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DOE Requests FERC Fast-Track a Rule That Will Benefit Coal and Nuclear Plants

Related People:
Denise C. Goulet
Sean T. Beeny

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On September 28, 2017, the U.S. Department of Energy ("DOE") took the unusual step of submitting a Notice of Proposed Rulemaking ("NOPR") for consideration by the Federal Energy Regulatory Commission ("FERC"), now docketed by FERC as RM18-1-000. The NOPR proposes to compensate certain generating resources in organized wholesale markets through out-of-market revenues for reliability, resiliency and fuel-assurance attributes. The proposed criteria for these subsidies would result in certain coal and nuclear resources being the beneficiaries. Depending on how the Regional Transmission Organizations ("RTOs") and Independent System Operators ("ISOs") that manage the organized wholesale markets would implement any directives stemming from a final rule, the NOPR could have a significant effect on how power is priced in those markets and could potentially drive up clearing prices and, in turn, consumer electricity bills.

DOE's intent appears to be to provide nuclear and coal resources—in organized wholesale markets—with financial support over and above current market clearing prices. The NOPR proposes that each RTO/ISO would be required to propose market rules that provide eligible coal and nuclear plants physically located in RTO/ISO regions that are not subject to cost-of-service rate regulation by a state or local authority with full recovery of the costs associated with reliability, resiliency and on-site fuel assurance. The types of costs proposed for recovery include, but are not limited to, "operating and fuel expenses, costs of capital and debt, and a fair return on equity and investment." The NOPR is short on details, proposing to leave the details of implementation to the RTOs/ISOs. Any estimate of the effect on consumers would depend on the approach taken by the RTOs/ISOs in implementing the directives. For example, if an RTO/ISO determined that its current capacity market design rules already comply with the NOPR proposal, the proposed rule could have little impact on consumers in that region. However, if the RTO/ISO developed a method for providing additional out-of-market compensation for such resources akin to a Reliability Must Run ("RMR") contract, consumers could face significant increases in electricity prices.

This NOPR raises numerous fundamental questions that will have to be addressed by FERC and the industry:

- Would the proposed rule establish guaranteed price floors, and thus subsidies, for eligible coal and nuclear resources, while also allowing them to retain all the upsides of market prices when those prices exceed costs, leading to a "higher of market-based rates or cost" pricing regimen?

- What effect would these out-of-market revenues have on the incentives for new market entry built into current market design?

- How would the proposed rule be reconciled with FERC's long-professed objective of facilitating competitive wholesale markets?

- How would attributes of reliability and resiliency to be rewarded by the NOPR be measured and valued?

- What would be a reasonable compensation level, if any, for the attributes to be compensated?

FERC Staff issued a set of queries to try to obtain answers to these and other questions.

FERC established an unusually short comment period, with an initial comment deadline of October 23, 2017, and reply comments due November 7, 2017. A number of entities requested an extension of time to 90 days for comments as well as an extension of time for FERC to consider comments. As of the issuance of this Alert, FERC had not ruled on these motions.