

174 FERC ¶ 61,112
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Richard Glick, Chairman;
Neil Chatterjee, James P. Danly,
Allison Clements, and Mark C. Christie.

Grid Reliability and Resilience Pricing

Docket No. RM18-1-001

ORDER ADDRESSING ARGUMENTS RAISED ON REHEARING

(Issued February 18, 2021)

1. On January 8, 2018, the Commission issued an order¹ terminating the proceeding it initiated in Docket No. RM18-1-000 to address the Proposed Rule on Grid Reliability and Resilience Pricing (Proposed Rule) submitted to the Commission by the Secretary of Energy.² The Foundation for Resilient Societies (Resilient Societies) requested rehearing of the January 2018 Order.

2. Pursuant to *Allegheny Defense Project v. FERC*,³ the rehearing requests filed in this proceeding may be deemed denied by operation of law. However, as permitted by section 313(a) of the FPA,⁴ we are modifying the discussion in the January 2018 Order and reach the same result in this proceeding, as discussed below.⁵

¹ *Grid Reliability and Resilience Pricing*, 162 FERC ¶ 61,012 (2018) (January 2018 Order).

² *Grid Resiliency Pricing Rule*, 82 Fed. Reg. 46,940 (Oct. 10, 2017).

³ 964 F.3d 1 (D.C. Cir. 2020) (en banc).

⁴ 16 U.S.C. § 825l(a) (“Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.”).

⁵ *Allegheny Def. Project*, 964 F.3d at 16-17. The Commission is not changing the outcome of the January 8 Order. See *Smith Lake Improvement & Stakeholders Ass’n v. FERC*, 809 F.3d 55, 56-57 (D.C. Cir. 2015).

I. Background

3. On September 29, 2017, the Secretary submitted the Proposed Rule pursuant to section 403 of the Department of Energy (DOE) Organization Act. The Proposed Rule directed the Commission to consider requiring certain RTOs and ISOs to establish a tariff mechanism providing for: (1) the purchase of energy from an eligible “reliability and resilience resource;” and (2) the recovery of costs and a return on equity for such resources (i.e., a “resilience rate”). The Proposed Rule stated that eligible reliability and resilience resources must: (1) be located in an RTO/ISO with an energy and capacity market; (2) be able to provide essential reliability services;⁶ and (3) have a 90-day fuel supply on site.

4. The Commission initiated Docket No. RM18-1-000 to consider the Proposed Rule. The Commission issued a Notice Inviting Comments on the Proposed Rule on October 2, 2017, with initial comments due on October 23, 2017, and reply comments due on November 7, 2017.⁷ In addition, on October 4, 2017, the Director of the Commission’s Office of Energy Policy and Innovation issued a request for information seeking responses and comment on a number of specific questions raised by the Proposed Rule.⁸ The Commission received extensive comments and reply comments in response to the Proposed Rule and the Staff Request for Information from a wide variety of interested stakeholders, including Resilient Societies.

5. In the January 2018 Order, the Commission terminated the proceeding in Docket No. RM18-1-000. The Commission stated that, in order to require RTOs/ISOs to implement tariff changes as contemplated by the Proposed Rule, section 206 of the Federal Power Act (FPA) requires that there must first be a showing that the existing RTO/ISO tariffs are unjust, unreasonable, unduly discriminatory or preferential.⁹ The

⁶ The essential reliability services were to include, but not be limited to: voltage support, frequency services, operating reserves, and reactive power. Proposed Rule at 18.

⁷ *Grid Reliability and Resilience Pricing*, Notice Inviting Comments (Oct. 2, 2017).

⁸ *Grid Reliability and Resilience Pricing*, Staff Request for Information (Oct. 4, 2017).

⁹ January 2018 Order, 162 FERC ¶ 61,012 at P 14 (citing 16 U.S.C. §§ 824e(a)); *Emera Maine v. FERC*, 854 F.3d 9, 25 (D.C. Cir. 2017) (“Without a showing that the existing rate is unlawful, FERC has no authority to impose a new rate.”); *FirstEnergy Serv. Co. v. FERC*, 758 F.3d 346, 353 (D.C. Cir. 2014) (“Regardless of whether it is

Commission found that the Proposed Rule did not satisfy that requirement under section 206 of the FPA, and terminated Docket No. RM18-1-000.¹⁰ The Commission explained that, while some commenters alleged grid resilience or reliability issues due to potential retirements of particular resources, those assertions do not demonstrate the unjustness and unreasonableness of the existing RTO/ISO tariffs. The Commission further found that the extensive comments submitted by the RTO/ISOs do not point to any past or planned generator retirements that may be a threat to grid resilience.¹¹ The Commission disagreed with assertions that the Commission's price formation efforts supported the determinations in the Proposed Rule.¹²

II. Request for Rehearing

6. Resilient Societies seeks rehearing of the January 2018 Order, arguing that the Commission's termination of the proceeding in Docket No. RM18-1-000 was arbitrary and capricious, and thus violated the Administrative Procedure Act, because the Commission failed to respond meaningfully to arguments raised before it.¹³

7. Resilient Societies specifies seven errors in the January 2018 Order. Resilient Societies asserts that the Commission erred by not: (1) satisfactorily explaining its finding that neither the Proposed Rule nor the record satisfied the threshold statutory requirement of demonstrating that the RTO/ISO tariffs are unjust and unreasonable, particularly in light of Resilient Societies' comments about unjust charges for "ghost capacity;"¹⁴ (2) providing a lawful rationale for ignoring comments filed by Resilient Societies and ClearPath Foundation regarding auction-based, technology-

charged with completing step two, proposing new just and reasonable rates, [petitioner] still must complete step one, demonstrating that PJM's existing rates are unjust and unreasonable.").

¹⁰ January 2018 Order, 162 FERC ¶ 61,012 at P 14.

¹¹ *Id.* P 15.

¹² *Id.* P 16.

¹³ Resilient Societies Rehearing Request at 2.

¹⁴ *Id.* at 3-4. "Ghost capacity" is the term Resilient Societies uses to describe electric generation capacity that lacks fuel stored on-site and, which according to Resilient Societies, means that it can disappear during emergencies. *Id.* at 2 (citing Resilient Societies Reply Comments at 10-15).

neutral remedies to unjust and unreasonable rates in RTO/ISO organized markets;¹⁵ (3) establishing a technical conference, which Resilient Societies argues could provide the means of demonstrating what share of generation capacity is “ghost capacity” under different definitions and what alternatively could constitute “resilient capacity”;¹⁶ (4) providing a reasoned analysis for finding that North American Electric Reliability Corporation (NERC) physical security and geomagnetic disturbance standards are a valid rationale to terminate the rulemaking proceeding on resilience pricing of generation, when generation is almost completely exempted from these standards;¹⁷ (5) satisfactorily explaining why it ignored Resilient Societies’ analysis that showed the proportion of generation capacity with energy stored on-site in the RTO/ISO markets is significantly lower than the proportion of generation capacity with energy stored on-site under cost-of-service regulation;¹⁸ (6) satisfactorily explaining why it gave the RTOs/ISOs preferential treatment over all other public stakeholders by initiating a new proceeding in which the RTOs/ISOs will have the privilege of setting the discussion framework for any reply comments, which will be disadvantageous to other stakeholders;¹⁹ and (7) explaining why it ignored Resilient Societies’ request for prompt action to establish markets for generation resilience, with pricing to include on-site energy reserves.²⁰

III. Discussion

8. At the outset, we observe that Resilient Societies fails to discuss any of the issues identified in its “Statement of Issues and Specifications of Error” in its rehearing request except for its assertion that the Commission should provide reasoned analysis of Resilient Societies’ arguments regarding “ghost capacity” in ISO-NE which are related to the first issue it identified in its “Statement of Issues and Specifications of Error.” Moreover, while Resilient Societies generically cites three cases at the beginning of its “Statement

¹⁵ *Id.* at 4.

¹⁶ *Id.*

¹⁷ *Id.* at 4-5.

¹⁸ *Id.* at 5-6.

¹⁹ *Id.* at 6.

²⁰ *Id.*

of Issues and Specifications of Error” in support of all seven of its identified issues,²¹ it fails to discuss any of these legal issues to support its arguments in the body of its pleading.

9. In the January 2018 Order, the Commission made a very specific finding: “[n]either the Proposed Rule nor the record in this proceeding satisfied the threshold statutory requirement [in section 206 of the FPA] of demonstrating that the RTO/ISO tariffs are unjust and unreasonable.”²² The January 2018 Order acknowledged that some commenters alleged resilience concerns; however, as noted above, the Commission explained that “these assertions do not demonstrate the unjustness and unreasonableness of the existing RTO/ISO tariffs.”²³ In light of the Commission’s finding that the Proposed Rule, as well as the record in this proceeding, failed to satisfy the threshold statutory requirements of section 206, the Commission had no basis to impose any of the remedies contemplated in Resilient Societies’ filings.²⁴

10. Nothing in Resilient Societies’ rehearing request convinces us that the Commission erred in the January 2018 Order. Resilient Societies raises various arguments that the Commission should have considered specific issues or should have initiated additional proceedings, but none of its arguments persuade us that the January 2018 Order was in error on the threshold question of whether the Proposed Rule and the record in Docket No. RM18-1-000 satisfied section 206. For example, while Resilient Societies raises concerns about “ghost capacity” in ISO-NE, those concerns do not demonstrate that ISO-NE’s existing tariff or the tariffs of other RTOs/ISOs are unjust

²¹ *Id.* at 3 (“for each [enumerated issue], the applicable court precedent is contained in the prior citation of *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, [463 U.S. 29, 43 (1983),] *TransCanada Power Mktg. Ltd. v. FERC*, [811 F.3d 1, 12 (D.C. Cir. 2015),] *New England Power Generators Ass’n, Inc. v. [FERC]*, 881 F.3d 202, 211 (D.C. Cir. 2018)].”).

²² January 2018 Order, 162 FERC ¶ 61,012 at P 15.

²³ *Id.*

²⁴ The Commission initiated a new proceeding on grid resilience in Docket No. AD18-7-000. In a concurrently issued order, the Commission is terminating Docket No. AD18-7-000. *Grid Resilience in Regional Transmission Organizations and Independent System Operators*, 174 FERC ¶ 61,111 (2021).

and unreasonable.²⁵ Nor does Resilient Societies' argument concerning its analysis of generation with on-site storage in RTO/ISO markets. In addition, Resilient Societies' argument that the Commission ignored its comments on remedies to unjust and unreasonable rates focuses on options that the Commission would only be in a position to address if it had found that the existing tariffs were unjust and unreasonable.²⁶ Resilient Societies' request for a technical conference likewise does not demonstrate that the Commission erred in the January 2018 Order.²⁷ Finally, Resilient Societies misreads the January 2018 Order to argue that the Commission erred in relying on NERC standards to terminate the rulemaking proceeding. The January 2018 Order referenced the Commission's work with NERC as an example of the importance of grid resilience to the Commission, and was not a basis for the termination of Docket No. RM18-1-000.²⁸

11. Because the Commission explained its reasoning for terminating Docket No RM18-1-000, for the reasons discussed above, it was not an abuse of discretion for the Commission to terminate that proceeding.²⁹ Accordingly, we sustain the result of the January 2018 Order.

²⁵ We also note that the Proposed Rule was narrowly drawn, as explained in P 3, above, and the January 2018 Order's consideration was limited to the narrow issues presented. Resilient Societies would have us expand Docket No. RM18-1-000 to encompass issues not included in the Proposed Rule under consideration, such as payments by retail customers in ISO-NE for ghost capacity. We reject such an attempt to expand the narrowly drawn proceeding.

²⁶ See, e.g., *Emera Maine v. FERC*, 854 F.3d 9, 25 (D.C. Cir. 2017) ("Without a showing that the existing rate is unlawful, FERC has no authority to impose a new rate.").

²⁷ In any event, the decision whether to hold a technical conference is a procedural matter within the Commission's discretion. See, e.g., *Stowers Oil and Gas Co.*, 27 FERC ¶ 61,001 (1984) (stating that the Commission is generally the master of its own calendar and procedures). As noted, the Commission elected a different procedure for further examining the concerns raised in the Proposed Rule. See *supra* n.24.

²⁸ See January 2018 Order, 162 FERC ¶ 61,012 at P 12.

²⁹ See, e.g., *Professional Drivers Council v. Bureau of Motor Safety*, 706 F.2d 1216, 1220-21 (D.C. Cir. 1983) (upholding agency's decision not to promulgate new rules in an area already subject to agency regulation); *Nat. Resources Defense Council, Inc. v. Securities and Exchange Comm'n*, 606 F.2d 1031, at 1052-53, 1062 (D.C. Cir. 1979) (explaining that review of an agency's decision not to adopt a rule is afforded special deference, and upholding agency's decision not to promulgate new rule).

The Commission orders:

In response to Resilient Societies' request for rehearing, the January 2018 Order is hereby modified and the result sustained, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.