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Regional Operators' Rebuke Of Perry Plan May Sway FERC

By **Keith Goldberg**

Law360, New York (October 24, 2017, 7:08 PM EDT) -- Monday was the deadline for public comments on Energy Secretary Rick Perry's proposal to pay coal and nuclear plants for providing baseload power and grid reliability services, and aside from coal and nuclear advocates, the reviews were scathing. But experts say harsh words from regional grid operators who run wholesale energy markets could speak loudest to FERC as it evaluates Perry's plan.

FERC has received hundreds of comments on Perry's notice of proposed rule-making, which asked the agency to direct regional grid operators that run wholesale markets to revise their tariffs to ensure that baseload power generators in those markets fully recover their costs if they provide essential grid reliability services and have a 90-day fuel supply on site. The condemnation is widespread, with oil and gas and renewable-energy groups, state utility regulators and attorneys general, environmental and consumer advocates, and even former FERC commissioners and U.S. corporate giants blasting the plan as ill-conceived and potentially unlawful.

Standing out among the critical commenters is the so-called ISO/RTO Council, composed of the regional grid operators subject to FERC's jurisdiction. They urged FERC to reject Perry's proposal, saying it's the wrong way to address any concerns over grid reliability and how to value it in wholesale power markets.

"The proposal set forth in the NOPR is far-reaching and would degrade the efficiency and effectiveness of existing organized wholesale markets, would provide improper incentives and disincentives to current and future market participants, would not promote the goals stated in the NOPR (i.e., enhancement of electric reliability and resilience), and would reverse the progress the commission and the nation's regional transmission organizations and independent system operators have made in developing robust and reliable competitive markets," the council said in its comments.

Comments by individual grid operators were no less critical. PJM Interconnection, which oversees the grid in 13 mid-Atlantic states and Washington, D.C., said the proposal not only undermines competitive wholesale markets but also "simply cannot be reconciled with the Federal Power Act or with the policies Congress has embedded in the statute."

Meanwhile, Mid-Continent Independent System Operator, which manages the grid in a significant portion of the middle of the U.S., said Perry's proposal "identifies no imminent reliability or resilience issues, and no near-term reliability or resilience issues exist in MISO that require immediate action beyond the application of ongoing processes and existing tools that address resource availability and retirement in the MISO region."

Given that FERC has historically deferred to regional grid operators on how their electricity markets should run, their condemnation of Perry's proposal could tip the balance as the agency decides whether to follow through on it, experts say.

"Particularly given that at least a couple commissioners are reported to have suggested rather bluntly that they don't much care for the proposal either, and what better support than to have the guardians of the galaxies backing you up?" said Larry Eisenstat, who chairs Crowell & Moring LLP's energy group. "At the very least, though, FERC will give considerable weight to what the RTOs say, particularly when it comes to identifying the proposal's impacts on markets in general, and on various pending and already contemplated future implementation issues."

Regional grid operators didn't just blast the substance of Perry's proposal, they said the 15 days it gives RTOs and ISOs to comply with whatever final action FERC takes likely runs afoul of notice and due process provisions in both the FPA and Administrative Procedure Act.

"To hear them say 15 days for compliance is unworkable should be taken extremely seriously," University of Richmond law professor Joel Eisen said. "This is a disaster on energy law, economic and administrative law grounds."

DOE spokeswoman Shaylyn Hynes said Tuesday that the agency is pleased by all the feedback to Perry's proposal, saying it's accomplished his goal of starting "a long overdue conversation about grid resiliency."

"We are still reviewing comments, but it is clear that there is a significant amount of support for the secretary's proposal," Hynes said. "It is worth noting that even some critics of the proposal acknowledge there is a problem and that FERC needs to act to address pricing in the electric markets."

As for FERC, it has little time to evaluate the legal and practical issues raised by the public commenters — both pro and con — and craft a rule. Reply comments are due at FERC by Nov. 7, and Perry's proposal directs FERC to take action by Dec. 11.

"It's a Herculean task before the FERC staff," said Adam Wenner, a former FERC deputy assistant general counsel who heads Orrick Herrington & Sutcliffe LLP's energy regulatory practice. "It can be done, but they'll be working 24/7, or close to it."

There are two new commissioners at FERC, including Chairman Neil Chatterjee, who has said that Perry's proposal deserves consideration. But FERC has plenty of leeway in acting on the plan, and experts can see the agency possibly straying far from what Perry has envisioned, from extending the compliance dates for regional grid operators to simply rolling the proposal into ongoing agency proceedings, such as one examining ways to harmonize state and federal energy policies with wholesale markets.

"For political reasons I think outright rejection is unlikely, but it would not surprise me if FERC were to conclude that the DOE proposal raises important and complex questions that require further study," Winston & Strawn LLP partner Ray Wuslich said. "The RTOs' pleading actually supports that outcome."

--Editing by Brian Baresch and Kelly Duncan.