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FERC Lacks Jurisdiction to Set Station Power Charges

Article By:

John D. McGrane

On December 18, 2012, the U.S. Court of Appeals for the District of Columbia Circuit issued its ruling in Calpine Corp. v. FERC and affirmed FERC's conclusion that it does not have the authority to regulate public-utility charges to independent generators for the generators' use of station power.[1] The D.C. Circuit agreed with FERC that such sales are retail sales of power that are subject to retail jurisdiction. That jurisdiction extends to the question of whether or not a sale of retail power has occurred.

After Order No. 888 unbundled generating from transmission and distribution services, the issue of how independent generators would be charged for station power arose. FERC created "netting intervals," under which a generator is not required to pay retail rates for power consumption as long as its net output is zero or positive over a fixed period. If the generator uses more power than it sends to the grid, it is considered to have obtained the shortfall in a retail sale from a third party. In other proceedings, FERC initially approved hourly netting periods. It later approved nettings intervals of one month.

FERC later ordered the California Independent System Operator (CAISO) to revise its tariff to conform to other tariffs and provide for monthly netting. Subsequently, a utility sought approval of an alternative basis to charge for station power, under which it would assess direct stranded cost and consumption charges against net-positive generators in lieu of retail charges. FERC rejected that proposal. On appeal, the D.C. Circuit considered whether it would exceed FERC's jurisdiction to set any netting intervals regulating sales of station power. The D.C. Circuit vacated and remanded the case to FERC on the basis that FERC's approval of the revised tariff exceeded its authority. It stated, "'[W]e do not understand why FERC is empowered to conclude that a retail sale has not taken place unless it can claim the transaction is, instead, a wholesale sale or a transmission.'"[2]

FERC issued an order on remand finding that it lacked a jurisdictional basis to determine when the provision of station power constitutes a retail sale. It also indicated that the netting interval in the CAISO tariff could only govern FERC-jurisdictional transmission charges and not retail charges. The D.C. Circuit affirmed FERC's order. Responding to the petitioners' claim that charges for station power would be discriminatory, the court stated as follows: "According to petitioners' logic,any retail charge for station power imposed on independent generators is inherently discriminatory. Yet petitioners implicitly concede that a monthly netting period is acceptable, which undermines their asserted principle." The court also rejected arguments that vertically integrated utilities provide themselves station power for free, finding that such utilities "'pay' an opportunity cost." Even if there was such a competitive disadvantage, however, the petitioners were unable to explain how that fact would provide FERC with the authority to address their claim. FERC already had rejected the position that its wholesale jurisdiction provides a basis for regulating station power. Finally, the court distinguished other orders where counsel for generators conceded that establishing a netting interval of one hour would be within FERC's jurisdiction. In those cases, the court found that FERC also could establish a netting period of one month. No such concession was made in the proceedings at issue.

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[1] Calpine Corp. v. FERC, Case No. 11-1122 (D.C. Cir. Dec. 18, 2012).

[2] Id. (quoting S. Cal. Edison Co. v. FERC, 603 F.3d 996, 1000 (D.C. Cir. 2010)).

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