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DC Circ. Says FERC Must Address Power Supply Estimates

By **Michael Phillis**

Law360 (July 9, 2021, 5:21 PM EDT) -- The D.C. Circuit on Friday ordered the Federal Energy Regulatory Commission to reexamine PJM Interconnection electricity market pricing rules, saying the agency had not adequately explained why it allowed the grid operator to factor in an additional incentive for power generators in estimating power prices.

The challengers, including the Office of the People's Counsel for the District of Columbia and the Sierra Club, argue that FERC burdened consumers with extra costs when it approved pricing rules for capacity markets, where generators are paid for committing themselves to providing power in the future, run by PJM Interconnection, a regional transmission organization that oversees the grid for 13 Mid-Atlantic and Midwest states and Washington, D.C.

The unanimous panel upheld the so-called reference resource used to help estimate how much new generators need to earn in the capacity market to make it financially worthwhile for new generation to be built, despite objections that the choice may bump consumer costs up by \$140 million a year. But FERC also approved PJM's decision to include a 10% add-on to the costs of the reference resource without properly explaining why it did so.

"The commission's response to the contrary evidence can be described as little more than a hand wave," U.S. Circuit Judge Karen LeCraft Henderson wrote, remanding the matter without vacating it.

The advocates protested FERC's April 2019 order approving a new "demand curve" used to estimate what generation capabilities are needed to reliably power the grid. They said the new calculation allows PJM to charge consumers more to bulk up its reserve margin and that it's based on unrealistic future demand estimates that conflict with market reality.

At issue is how new generators, which may be needed to ensure that enough power is pumped into the grid to handle peak electricity demand, must be compensated to make building those new facilities worthwhile. PJM considers how much those facilities must earn by examining the costs to build and run a hypothetical new facility while also subtracting certain revenues. That hypothetical amount impacts what consumers are expected to pay to keep the grid reliable.

At issue is the chosen type of hypothetical resource used for those estimates. The commission allegedly improperly agreed to make the reference resource a combustion turbine plant instead of combined cycle technology, which the challengers say is cheaper to build and therefore would lower rates for consumers.

The panel agreed that FERC reasonably approved PJM's decision to use a combustion turbine plant, even though a hired-on outside expert made a different recommendation.

The panel said that the challengers seem to be arguing that using the combustion turbine plan "would be more just and more reasonable" but perfect decision-making isn't the standard, the panel said.

FERC reasonably supported its decision to approve the combustion turbine plant as the reference resource. Combustion turbine plants are "relatively inexpensive" and quick to build, evidence that supports them as a choice in models for grid stability.

And, if combined cycle plants are used instead, it "represents only a 1.7% reduction in consumer costs," according to the panel.

"The commission has recognized that, even if a resource provides more reliability than the reliability requirement estimates, that additional reliability has value," the panel said.

PJM allows, but does not require, generators to add 10% to electric supply offers because of uncertainties in the market. FERC signed off on PJM including this 10% add-on in how it estimates revenues for the reference resource.

The panel cited evidence that because of the 10% add-on, revenue for combustion turbine plants "would decline by up to 32%." Challengers argued that PJM utilizes lower-cost power so upping the offer cost means the resource is used less. But FERC nevertheless signed off on PJM's move but did not explain why.

"Simply because suppliers are permitted to utilize the 10% adder — and recognizing there are good reasons for them to be so permitted — we do not think it reasonable to assume the suppliers will utilize the 10% adder, especially when the evidence here indicates that the use of the adder would run counter to a combustion turbine plant's economic interest."

If in the real world, few plants utilize the adder, "it makes little sense to include the 10% adder for a hypothetical combustion turbine" for the sake of accuracy, the panel said.

The Office of the People's Counsel for the District of Columbia said it was evaluating next steps. According to a statement, the office was disappointed with the panel's conclusions on the reference resource "and the resulting impacts of that choice on consumers," but was happy to see the result sending the add-on back to the commission.

"As the Court makes clear, even expert agencies must engage in reasoned decision-making and FERC failed to do so here," DC People's Counsel Sandra Mattavous-Frye said in a statement.

Oral arguments **were held in April.**

A representative with FERC declined to comment.

U.S. Circuit Judges Sri Srinivasan, Karen LeCraft Henderson and Cornelia T.L. Pillard sat on the panel for the D.C. Circuit.

The Sierra Club is represented in-house by Casey A. Roberts and Kim Smaczniak of Earthjustice

Maryland's Office of People's Counsel is represented in-house by William F. Fields and Joseph G. Cleaver.

Delaware's Division of the Public Advocate is represented by Regina A. Iorii of the Delaware Department of Justice.

The Office of the People's Counsel for the District of Columbia is represented in-house by Sandra Mattavous-Frye, Karen R. Sistrunk, Anjali G. Patel and Frederick Heinle III.

FERC is represented in-house by David L. Morenoff, Robert H. Solomon and Carol J. Banta.

PJM is represented in-house by Paul M. Flynn, and by Ryan J. Collins of Wright & Talisman PC.

The suit is Delaware Division of the Public Advocate et al. v. FERC, case number 20-1212, in the U.S. Court of Appeals for the District of Columbia Circuit.

--Additional reporting by Khorri Atkinson and Morgan Conley. Editing by Peter Rozovsky.

Update: This story has been updated with a comment from the Office of the People's Counsel for the District of Columbia.