

Court Limits FERC's Authority to Direct Modifications Under Section 205

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The court reaffirms that when reviewing a utility's filing under Section 205, FERC may not "transform the proposal into an entirely new rate."

On July 7, the US Court of Appeals for the District of Columbia Circuit issued its opinion in *NRG Power v. FERC*,^[1] vacating in part and remanding a May 2013 order by the Federal Energy Regulatory Commission (FERC)^[2] that had accepted PJM Interconnection, L.L.C.'s (PJM's) revisions to the Minimum Offer Price Rule (MOPR) in the PJM electricity capacity market subject to PJM's acceptance of certain modifications. The court held that in directing the modifications to the PJM proposal, FERC created "a new rate scheme that was significantly different from [both PJM's proposed and existing rate designs]," thereby exceeding FERC's authority under Section 205 of the Federal Power Act (FPA). The court also held that PJM's consent to FERC's modifications did not cure FERC's regulatory overreach because utility customers did not receive an opportunity for notice and comment on the modified rate. Following this most recent decision, FERC will need to exercise caution in proposing modifications to a utility's filing under Section 205.

PJM's Proposed Rate Structure: Minimum Offer Price Rule

The MOPR is directed at new generation owners participating in the PJM capacity market that receive subsidies or payments for their generation from outside the PJM

market. The MOPR is intended to prevent such participants from artificially depressing the clearing price in capacity auctions. The MOPR originally set a price floor but allowed generators to bid below the floor only if the new generator could prove that the bid reflected its actual generation costs (the unit-specific exemption). In addition, the MOPR ceased to apply to a generator after a one-year mitigation period.

Due to concerns with the effectiveness of the unit-specific exemption, in 2012 PJM proposed to revise the MOPR in a filing submitted to FERC. The proposal extended the mitigation period to three years and replaced the unit-specific exemption with categorical exemptions from the price floor for unsubsidized generators, generators subsidized through nondiscriminatory state-sponsored programs, and Load Serving Entities that generate their own electricity. Notably, the proposal sought to serve as a compromise between generators and Load Serving Entities and received the endorsement of more than two-thirds of PJM stakeholders.

Acting under Section 205 of the FPA, FERC determined that PJM's proposed MOPR revisions were not just and reasonable because the exemptions from the MOPR price floor were too narrow. Instead of rejecting the tariff, however, FERC conditionally accepted PJM's proposal, subject to the condition that PJM modify it to retain the unit-specific exemption and change the mitigation period back to one year. PJM agreed to FERC's conditions, but several electricity generators did not. FERC subsequently denied these generators' request for a rehearing.

DC Circuit's Opinion

The *NRG Power* court evaluated FERC's rulings against two controlling cases: *City of Winnfield v. FERC*, 782 F.2d 871 (D.C. Cir. 1984), and *Western Resources v. FERC*, 9 F.3d 1568 (D.C. Cir. 1993). In *City of Winnfield*, the DC Circuit upheld an order in which FERC rejected a utility's proposed rate increase founded upon a rate design change but allowed a rate increase under the prior rate design, conditioned upon the utility's consent to the modification. In *Western Resources*, the DC Circuit rejected FERC's attempts to suggest an *entirely different rate design* under Section 4 of the Natural Gas Act (akin to Section 205 of the FPA) without the utility's consent.

The *NRG Power* court concluded that once again FERC had suggested an *entirely different rate design* when FERC, acting under Section 205 of the FPA, conditioned its acceptance of PJM's proposed MOPR revisions on PJM's consent to FERC's changes. FERC's suggested modifications to PJM's MOPR rule "followed a completely different strategy" because they expanded the scope of PJM's MOPR exemptions beyond that contained in either PJM's proposed tariff or its then-existing tariff. The court noted that by allowing the categorical exemptions favored by Load Serving Entities in the proposed tariff while retaining the unit-specific exemptions opposed by generators from the existing tariff, FERC "largely eviscerated the terms of the bargain" presented in PJM's original filing. And even though PJM consented to the modifications, the court explained that such consent is inadequate if affected utility customers do not have notice of, or an opportunity to comment on, the new rate structure.

Industry Implications

The court's decision affirms certain limits on FERC's authority under Section 205 of the FPA. When FERC is acting only under its Section 205 authority, it may only suggest modifications to a utility's filing if the modifications are minor and the utility consents. The court left open the precise contours of the "minor" changes that FERC may suggest—subject to the proposing utility's consent—when acting only under Section 205.

[1] *NRG Power Mktg., LLC, & GenOn Energy Mgmt., LLC v. Fed. Energy Regulatory Comm'n*, Nos. 15-1452 and 15-1454 (D.C. Cir. July 7, 2017).

[2] *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090 (2013).

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