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**PUBLIC UTILITIES - FEDERAL**

## Entergy Arkansas, LLC v. Federal Energy Regulatory Commission

**United States Court of Appeals, District of Columbia Circuit - July 26, 2024 - F.4th - 2024 WL 3546765**

Companies that generated, transmitted, distributed, and sold electricity filed petitions for review, under Administrative Procedure Act (APA), of decisions of Federal Energy Regulatory Commission (FERC) approving electrical grid operator's proposed tariff changes, including switch from annual to seasonal capacity markets, change in method for calculating generator capacity, and change in rules regarding generator outages, as well as denying companies' request for rehearing.

Petitions were consolidated. Public utilities commissions in Mississippi, Louisiana, and Arkansas and nonprofit corporation that operated electrical grid in eastern Texas intervened in support of companies.

The Court of Appeals held that:

- FERC reasonably concluded that new accreditation methodology would more accurately predict resources' future performance during periods of highest demand in general;
- FERC reasonably concluded that new methodology more accurately predicted individual resources' future performance;
- FERC adequately explained why it expected volatility to be low under new methodology;
- FERC reasonably concluded that any volatility was unlikely to unduly impact market participants;
- FERC adequately explained its approval of requirement that resources acquire replacement capacity if they are offline for more than 31 days in a season; and
- FERC adequately explained its approval of requirement that resource owners give operator 120 days' notice of planned outages.

In approving tariff changes proposed by electrical grid operator to switch from annual to seasonal capacity market, including new accreditation methodology under which 80% weight would be given to the 65 hours in each of the past three years in which electrical supply was tightest, Federal Energy Regulatory Commission (FERC) reasonably concluded that operator's new methodology would more accurately predict resources' future performance during periods of highest demand in general; FERC relied on operator's study, which examined 11 emergency days from past year and concluded that old methodology overestimated how much electricity would be offered into market by roughly 8% to 22%, whereas new methodology's estimates were off by only about 1%.

Energy companies failed to exhaust their arguments, on their petition for review of Federal Energy Regulatory Commission (FERC) decision approving electrical grid operator's proposed tariff changes to switch from annual to seasonal capacity markets and to change accreditation methodology for generator capacity, that study which FERC relied upon to determine that new accreditation methodology would be more accurate than existing methodology had too small sample size and did not convert intermediate seasonal capacity figures into final seasonal capacity figures, and thus,

Court of Appeals lacked jurisdiction to consider arguments; companies did not discuss study at all when requesting rehearing of FERC's approval of rule changes.

In approving tariff changes proposed by electrical grid operator to switch from annual to seasonal capacity market, including new accreditation methodology under which 80% weight would be given to the 65 hours in each of the past three years in which electrical supply was tightest, Federal Energy Regulatory Commission (FERC) adequately explained its conclusion that new methodology more accurately predicted individual resources' future performance; FERC explained that new methodology addressed all reasons for unavailability, whereas old methodology only reflected forced outage rates, year-to-year variation in an individual resource's accreditation was warranted based on whether resource had under- or over-delivered in past, and new method considered three years of prior performance.

In approving tariff changes proposed by electrical grid operator to switch from annual to seasonal capacity market, including new accreditation methodology, Federal Energy Regulatory Commission (FERC) reasonably explained that it expected volatility to be low; FERC relied on operator's study, which used standard deviation for each market participant as measure of how much volatility each participant would have experienced over four planning years had new methodology been in use, and found standard deviation of less than 2% systemwide, with 75% of market participants having standard deviation of under 7.6%, and FERC reasonably chose to focus on across-the-board volatility rather than worst-case scenario of single participant with largest standard deviation after outliers were excluded.

In approving tariff changes proposed by electrical grid operator to switch from annual to seasonal capacity market, including new accreditation methodology, Federal Energy Regulatory Commission (FERC) reasonably concluded that any volatility under new methodology was unlikely to unduly impact market participants; FERC found that, even when volatility existed at resource-specific level, volatility would usually be lower at market-participant level given participants' broad portfolios of resources, that using three-year rolling average as basis for methodology minimized impact of chance, that resource owners could rely on past performance data to estimate future capacity accreditations, and that electricity distributors could purchase additional capacity to make up any shortfalls.

In approving tariff changes proposed by electrical grid operator to switch from annual to seasonal capacity market, Federal Energy Regulatory Commission (FERC) adequately explained its approval of rule that resources that are offline for over 31 days in a three-month season must either acquire replacement capacity or pay penalty; 31-day threshold weighed competing interests of allowing generators to go offline to perform maintenance versus ensuring grid reliability within a season and ensuring that resources would fulfill commitments for which distributors had paid them, and owners of resources requiring extended maintenance could opt out of capacity market for a season, shorten maintenance, acquire replacement capacity, or schedule maintenance to straddle two seasons.

Energy companies adequately exhausted their argument that Federal Energy Regulatory Commission (FERC) failed to explain why electrical grid operator's proposed rule requiring owners of resources that went offline for more than 31 days in a three-month season to either purchase replacement capacity or pay penalty would not unduly burden resources that required extended maintenance longer than 31 days, as necessary for Court of Appeals to have jurisdiction to consider such argument on companies' petition for review for FERC's approval of rule and denial of rehearing; companies argued before FERC that its approval was irrational because duration of planned outages for nuclear units was commonly longer than 31 days and that 31-day threshold could impede maintenance of other generating units.

In approving tariff changes proposed by electrical grid operator to switch from annual to seasonal capacity market, Federal Energy Regulatory Commission (FERC) adequately explained its approval of rule requiring resource owners to give operator 120 days' notice of planned outages; FERC explained that requiring advance notice did not only ensure grid reliability, but also allowed operator and other stakeholders to plan for outages in advance, and 120-day notice period ensured that operator would have information it needed prior to start of three-month season in order to identify and mitigate potential reliability issues.

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