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FERC Developments: August 2019 PJM Capacity Auction Postponed

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FERC Postpones PJM Capacity Auction

Less than three weeks before it was scheduled to take place, the Federal Energy Regulatory Commission ("FERC") has ordered PJM Interconnection, L.L.C. ("PJM") to postpone its next capacity auction.[1] The order, issued on July 25, 2019, responds to a motion from April 10, 2019, in which PJM requested that FERC allow it to proceed with its annual Base Residual Auction ("BRA") for the 2022/2023 Delivery Year (June 1, 2022 through May 31, 2023), planned to be held August 14–28 of this year, without risk of refunds or a subsequent rerun of the auction. FERC instead ordered PJM to postpone the BRA until replacement rules — rules FERC approves as just and reasonable — are in place.

While the postponement removes the threat of a market rerun and the potential for resetting prices or capacity awards, it adds new uncertainty for capacity market participants, as 2022/2023 BRA capacity commitments and prices will not be known for the indefinite future and will be decided by new, as yet undefined, market rules.

Three Years in the Making

This order is the latest development in a long-running series of proceedings related to PJM's capacity market. On March 21, 2016 (in FERC Docket No. EL16-49), a group of merchant generators with PJM-based holdings filed a complaint alleging that PJM's Minimum Offer Price Rule ("MOPR," a construct for establishing seller price floors for new capacity resources) was unjust and unreasonable because it failed to address the price-suppressing impact of state-mandated payments for certain existing generation resources. At the time, several states had either proposed or implemented so-called "zero-emission credits" or similar subsidies to support nuclear generating facilities, which had become uncompetitive as a result of low-priced natural gas-fired generation. The complaint proposed to resolve the price-suppressing effect of such "out-of-market" payments by extending the MOPR to government-subsidized existing generating resources.

In April 2018, before FERC had acted on the pending MOPR complaint, PJM filed a new request (in Docket No. ER18-1314) for FERC to direct PJM to modify its tariff in one of two ways. In its "Capacity Repricing" proposal, PJM proposed to modify its capacity auctions (including the BRA and Incremental Auctions, both of which are components of the Reliability Pricing Model ("RPM")), to include a two-stage annual auction, with capacity commitments determined in stage one and capacity clearing prices set in stage two. In its "MOPR-Ex" proposal, PJM would expand the MOPR to apply to offers from some (but not all) state-subsidized resources, both new and existing. Then, in May, three merchant generators proposed (in Docket No. EL18-169) an additional alternative called the "Clean MOPR," which would apply to all new and existing state or federally subsidized resources.

On June 29, 2018, FERC: rejected both of PJM's proposals and initiated a new investigation and paper hearing (in Docket No. EL18-178); consolidated existing capacity-market proceedings, except for the Clean MOPR proceeding (which remains pending but unconsolidated); and determined that PJM's MOPR failed to mitigate price distortions caused by out-of-market payments and support to (i) new capacity-market entrants not fueled by natural gas, and (ii) existing capacity resources of any type.[2] FERC directed PJM to submit an alternative approach that would: modify PJM's existing MOPR to apply to new and existing resources that receive out-of-market payments, regardless of resource type, with "few to no exemptions;" and allow, on a resource-specific basis, for resources that receive out-of-market payments to choose between being removed from the PJM capacity market (albeit with a capacity commitment) or becoming subject to the MOPR.[3]

On October 2, 2018, PJM responded by proposing both an "Expanded MOPR" and a "Resource Carve-Out" ("RCO") construct. Under the proposal, PJM would apply the MOPR to all new and existing resources, with limited exceptions for certain long-standing and immaterial subsidies. PJM would then implement the RCO process, whereby resources that receive a material subsidy could be removed from the RPM auction bid stack, along with a corresponding amount of load. Finally, PJM proposed an optional "Extended RCO," which would re-price capacity awards in RPM auctions by re-running the bid stack with hypothetical, cost-based prices for the RCO resources and thereby avoid the potential price suppression that could result from the standard RCO construct.

Interested parties submitted more than 900 filings in response to FERC's June 2018 order and PJM's October 2018 filing. The filings included substantive alternative structures proposed by merchant generators and other PJM market participants, along with requests to modify, expand or reject the new constructs PJM had proposed. As pressure for change continued to build, in February 2019, PJM's Independent Market Monitor ("IMM") filed a complaint (in Docket No. EL19-47), which proposed to modify the methodology by which PJM calculates offer caps in its RPM auctions. The IMM has asserted, and comments from merchant generators have supported, that the proposed changes would subject more capacity sellers to market-power mitigation. FERC has not yet acted on the IMM's complaint or determined whether to consolidate it with the other, pending capacity market proceedings.

Commission Dynamics May Dictate Timing

In its July 25, 2019, order, FERC declined to provide a new date for the 2022/2023 BRA or to indicate when it will act on pending changes to PJM's capacity auction rules.

FERC's July 25 order included separate concurrences from Commissioners Cheryl LaFleur, Richard Glick and Bernard McNamee, each of whom offered independent reasons for supporting the July 25 order. Commissioners LaFleur and Glick also used their concurrences to reiterate concerns they expressed when they dissented from the June 2018 order. These concurrences highlight FERC's split among the four sitting Commissioners. Commissioner LaFleur's departure from the Commission at the end of August, with no announced nominations to fill the two empty seats, will leave just three sitting FERC Commissioners for the foreseeable future. It remains to be seen whether the three remaining Commissioners will be able to find a compromise position that at least two of them support, and finally issue an order on the pending PJM matters. However, even if the Commission acts this fall, PJM likely will require several months to implement the Commission's mandate. Consequently, the 2022/2023 BRA may not occur until at least spring of 2020, and the 2023/2024 BRA, currently scheduled for May 2020, may also be delayed.

Looking Forward: State Action to Subsidize Generators Continues

Just a few days prior to the issuance of FERC's order, PJM market participants, stakeholders and observers were reminded that state-level efforts to subsidize selected generation resources — the same types of subsidies that prompted the pending complaints and potential rule changes — continue to evolve. On July 23, 2019, Ohio Governor Mike DeWine signed into law a measure to provide "nuclear resource credits" for Ohio-based nuclear generation facilities, establish a non-bypassable charge to fund certain coal-fired facilities owned by the Ohio Valley Electric Corporation, and make other changes to its electric generation policies. This latest initiative to provide out-of-market payments to select PJM-based generators highlights the continuing challenge facing PJM as it seeks to administer a competitive capacity market that accommodates the variety of state programs within its footprint, ranging from zero emissions subsidies and support for coal-fired generation to renewable energy mandates.

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1. *See Calpine Corp., et al. v. PJM Interconnection, L.L.C.*, 168 FERC ¶ 61,051 (2019).↩

2. *Calpine Corp., et al. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236 (2018).↩

3. *Id.* at P 8.↩

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