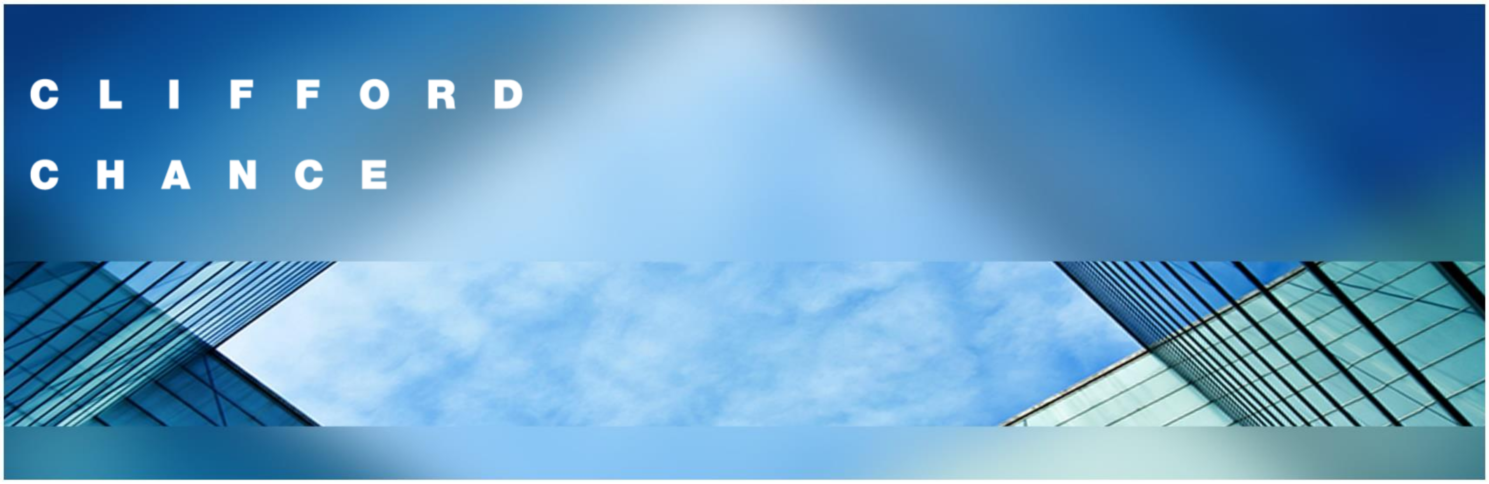

FEDERAL ENERGY REGULATORY COMMISSION REJECTS DEPARTMENT OF ENERGY'S PROPOSED RULE

On January 8, 2018, the Federal Energy Regulatory Commission ("FERC") issued an order (the "Order") rejecting the U.S. Department of Energy's ("DOE") proposed Grid Resiliency Pricing Rule and initiating a new investigation to study grid resiliency of the bulk power system.

I. BACKGROUND: GRID RESILIENCY PRICING RULE

On September 28, 2017, the DOE invoked a rarely used authority that allows the DOE to propose a rule under the Federal Power Act. The DOE issued a Notice of Proposed Rulemaking ("NOPR") called the Grid Resiliency Pricing Rule. As proposed, the Grid Resiliency Pricing Rule sought to require FERC to modify pricing mechanisms used in Regional Transmission Organization ("RTO") and Independent System Operator ("ISO") wholesale electricity markets. In the NOPR, DOE argued that the reliability of the nation's electric grid is being threatened by the loss of traditional baseload generation, and thus, such fuel-secure generation resources should be preserved in order to ensure the resiliency of the electric grid. If passed, the Grid Resiliency Pricing Rule would have required FERC-approved RTOs and ISOs to amend their rules to provide for a special rate and the recovery of costs for generators that have a ninety-day fuel supply. This proposed Grid Resiliency Pricing Rule was widely controversial, with many commenters alleging that DOE's true intention was to subsidize existing coal and nuclear plants in order to prevent their market-driven retirements.[1]

1 For more information regarding the proposed Grid Resiliency Pricing Rule and subsequent comments, see our client briefing from November 2017: "Department of Energy Proposes Controversial Grid Resiliency Pricing Rule."

II. TIMELINE OF DOE AND FERC'S ACTIONS

September 28, 2017	The DOE issued the NOPR called the Grid Resiliency Pricing Rule and directed FERC to take action within sixty days.
October 2, 2017	FERC issued a notice seeking comments to the proposed Grid Resiliency Pricing Rule from the public. FERC received over 1500 comments from organizations and individuals in response to the NOPR.
December 7, 2017	Shortly before FERC's deadline to act, Commissioner Kevin J. McIntyre, who was sworn in on the same day, wrote to the DOE on FERC's behalf and requested a thirty-day extension to afford adequate time to review the comments and consider the record.
December 8, 2017	The DOE approved of FERC's request and granted the requested thirty-day extension.
January 8, 2018	FERC issued the Order rejecting the DOE's proposed Grid Resiliency Pricing Rule and began a new, wider investigation to determine whether any additional action regarding grid resiliency is appropriate.

III. FERC'S JANUARY 8, 2018 DECISION

A. Rejection of the Proposed Grid Resiliency Pricing Rule

FERC rejected the DOE's proposed Grid Resiliency Pricing Rule that would require RTOs and ISOs to implement tariff changes and found that it does not meet the statutory requirements of the Federal Power Act.

In order to require FERC to modify pricing mechanisms as directed by the proposed rule, the DOE would have to show that the existing RTO or ISO tariffs are "unjust, unreasonable, unduly discriminatory or preferential". Then, any remedy proposed must be shown to be "just, reasonable, and not unduly discriminatory or preferential."

FERC concluded that the proposed Grid Resiliency Pricing Rule did not satisfy these requirements. First, FERC found that the allegations in the NOPR did not sufficiently demonstrate the current existence of unjust or unreasonable tariffs. Second, FERC argued that the remedy proposed by the Grid Resiliency Pricing Rule – to provide for a special rate and the recovery of costs for generators that have a ninety-day fuel supply – does not establish just and reasonable rates, and only supports certain energy resources.

On such basis, FERC issued the Order rejecting the proposed Grid Resiliency Pricing Rule.

B. New Investigation

Although FERC rejected the proposed Grid Resiliency Pricing Rule, FERC acknowledged the importance of a resilient and reliable electricity grid.

Consequently, FERC is initiating a new proceeding to further examine the risks that the bulk power system faces and to better understand challenges to grid resiliency. The Order includes specific, detailed information for each RTO and ISO to submit for FERC to review. Based on the comments to the proposed rule, it was evident that there was no uniform definition of "resilience" used across the energy industry. FERC therefore provided a uniform definition of resilience and seeks comments from the RTOs and ISOs on FERC's understanding of resilience as described in the Order. FERC also seeks comments on how each RTO or ISO currently assesses threats to resilience in its region, and lastly, FERC seeks comments on how RTOs and ISOs mitigate any risks to grid resilience. While the proposed Grid Resiliency Pricing Rule focused mostly on secure onsite fuel, FERC will use these submissions to evaluate all aspects of grid resiliency.

IV. NEXT STEPS

FERC has directed the RTOs and ISOs to provide responses to the information detailed in the Order within sixty days. Interested parties may then submit comments in response within thirty days of the due date of the RTO and ISO submissions. FERC will consider the entire record to determine whether any additional action will be necessary to protect the resiliency of our electric grid.

In a DOE press release dated January 8, 2018, immediately following the issuance of FERC's Order, Secretary of Energy Rick Perry stated that he appreciated FERC's consideration of the proposed rule and looks forward to continuing to work with FERC on the issue of resiliency.

We will continue to monitor FERC's decision and send updates as warranted.

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