Energy Choice Matters

March 19, 2010

FERC Refuses to Disclaim Jurisdiction Over Tres Amigas, Cites Scenarios for Disclaimer

FERC yesterday refused to disclaim jurisdiction over the Tres Amigas superstation project, citing a lack of support in Tres Amigas' application, though the Commission left the door open for approaches Tres Amigas could follow that would satisfy requirements for FERC to disclaim jurisdiction over the project intended to link the nation's three interconnects (EL10-22).

FERC noted that an interconnection between ERCOT and the Tres Amigas project (located in New Mexico), "has been proposed for the express purpose of facilitating the transfer of energy between ERCOT, the Eastern Interconnection, and WECC."

"This means that energy would be generated in one state and transmitted to another state for consumption in that other state, and would necessarily involve the 'transmission of electric energy in interstate commerce.' Independent of whether 'commingling' occurs at the Project, power transmitted to and from the Project crosses the Texas/New Mexico border. Without the benefit of an exemption under the FPA, as discussed further below, the interconnection proposed would result in ERCOT and ERCOT utilities becoming subject to the Commission's jurisdiction as public utilities," FERC held.

Potential ERCOT transmission owners have expressed reluctance to participate in the Tres Amigas project if it would result in FERC jurisdiction over ERCOT.

Sections 210 and 211 of the Federal Power Act allow certain interstate interconnections to be made without otherwise subjecting the electric utility or other entity applying under those sections to FERC jurisdiction for any purposes other than the purposes specified in Sections 210 and 211.

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FERC NOPR Would Pay Demand Response Full LMP to Combat "Under-Investment"

FERC issued a NOPR yesterday that would compel all Commission-approved RTOs with tariffs providing for participation of demand response resources in their energy market to pay demand response resources, in all hours, the full Locational Marginal Price for demand reductions made in response to price signals, effectively adopting what some quarters, including generators, have deemed a "subsidy" in order to, as FERC put it, cure potential "under-investment" in demand response (RM10-17).

"[W]e believe paying demand response resources the LMP in all hours will compensate those resources in a manner that reflects the marginal value of the resource to each RTO and ISO, comparable to treatment of generation resources," FERC said in the proposed rule.

"Given that the LMP represents the marginal value of the resource being used by the RTO or ISO to balance supply and demand, it follows that the LMP should be paid to any resource clearing in the RTO's or ISO's energy market," the NOPR finds.

FERC noted that compensation for demand resources varies by RTO (with PJM notably deducting the retail rate from the LMP in its compensation), and said that the current wholesale compensation levels may, "be leading to under-investment in demand response resources, resulting

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Calif. Munis, CCAs File Lawsuit to Remove Proposition 16 From Ballot

Several California municipal utilities and community choice aggregators (CCA) filed a suit in Sacramento County Superior Court seeking a peremptory writ of mandate to compel the California Secretary of State to disqualify Proposition 16 from the ballot in the June 8, 2010 election, "because the petition used to qualify it misrepresented and concealed the initiative's true purpose and effect, and because the initiative itself is so permeated with misinformation that it prevents a reasonable voter from making informed choices and therefore constitutes a violation of due process under the Fourteenth Amendment to the United States Constitution."

As previously reported, Proposition 16, backed by Pacific Gas & Electric, would require the vote of two-thirds of the residents in a CCA before the CCA could be formed, or for a local government to spend public funds on a CCA. Due to the wording of the initiative, the measure would also require a two-thirds vote for expansion of municipal utilities.

Petitioners include the Sacramento Municipal Utility District, San Francisco Local Agency Formation Commission, City and County of San Francisco, City of Moreno Valley, the City of Redding, the California Municipal Utilities Association, the San Joaquin Valley Power Authority, the Modesto Irrigation District, and the Merced Irrigation District.

"Proposition 16 - misleadingly calling itself 'The Taxpayers Right to Vote Act' - purports to impose a constitutional requirement of two-thirds voter approval as a means to control taxes, borrowing, or spending by a public entity to provide electricity service. But voters already have direct control over local public entities, and electricity service is funded by electric rates, not by taxes. As such, Proposition 16 has nothing to do with taxes, borrowing, or government spending, and does nothing to guarantee reasonable electric rates," the petitioners said.

Though rare, California initiatives have been stricken from the ballot due to findings of misrepresentations in the past. More common are modifications to an initiative's wording as a result of a complaint.

"Proposition 16 was drafted to conceal its true purpose and effect in order to induce citizens to sign the petition to qualify the initiative, and voters to vote for it. In short, the one thing that would cause signers and voters to pause - that Proposition 16 adds nothing to the public's control over taxes, borrowing, and spending but rather would only serve to lock in PG&E's monopoly over its existing service areas - was deliberately concealed. If revealed, PG&E knew that Proposition 16 would never qualify for the ballot or have any chance to be adopted by the voters. Even the inclusion of the name of the sponsoring utility - PG&E - could be fatal to the initiative," the suit alleges.

Among several specific claims which the petitioners allege are misleading are, "[t]he references in the Findings and Declarations portion of the initiative stating that California law requires two-thirds voter approval for tax increases for specific purposes and that local governments should be held to the same standard before using public funds, borrowing, issuing bonds or obtaining other debt or financing." Such statements in the initiative, "are false and misleading in that these statements misrepresent that Proposition 16 is a measure to control public borrowing with a two-thirds voting requirement, when this function is already subject to such requirements," petitioners said. The case is Modesto Irrigation District et al. v. Debra Bowen et al.

Separately, the Marin Energy Authority has filed a complaint against Pacific Gas & Electric at the California PUC, alleging PG&E's various efforts to stymie the CCA violate state law. The complaint repeats many of the same claims made in an earlier motion from the City and County of San Francisco for the PUC to revise its rules governing marketing by utilities related to CCAs (Only in Matters, 1/14/10).

Mich. PSC Revokes Intervention Status of Suppliers in Consumers' GCR Case

The Michigan PSC overturned the findings of an ALJ and denied Direct Energy and Interstate Gas Supply permissive intervention in

Consumers Energy's 2010-11 gas cost recovery (GCR) plan proceeding (U-16149).

The ALJ had agreed that permissive intervention was warranted because pursuant to various tariffs, if the competitive suppliers fail to deliver sufficient gas to Consumers each month, they must pay a fine equal to $6.00 per million British thermal units plus the higher of the spot market price or GCR price. In addition, Consumers is required to pay competitive suppliers for monthly gas deliveries an amount that is the lesser of the price billed to the supplier's customers or 110% of the GCR price, and the annual reconciliation of the fees paid by Consumers to the suppliers is in part dependent on the GCR factor set in the GCR case.

However, the PSC said that the injuries cited by the suppliers, "are speculative at best, and largely under the control of [the suppliers]."

The suppliers pile, "supposition on top of supposition" to support their intervention to finally arrive at their alleged injury-in-fact, the PSC ruled (i.e., if the GCR factor is set too high and if the supplier falls short in its deliveries, then a fine tied to the GCR factor will have to be paid). "The Commission finds that this hypothetical injury is insufficient to confer standing on [the suppliers]."

The Commission held that GCR cases do not address the terms and conditions of the Gas Customer Choice tariffs, nor do they address the effects of implementation of the Gas Customer Choice tariffs. These issues should be taken up in a general rate case, the PSC said.

FERC Orders NERC to Revamp Process to Overrule Stakeholders

Lamenting the ability of stakeholders to prevent action on directives from the Commission, FERC ordered NERC to revise its procedures used to develop mandatory bulk electric system reliability standards to ensure that stakeholders cannot withhold a standard that complies with a FERC directive from reaching the NERC Board of Trustees (RR09-6).

FERC gave NERC latitude to devise a solution that addresses the Commission's concerns.

"We take this action because of a growing concern that the current voting process in the [NERC] rules of procedure can be used to prevent compliance with Commission directives to address particular reliability matters," FERC said, citing inaction on directives to NERC relating to Reliability Standard FAC-008-1. That standard requires each transmission owner and generator owner to develop a methodology for determining the ratings of its Bulk-Power System facilities and also requires that the methodology incorporate specific data and conditions identified in the Standard. In Order No. 693, FERC approved FAC-008-1, but directed NERC to add a requirement that, "for each facility, [each transmission owner and generator owner] identify the limiting component and, for critical facilities, the resulting increase in rating if that component is no longer limiting."

FERC noted that NERC has not yet responded to its directive, despite bringing revised standards before stakeholders. The Commission blamed NERC's two-thirds voting requirement, along with a requirement for a second, "recirculation ballot" even after a measure passes, if any stakeholder votes "negative with reasons." FERC said that a standard complying with its directive initially received two-thirds support at NERC, but garnered some negative votes with reasons. On the recirculation vote, the measure failed to receive two-thirds support, preventing it from reaching the NERC board.

Separately, FERC set a deadline of Sept. 18, 2010 for NERC to comply with FERC directives to revise Standard BAL-003-0, relating to frequency response.

Additionally, FERC issued a NOPR to lower the definition of bulk electric system to facilities of 100 kV or higher (RM09-18). Currently, regional entities have discretion in defining such lower voltage transmission as part of the bulk electric system subject to NERC and FERC reliability compliance. Under FERC's NOPR, regional entities could still apply for waivers of the 100 kV standard.

Briefly:

BlueStar Scheduled to Start Serving Residential Customers at PPL in April

BlueStar Energy Services said yesterday that it is scheduled to start serving residential and small commercial customers at PPL in April, in seeking a waiver of the budget billing requirement applicable to suppliers through November, to permit upgrades to its billing system. BlueStar's waiver request will be more fully discussed in Monday's issue.

TXU Signs Stripes to Energy Efficiency Rebate Program

TXU Energy said that it has signed 440 Stripes convenience stores to its Energy Efficiency Rebate Program under a 29-month contract representing an annual load of 155,000 MWh. Under the rebate program, under which the stores will collect up to $175,000, many of the stores will upgrade their HVAC controls, retrofit fluorescent lighting fixtures, and implement LED lighting technology inside freezers and under exterior canopies. Several stores will also test TXU's iThermostat. Business customers interested in the Energy Efficiency Rebate Program must sign a minimum 12-month contract with TXU Energy. TXU Energy said that it is the only REP in Texas providing this type of energy rebate program.

Calpine PowerAmerica to Pay $225,000 Under California Resource Adequacy Settlement

Calpine PowerAmerica-CA, LLC would pay $225,000 to settle claims that it failed to meet California's resource adequacy requirements, under a decision from the PUC's Presiding Officer approving the settlement. The PUC's Consumer Protection and Safety Division had alleged that Calpine wrongly included resources from an expired liquidated damages contract in meeting its resource adequacy obligations for the months of July, August, and September 2008, causing a total system deficiency of 70.37 MW-month. The CPSD also alleged that Calpine's 2008 Year-Ahead Local Compliance Filing included local procurement obligation deficiencies because Calpine failed to use the correct number in its demand response calculations, creating a deficiency totaling 10.76 MW-month for 2008. The CPSD was originally seeking a fine of approximately $735,000. Calpine, which said it complied with the PUC's rules, does not admit fault under the settlement.

FERC Models New Penalty Policy Statement on U.S. Sentencing Guidelines

FERC yesterday issued a modified policy statement governing penalty guidelines for its enforcement actions, which are modeled after the United States Sentencing Guidelines, with modifications to account for FERC-specific considerations (PL10-4). Under the guidelines, FERC will generate a penalty range based on the combination of: (1) a violation level, consisting of a base level that is adjusted for various factors (such as monetary gain, potential/actual risk to reliability; volumes involved, etc.) and (2) a culpability score, which considers an organization's past and current conduct and efforts to remedy the violation. The culpability score will be decreased in cases of self-reporting, cooperation, acceptance of responsibility, and resolution without a trial-type hearing. The penalty guidelines also distinguish between the types of violation and establish a corresponding base violation level and dollar amount commensurate with the violation.

Mich. PSC Approves SEMCO GCR Reconciliation

The Michigan PSC approved a settlement agreement reconciling SEMCO Energy Gas Company's 2008-2009 gas costs for its Battle Creek Division. The settlement found that the utility over-recovered a net total of $249,369, including interest, from its Battle Creek Division gas customers. The net over-recovery will be rolled forward into the beginning balance for the company's 2009-2010 gas cost recovery (GCR) reconciliation for its Battle Creek Division.

SCE Opens RFO for Merchant Solar Power

Southern California Edison has opened its RFO process for the merchant side of its previously reported solar photovoltaic program, which will seek 250 MW of competitive solar power of 1-2 MW over the next five years (www.sce.com/spvp-ipp).

Tres Amigas ... from 1

Section 210 of the FPA allows the Commission, upon application of, among others, any electric utility, to issue an order requiring the physical connection of the transmission facilities of any electric utility with the facilities of such applicant. Section 211 of the FPA allows the Commission, upon application of, among others, any electric utility, to issue an order requiring that a transmitting utility provide transmission services to such applicant. The only interconnections between ERCOT and facilities outside Texas, and the transmission of power over those interconnections, have been made pursuant to Commission orders under Sections 210 and 211 of the FPA.

The issue is that Tres Amigas has not identified with specificity the parties and circumstances under which it would interconnect with ERCOT. FERC said that knowing such parties and circumstances is essential in determining whether it may disclaim jurisdiction per an application filed under Section 210 of the FPA.

Specifically, the investor-owned Transmission and Distribution Service Providers in ERCOT may not be considered an "electric utility" under the FPA, and thus eligible for the Section 210 exemption, since they are unbundled and do not serve customers at retail. However, FERC noted that, "there may still be ways to achieve interconnection under section 210 using the existing legal framework," while preserving the current jurisdictional status quo. "For instance, in *Brazos*, a Rural Utilities Service-financed cooperative in Texas that was a transmission utility also generated and sold power, thereby qualifying as an electric utility eligible to seek an order directing interconnection pursuant to section 210 of the FPA," FERC noted.

The Commission further observed that no municipally owned utility or electric cooperative in Texas has chosen to unbundle its operations, and therefore such entities may potentially be eligible applicants or eligible to be the subject of a Commission order issued under section 210. FERC also repeated the PUCT's observation that, even after unbundling, some companies continue to own transmission and distribution utilities, a retail electric provider, and a power-generation company.

"Likewise, section 211 of the FPA allows the Commission, upon application, to issue an order requiring that a transmitting utility provide transmission services to any electric utility or person generating electric energy for sale for resale. An arrangement could possibly be structured so that a transmitting utility transmits electric energy pursuant to section 211 from Texas into New Mexico. In fact, the Commission has found that the entities that own and operate the existing facilities used to transmit power into and out of ERCOT (albeit directed pursuant to sections 210 and 211) meet the definition of transmitting utilities for the purpose of issuing new orders under section 211 of the FPA," FERC added.

Negotiated Rate Authority

Separately, FERC granted Tres Amigas' application for authority to sell transmission service at negotiated rates, subject to conditions designed to limit Tres Amigas' ability to withhold the project's capacity from the market (ER10-396).

While FERC granted Tres Amigas' proposal to enter into anchor customer agreements for up to 50 percent of the project's capacity, FERC otherwise found Tres Amigas' proposed method of initial capacity allocation to be insufficient to ensure that capacity is allocated in a fair and open manner at rates subject to competitive price discipline. Tres Amigas' proposal included restricting the amount of capacity offered in the initial auction and thereafter holding additional auctions prior to commercial operation of the project, as well as retaining up to 20 percent of the capacity at each terminal for sale subsequent to the commercial operation date.

Such restrictions pose, "too great a risk that [Tres Amigas] could limit the amount of capacity offered in an initial auction so as to unreasonably create an artificial level of scarcity in the amount and form of transmission rights available at any given time," FERC said. "We are concerned with Applicant's proposals to offer limited amounts of different tranches of capacity rights and to hold back up to 20 percent of the initial capacity in conjunction with the grant of anchor customer rights," the

Commission added.

FERC said that Tres Amigas' open season process would satisfy Commission requirements for a fair, transparent open season if Tres Amigas makes all of the project's initial capacity not purchased by an anchor customer, if any, available for sale at all times during the open season process. Accordingly, FERC denied Tres Amigas' request to withhold 20 percent of its capacity.

To the extent Tres Amigas contracts with anchor shippers, it must provide the same rate and terms which the anchor shipper received to any customer in an open season willing to commit to the same term, FERC held.

Although several Texas industrial consumers objected to the request for negotiated rate authority because of the impact on Texas ratepayers, FERC said that the industrials, "have not provided evidence to show that Applicant's market entrance as a supplier of transmission service to ERCOT would harm ratepayers or, more importantly, explained why such a showing would warrant rejection of negotiated rates otherwise justified by the types of considerations cited above."

FERC's order did not address the issue of whether any battery storage facilities constructed by Tres Amigas are transmission assets subject to the negotiated rate authority granted, and thus FERC's approval of negotiated rate authority does not encompass sales of energy or ancillary services.

Demand Response ... *from 1*

in higher, and unjust and unreasonable, prices in the organized electricity markets."

"Based upon our own review, the Commission is now concerned that evidence of demand reductions in PJM, and inadequate demand response participation, now and in the future, may be the result of compensation that is no longer just and reasonable, because ... the existing and varying levels of compensation generally fail to reflect the marginal value of demand response resources to ISO and RTO energy markets," the Commission added.

"In those markets paying less than the LMP to demand response resources, such resources have less revenues to support investment in demand response-enabling technology (such as metering equipment, energy usage monitors and process controls) necessary to enable more wholesale market participation by demand response resources. Where compensation for demand response is inadequate, demand response resources will be hesitant to invest in demand response devices," the NOPR concludes.

The NOPR drew a partial dissent from Commissioner Philip Moeller, who said that the Commission has not justified the conclusions reached in the proposed rule.

"[A]s the [demand response] industry continues to mature, we must ensure that our policies are properly tailored to guide the development of demand response in a manner that will result in economically-efficient outcomes. Moving too quickly to reach a desired result can result in unintended consequences - and I believe that today's decision to propose a standard payment could have unintentional effects on both demand response participation and the efficient operation of the organized markets over the longer term," Moeller said.

"While the majority claims that it is 'concerned that compensation for demand response in PJM and other RTO and ISO markets may no longer be just and reasonable', the NOPR lacks a thorough discussion of the evidence that they relied upon to substantiate their concerns. The NOPR also lacks a sufficient explanation of the 'experience' that FERC has recently gained that would otherwise support the conclusion that the organized electric markets 'fail to compensate demand response at levels that reflect the marginal value of the resource being used by the RTO or ISO to balance supply and demand,'" Moeller added.

"To the contrary, the record in Docket No. EL09-68-000 [the PJM compensation docket] shows wide disagreement in the industry regarding the issue of demand response compensation. In that proceeding, state utility commissions, the grid operator, industry economists, and the market participants all reached various conclusions regarding the question of how to compensate demand response resources in PJM. In light of such rigorous debate, I am not sure if the Commission has a sustainable rationale to support a finding that the proposed rule is just and reasonable and that the existing compensation methods (that have been approved by this Commission) are no longer just and reasonable," Moeller continued.

"In fact, only recently did the Commission issue an order that not only sustained the manner by which PJM compensates demand response resources but also encouraged PJM and its stakeholders to identify and analyze issues to improve their demand response program. Subsequently, PJM filed a detailed report explaining that while the stakeholder process did not yield a consensus position, the PJM Board moved forward and developed a compromise solution that was designed to strengthen its demand response markets. In lieu of evaluating the merits of the proposal approved by PJM's Board, the NOPR terminates the PJM docket and directs PJM and its stakeholders to focus on whether demand response resources should be paid the market price - a question that has undoubtedly been analyzed, addressed and debated at numerous stakeholder meetings," Moeller noted.

"Since today's NOPR does not sufficiently explain the need for a uniform compensation approach, I am troubled by the decision to terminate PJM's individual proceeding. If approved, PJM's efforts toward developing a compromise solution for its market would have likely resulted in additional demand response participation and its associated benefits. However, with this NOPR's issuance, PJM and the other RTOs must now refrain from making changes to its demand response compensation rules pending the outcome of the rulemaking proceeding," Moeller said.

"The NOPR may also discourage some emerging organized markets from continuing to evolve toward the LMP model, as well as discourage some non-organized regions from seriously considering moving toward a market structure," Moeller cautioned.