

FERC Seeks Comments On How To Advise EPA Regarding the Reliability Impact Of Clean Air Act Rules

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The Federal Energy Regulatory Commission (FERC) issued a [Notice](#) on Jan. 30, 2012 seeking comments on a [Staff White Paper](#) that proposes procedures for a type of FERC action which has no precedent and is based on uncertain statutory authority. The proposed procedures address how FERC should advise the Environmental Protection Agency (EPA) with respect to potential reliability issues associated with electric generators that may be forced to shut down due to an inability to comply with EPA air quality rules.

The Notice has been issued in the midst of Congressional pressure for FERC to do something to address such reliability issues, even though FERC itself has no statutory authority over generation adequacy and no experience modeling potential impacts from plant shutdowns. That the Notice simply distributes a staff proposal for comment, with no Commissioner comments, may reflect differences of opinion among Commissioners as to what involvement, if any, FERC should have with regard to opining on generation sufficiency.

Background

EPA finalized national emission standards for hazardous air pollutants from electric generating units (EGUs), commonly known as the "Mercury and Air Toxics Standards" (MATS), in December 2011. All EGUs must be in compliance with the standards within three years, but one additional year may be granted if necessary for the installation control facilities. EPA stated that its internal analysis projected only a modest level of EGU retirements as a result of the standards and did not anticipate that such retirements would adversely affect electric reliability. Further, EPA stated that there are likely to be few, if any, cases in which it is not possible to mitigate a reliability issue within the four-year compliance deadline.

Some industry groups and elected officials are not convinced that the MATS will not jeopardize generation resource adequacy. The House Energy and Commerce Subcommittee on Energy and Power held hearings in September 2011 on this issue, and among others, asked FERC Commissioners to testify. FERC Chairman Wellinghoff stated his view that existing planning authorities with developed modeling capabilities have the necessary data and tools to analyze the potential local and regional reliability impacts stemming from the EPA regulations, and they are the appropriate forums for addressing any such potential reliability impacts. Further, the Chairman noted that although FERC has statutory authority to establish and enforce reliability standards for

the bulk power system under section 215 of the Federal Power Act, the statute expressly prohibits FERC from ordering the construction of generation or establishing standards for generation adequacy. Wellinghoff concluded that although FERC Staff can share their expertise with EPA when appropriate, FERC is not equipped to perform comprehensive resource adequacy assessments, nor would developing such capability be an efficient use of resources.

Two of the other Commissioners essentially agreed with the Chairman that the reliability impacts of EPA's rules could be adequately handled by existing institutions. Another of the Commissioners, however, urged a more formalized and expanded dialogue between FERC and EPA, and the fifth Commissioner stated his serious concerns about the impact of the rules. Obviously dissatisfied with what he heard from the majority of the Commissioners, the Chairman of the House Subcommittee announced that he "will continue to press both FERC and EPA for a comprehensive analysis of these rules until the job is done."

In light of the continuing concerns expressed by lawmakers and others about the reliability impact of the MATS, EPA issued a [Policy Memorandum](#) on Dec. 16, 2011, that attempted to give more assurance. The Policy Memorandum outlined a procedure for an EGU to operate in noncompliance with MATS for one more year, beyond the first four years, if evidence proved that the extra year was necessary to avoid a "serious risk" to electric reliability. This one-year extension would come under EPA's enforcement authority in the form of an Administrative Order (AO). To obtain such an AO, the EGU owner must file a specified request with EPA including the showing that the EGU was:

"critical to maintaining electric reliability, and that failure to operate the unit would: (a) result in the violation of at least one of the reliability criteria required to be filed with FERC, and, in the case of the Electric Reliability Council of Texas (ERCOT), with the Texas PUC, or (b) cause reserves to fall below the required system reserve margin."

EPA stated that it will, for purposes of using AO authority, rely on the advice and counsel of reliability experts, including, but not limited to, FERC, Planning Authorities (including Regional Transmission Operators (RTOs) and Independent System Operators (ISOs)), reliability organizations (the North American Electric Reliability Corporation (NERC) and regional reliability entities), and state utility commissions.

FERC's Notice

EPA's Policy Memorandum is the catalyst that triggered FERC's Notice of staff's White Paper. The White Paper states its purpose is to explain staff's position on how the Commission should advise EPA with regard to AO requests, noting that the decision to grant an AO is solely EPA's. Staff stated that EPA's procedures require that an entity requesting an AO must provide a copy of the request to FERC, including an analysis of the impact on reliability and the appropriate Planning Authority's concurrence or

comments on that analysis.

Staff's proposed procedure for FERC to handle its copy of the AO request is as follows:

- The request would be filed as an "informational" filing and assigned an administrative docket number; there would be no opportunity for intervention but comments may be submitted.
- Staff's Office of Electric Reliability would "process" the request.
- The standard of review would be whether, based on the circumstances presented, there might be a violation of a Commission-approved Reliability Standard resulting from the EGU shutdown, although Staff asked for comments on whether FERC's review should extend to other elements in EPA's Policy Memorandum. Staff said such a broader review could be conducted under FERC's general investigative authority.
- FERC Commissioners would vote to approve written comments sent to EPA and they would be publicly posted, but the comments would not constitute a final agency action, and there would be no opportunity for rehearing or judicial review.

FERC asked anyone interested to submit comments on Staff's White Paper by Feb. 29, 2012.

Analysis

Staff's proposal undertakes the task of proposing procedures for handling a potential future filing for which there is no precedent, no governing statute or regulation, and no clear direction for what FERC is to do, if anything, in response to the filing. The sole underpinning for staff's proposed procedures is EPA's Policy Memorandum, which states that EPA would rely upon the expertise of FERC and others to help it make the determination of the potential reliability impacts associated with shutting down a power plant. FERC is not required by law to do anything in response to the AO request package that EPA specifies must be provided to FERC, and FERC is not legally accountable for any comments it gives EPA. The procedures staff proposes would not be used for at least three to four years, because an electric generator can only ask for an AO after it exhausts the regular compliance deadline and any authorized extension.

Staff's White Paper reflects the dilemma that elected officials are clamoring for FERC to do something to prevent blackouts due to generation shutdowns, while FERC has little expertise and limited legal authority with respect to generation adequacy issues. In addition, there are currently shifting responsibilities for resource adequacy and questions about who should make those determinations. Where they exist, ISOs and RTOs have assumed primary responsibility for forecasting needed resources in their regions and developing mechanisms to meet that need. FERC has gotten tangentially

involved with resource adequacy in cases where the ISOs/RTOs have established capacity markets over which FERC has asserted jurisdiction. However, even in those cases, FERC has never opined on what resources are needed, only whether the markets are structured fairly to facilitate new entry.

State regulatory commissions regularly insist that resource adequacy issues are within their jurisdiction, and resist any federal encroachment on that domain. In early January, FERC and the National Association of Regulatory Utility Commissioners announced that they were launching a joint public forum to explore reliability issues stemming from new and pending environmental rules for the power sector, with the first meeting scheduled for Feb. 7, 2012. Meanwhile, NERC and some of the regional reliability organizations are considering what role they should play with regard to resource adequacy, and whether their legal authority allows them to make resource adequacy issues subject to mandatory standards.

Under these circumstances, it will be interesting to see what comments FERC may receive on the White Paper proposal.

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