KIRKLAND & ELLIS

Blog Post

MOPR Migration: Implications of FERC's PJM Capacity Market Order in the New York and New England Electricity Markets

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Update: At its February 20, 2020, open meeting, FERC acted on all four of the proceedings discussed in our original February 5, 2020, blog post (below). Our updated summary discussing FERC's actions is available here.

FERC recently issued an order expanding the application of the Minimum Offer Price Rule ("MOPR") in the PJM Interconnection, L.L.C. ("PJM") capacity market, to address what FERC identified as a price suppressive effect of state-subsidized generation resources.[1] The MOPR is a form of buyer-side market power mitigation that applies to PJM's annual capacity auctions, in which electric power suppliers offer to be available to provide power for a one-year, future period, and receive a capacity payment for that availability regardless of whether they are called upon to provide energy at any given time. Suppliers whose offers are accepted are said to have "cleared" the auction, and receive a single clearing price set by the offer price of the most expensive resource that clears the auction. The MOPR mitigates potential exercise of market power by restricting the offer prices of certain suppliers to prevent them from offering their capacity at a low level that would unfairly drive down the price received by other suppliers participating in the capacity auction.

Press coverage of FERC's PJM MOPR order has focused on its implications for energy infrastructure investment in the PJM region, which is the largest regional transmission organization in the U.S., reaching 13 states plus the District of Columbia. In response to the order, officials from several PJM states have complained that FERC has improperly shifted away from its past policy by eliminating certain MOPR exclusions directed by a June 2018 FERC order that would have given states more ability to implement their renewable power policies. This dispute will play out at FERC in the coming months, and is likely to then be appealed to the courts. If the PJM MOPR order does indicate a policy shift at FERC, it may also be significant for energy infrastructure investment and development outside of the PJM states, as FERC is currently considering electric market design changes in New York and New England.

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New York ISO

Like several states in the PJM region, New York has adopted ambitious clean energy goals. In 2019, New York passed the Climate Leadership and Community Protection Act, which requires the state to meet 70% of its energy needs from renewable resources by 2030, increasing to 100% by 2040. That statute also specifically requires the procurement of 3,000 MW of energy storage resources by 2030, 6,000 MW of solar photovoltaic generation by 2025 and 9,000 MW of offshore wind generation by 2035.

For many of the reasons FERC discussed in its PJM MOPR order, these New York clean energy initiatives may be in tension with operation of the capacity market administered by the FERC-regulated New York Independent System Operator, Inc. ("NYISO"). Does FERC's decision to expand the MOPR in PJM indicate that it will take similar action with regard to the NYISO capacity market? If so, one or more of several pending dockets could be a vehicle for such action:

- *New York Independent System Operator, Inc.*, FERC Docket No. ER16-1404, in which NYISO proposed to exempt certain renewable resources and self-supply resources from its buyer-side, capacity market mitigation rules.
- *Independent Power Producers of New York, Inc. v. New York Independent System Operator, Inc.*, FERC Docket No. EL13-62, which raises several issues relating to

buyer-side mitigation of capacity resources receiving out-of-market revenues related to reliability and repowering.

- *New York State Public Service Commission, et al. v. New York Independent System Operator, Inc.*, FERC Docket No. EL16-92, in which the complainants allege that the buyer-side, capacity market mitigation rules should not apply to demand response providers.
- *New York Public Service Commission and New York State Energy Research and Development Authority v. New York Independent System Operator, Inc.*, FERC Docket No. EL19-86-000, in which the complainants sought to exempt energy storage resources from the NYISO's buyer-side, capacity market mitigation rules.

If the outcome of the PJM MOPR order indicates a policy shift at FERC, the agency's next step could be to require more stringent buyer-side mitigation in the NYISO capacity market, similar to the new measures in PJM. For example, FERC could issue an order declining to exempt state-subsidized renewable resources, demand response resources and energy storage resources from the buyer-side mitigation rules, thereby making it less likely that they will be able to receive revenue from the capacity market. Such action could make it more difficult for New York to meet its electricity sector goals, increase the cost of achieving those goals or both.

Further complicating things, the New York Public Service Commission ("NYPSC") commenced a proceeding in August 2019 to consider whether the NYISO capacity market will hinder the state's ability to meet its clean energy goals. This proceeding also asks whether the state should pursue an alternative mechanism for procuring capacity, effectively bypassing the NYISO capacity market.

It will be important to monitor these FERC and NYPSC proceedings in the coming months, as they are the next opportunities for significant change to the electric market rules — and related investment opportunities — in New York.

ISO New England

The same tension that exists in New York and PJM is also present in New England, although the dynamics are somewhat different due to variations in the region's electricity market design. Several New England states have adopted aggressive clean energy goals, including through subsidies to certain preferred resources. In 2018, ISO New England, Inc. ("ISO-NE") attempted to harmonize its capacity market with those state policies through its Competitive Auctions with Sponsored Policy Resources ("CASPR") proposal at FERC.

The CASPR proposal involved modifying the capacity market rules to apply an MOPR to state-sponsored resources, making it less likely that such resources would be able to clear in a capacity auction, while also providing an alternative mechanism through which state-sponsored resources could nonetheless enter the capacity market by buying out the position of an existing resource that is willing to retire. Many aging fossil fuel-fired plants rarely produce energy but rely on capacity payments for revenues — that is, they are paid to be online and available during times of high energy demand, even if they do not provide any energy. The CASPR market rules allow such aging plants to sell their capacity obligations to new clean energy projects and retire earlier than they otherwise would have. FERC accepted ISO-NE's CASPR proposal in March 2018. Numerous parties requested rehearing of that order, and those requests are still pending, nearly two years later.

FERC's order expanding the MOPR in PJM raises new questions about how FERC will address the CASPR market design on rehearing. There is an argument that FERC's PJM MOPR order and the CASPR order are somewhat in tension. Where the CASPR market design provides a mechanism to accommodate new state-sponsored resources, the PJM capacity market with the expanded MOPR provides no analogous mechanism (although FERC's PJM MOPR order exempts certain *existing* state-sponsored resources from price mitigation). It remains to be seen whether FERC's PJM order signals a broader change in the agency's policy position on capacity market designs, like CASPR, that accommodate state policies.

In the meantime, the prospect of further FERC action has caused Connecticut to begin questioning whether the ISO-NE market rules are compatible with Connecticut's energy policies or whether alternative market designs would be better aligned. As with the New York state proceeding noted above, the outcome of Connecticut's inquiry, and whether other New England states will follow suit, could have significant implications for generation resources selling or developing infrastructure in New England.

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Conclusion

FERC's PJM MOPR order represents a significant step toward relieving the long-standing uncertainty for energy infrastructure investments in the PJM region, but it also raises new questions about similar investments in New York and New England. With several proceedings already teed-up, FERC may take action at any time to clarify its policy direction for those regions. At the same time, some states are already developing the framework for their own regulatory alternatives. Thus, it seems increasingly likely that additional, significant changes are coming for the regulatory structures — and for investors — in New York and New England.

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1. For more information, see December 20, 2019 *Kirkland Alert* "FERC Order PJM Capacity-Market Reforms, Addresses Uncertainty, Allows Auctions to Resume."↩

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