity or electric generation capacity sold at wholesale in interstate commerce, or (3) will support the construction, development, or operation of a new or existing capacity resource, or (4) could have the effect of allowing a resource to clear in any PJM capacity auction."[7]

The April Orders were triggered by various rehearing and clarification requests submitted by PJM as well as certain utilities, cooperatives, consumer advocates, public utility commissions and groups representing public and municipal power, states, industrials and clean energy, some of which contend that the MOPR Rules unjustifiably interfere with state decisions to bring low-cost and reliable clean energy to their communities.

The April Orders reaffirm and build on FERC's June 2018 and December 2019 orders, and clarify some issues, including that renewable energy credits (RECs) in purely voluntary (i.e., not part of a mandatory RPS program) market transactions are not considered state subsidies and will not trigger the MOPR, assuming such voluntary RECs will not be resold for RPS compliance. FERC also determined that the Regional Greenhouse Gas Initiative will not trigger the MOPR because it does not provide payments, concessions, rebates, or other financial benefits to resources.[8] Resources eligible for the RPS exemption from the MOPR include all existing resources included for an RPS program as of the December 2019 Order. Some states have expressed concerns over how the MOPR will impact their ability to deploy low carbon resources across their territories, and New Jersey and Illinois have raised the possibility of seeking resources outside the PJM capacity auction. FERC maintains that the MOPR and the PJM capacity market bring significant benefits to consumers.

[5] 169 FERC ¶ 61,239 at pp. 2, 50, 67, 89 and 214 (2019) ("December 2019 Order").
[6] December 2019 Order at pp. 2, 50, 67, 89 and 214.
[7] *Id.* at p. 67.
[8] 171 FERC ¶ 61,035 at pp. 381, 390.

Commissioner Glick dissented, arguing that the April Orders are illegal, illogical and "truly bad policy." Glick contended that the April Orders will dramatically increase capacity prices while slowing the region's transition to clean energy despite the expressed desires of consumers and the states.[9]

Petitions for review of the MOPR orders already have been submitted by, for example, the Illinois Commerce Commission to the U.S. Court of Appeals for the Seventh Circuit and by the American Public Power Association and American Municipal Power, Inc. jointly, and a ratepayer advocates group to the District of Columbia Circuit. In this controversial proceeding, other petitions for review will follow.

Certain market participants also continue to urge FERC to resume the capacity market auctions and approve PJM's MOPR compliance filing dated March 18, 2020, made in accordance with the December 2019 Order, which incorporates modified MOPR design elements into its capacity market rules that some entities argue better recognize the renewable energy's value in capacity markets.

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[9] Commissioner Glick dissent in both April Orders, PP 1, 90.