April 29, 2016

Not So Fast, Ohio.

In a pair of orders reminiscent of last week's Supreme Court opinion in *Hughes*[1] concerning federal and state jurisdiction, the Federal Energy Regulatory Commission (FERC) affirmed on Wednesday its exclusive role in ensuring just and reasonable rates for wholesale sales of electric energy and capacity, including those for contracts already approved by Ohio public utility regulators.[2] FERC left for another day the decision of whether it would approve the specific power purchase agreements between two Ohio public utilities (Ohio Utilities) and their wholesale power sales affiliates (Affiliate PPAs) that Ohio regulators had blessed. FERC also declined to address the issues of whether or how the mechanism for establishing wholesale power rates in the PJM Interconnection might be changed if FERC was to approve the Affiliate PPAs.

The narrow and specific issue raised and addressed by FERC on Wednesday is whether the Affiliate PPAs were exempt from a requirement of prior FERC approval in light of waivers FERC had previously granted. Under FERC regulations, prior FERC authorization is required before there can be wholesale sales of electric energy or capacity between a franchised public utility with captive customers and a market-regulated power sales affiliate.[3] That requirement can be, and routinely is, waived where a public utility shows that its retail customers have competitive alternatives to purchase power that do not reflect the costs under such an affiliate arrangement. In those circumstances and for this purpose, the utilities are determined not to have captive retail customers needing the protections afforded by the requirement of advance FERC approval. Based on assertions made to FERC in 2008, FERC previously granted the Ohio Utilities such a waiver. In Wednesday's orders, FERC agreed with those that filed complaints that circumstances had changed since 2008, and the prior waivers of the required advance approval ruling from FERC were no longer justified.

The rationale for FERC's conclusion was a 2014 proposal by the Ohio Utilities, recently approved by Ohio's regulators, in which the Ohio Utilities would purchase power under a long-term PPA from certain coal-, oil- and nuclear-fueled facilities owned or controlled by their affiliates; re-sell that power into the PJM markets; and recover the difference between their payments to their affiliates under the Affiliate PPAs and the revenues from the PJM re-sale. Of particular note, the cost recovery was structured to be from all retail customers of the Ohio Utilities, even those that opted to purchase from competitive suppliers. FERC concluded that the non-bypassable charge, which all retail customers must pay to support affiliate transactions, transformed those customers into captive retail customers requiring FERC's protective oversight.[4] Although the Ohio Utilities' retail ratepayers still retain the right to choose a different supplier, the ratepayers were "nonetheless captive in that they have no choice as to payment of the non-bypassable generation-related charges incurred under the Affiliate PPA[s]".[5] Accordingly, in order to protect against any potential for affiliate abuse, FERC found that waiver was not appropriate and its affiliate sales restrictions would apply to the Affiliate PPAs.[6]

While this order certainly can be challenged in a request for rehearing at FERC, the requirement for FERC approval of the Affiliate PPAs is binding pending any such challenge. Accordingly, if the parties wish to proceed with the Affiliate PPAs, the Affiliate PPAs must first be filed with FERC for approval. Any such filing would initiate a new proceeding and generally would be acted on by FERC within 60 days. In addition, there remains pending a complaint seeking changes in PJM's market rules to avoid adverse effects on wholesale power prices if the Affiliate PPAs are permitted to be implemented.[7] FERC rejected requests that it address those wholesale market issues in these proceedings.

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[1] *Hughes v. Talen Energy Marketing LLC*, 578 U.S. ___ (2016).

[2] *Electric Power Supply Assoc. et al. vs. FirstEnergy Solutions Corp.*, 155 FERC ¶ 61,101 (2016) ("*FirstEnergy*"); *Electric Power Supply Assoc. et al. vs. AEP Generation Resources, Inc. and Ohio Power Co.*, 155 FERC ¶ 61,102 (2016) ("*AEP*").

[3] 18 C.F.R. § 35.39(b) (2015).

[4] *FirstEnergy* at P 62.; *AEP* at P 60.

[5] *FirstEnergy* at P 55.; *AEP* at P 57.

[6] *FirstEnergy* at P 53.; *AEP* at P 55.

[7] *See Calpine Corp. et al. v. PJM Interconnection LLC,* Docket No. EL16-49-000 (filed Mar. 21, 2016).

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