

FEBRUARY 2020

VOL. 20-2

PRATT'S

ENERGY LAW

REPORT



LexisNexis

EDITOR'S NOTE: MANAGING DISPUTE RISKS

Victoria Prussen Spears

WHY MANAGING DISPUTE RISKS IN NPP PROJECTS IS IMPORTANT

Andrew McDougall, Daniel Garton, Richard Hill, Kirsten Odynski, and Dipen Sabharwal QC

AFTER SEVEN-YEAR BATTLE, FERC AUTHORIZES ANR STORAGE COMPANY TO CHARGE MARKET-BASED RATES FOR NATURAL GAS STORAGE SERVICES

James F. Bowe, Jr., and William E. Rice

COAL ASH RULE UPDATE: WILL CITIZEN GROUPS BE ABLE TO USE RCRA TO SECOND-GUESS UTILITIES' CLOSURE PLANS?Anthony G. Hopp

CLIMATE CHANGE AND RENEWABLE ENERGY IN THE MARITIME INDUSTRY

Frederick M. Lowther

THE BROAD REACH AND LIMITATIONS OF U.S. FORFEITURE LAW

Matthew J. Thomas, Jed M. Silversmith, and Dana S. Merkel

FERC APPROVES ELECTRIC STORAGE RESOURCE PRACTICES IN TWO REGIONS

Wilbur C. Earley

FERC PROPOSES TO REVISE QUALIFYING FACILITY RATES AND REQUIREMENTS

J. Daniel Skees, Mark C. Williams, Stephen M. Spina, and Joseph W. Lowell

Pratt's Energy Law Report

VOLUME 20

NUMBER 2

February 2020

Editor's Note: Managing Dispute Risks

Victoria Prussen Spears

37

Why Managing Dispute Risks in NPP Projects Is Important

Andrew McDougall, Daniel Garton, Richard Hill, Kirsten Odynski, and
Dipen Sabharwal QC

39

**After Seven-Year Battle, FERC Authorizes ANR Storage Company to Charge
Market-Based Rates for Natural Gas Storage Services**

James F. Bowe, Jr., and William E. Rice

45

**Coal Ash Rule Update: Will Citizen Groups Be Able to Use RCRA to
Second-Guess Utilities' Closure Plans?**

Anthony G. Hopp

50

Climate Change and Renewable Energy in the Maritime Industry

Frederick M. Lowther

56

The Broad Reach and Limitations of U.S. Forfeiture Law

Matthew J. Thomas, Jed M. Silversmith, and Dana S. Merkel

59

FERC Approves Electric Storage Resource Practices in Two Regions

Wilbur C. Earley

63

FERC Proposes to Revise Qualifying Facility Rates and Requirements

J. Daniel Skees, Mark C. Williams, Stephen M. Spina, and Joseph W. Lowell

67

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please email:

Jacqueline M. Morris at (908) 673-1528
Email: jacqueline.m.morris@lexisnexis.com
Outside the United States and Canada, please call (973) 820-2000

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at (800) 833-9844
Outside the United States and Canada, please call (518) 487-3385
Fax Number (800) 828-8341
Customer Service Website <http://www.lexisnexis.com/custserv/>

For information on other Matthew Bender publications, please call

Your account manager or (800) 223-1940
Outside the United States and Canada, please call (937) 247-0293

ISBN: 978-1-6328-0836-3 (print)
ISBN: 978-1-6328-0837-0 (ebook)
ISSN: 2374-3395 (print)
ISSN: 2374-3409 (online)

Cite this publication as:

[author name], [*article title*], [vol. no.] PRATT’S ENERGY LAW REPORT [page number]
(LexisNexis A.S. Pratt);

Ian Coles, *Rare Earth Elements: Deep Sea Mining and the Law of the Sea*, 14 PRATT’S ENERGY
LAW REPORT 4 (LexisNexis A.S. Pratt)

This publication is designed to provide authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of RELX Inc. Matthew Bender, the Matthew Bender Flame Design, and A.S. Pratt are registered trademarks of Matthew Bender Properties Inc. Copyright © 2020 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved.

No copyright is claimed by LexisNexis or Matthew Bender & Company, Inc., in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
www.lexisnexis.com

MATTHEW  BENDER

Editor-in-Chief, Editor & Board of Editors

EDITOR-IN-CHIEF

STEVEN A. MEYEROWITZ

President, Meyerowitz Communications Inc.

EDITOR

VICTORIA PRUSSEN SPEARS

Senior Vice President, Meyerowitz Communications Inc.

BOARD OF EDITORS

SAMUEL B. BOXERMAN

Partner, Sidley Austin LLP

ANDREW CALDER

Partner, Kirkland & Ellis LLP

M. SETH GINTHER

Partner, Hirschler Fleischer, P.C.

STEPHEN J. HUMES

Partner, Holland & Knight LLP

R. TODD JOHNSON

Partner, Jones Day

BARCLAY NICHOLSON

Partner, Norton Rose Fulbright

BRADLEY A. WALKER

Counsel, Buchanan Ingersoll & Rooney PC

ELAINE M. WALSH

Partner, Baker Botts L.L.P.

SEAN T. WHEELER

Partner, Latham & Watkins LLP

Hydraulic Fracturing Developments

ERIC ROTHENBERG

Partner, O'Melveny & Myers LLP

Pratt's Energy Law Report is published 10 times a year by Matthew Bender & Company, Inc. Periodicals Postage Paid at Washington, D.C., and at additional mailing offices. Copyright 2020 Reed Elsevier Properties SA, used under license by Matthew Bender & Company, Inc. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner. For customer support, please contact LexisNexis Matthew Bender, 1275 Broadway, Albany, NY 12204 or e-mail Customer.Support@lexisnexis.com. Direct any editorial inquiries and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway Suite 18R, Floral Park, New York 11005, smeyerowitz@meyerowitzcommunications.com, 646.539.8300. Material for publication is welcomed—articles, decisions, or other items of interest to lawyers and law firms, in-house energy counsel, government lawyers, senior business executives, and anyone interested in energy-related environmental preservation, the laws governing cutting-edge alternative energy technologies, and legal developments affecting traditional and new energy providers. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

POSTMASTER: Send address changes to Pratt's Energy Law Report, LexisNexis Matthew Bender, 121 Chanlon Road, North Building, New Providence, NJ 07974.

FERC Approves Electric Storage Resource Practices in Two Regions

*By Wilbur C. Earley**

The Federal Energy Regulatory Commission has issued orders addressing the compliance filings of two regional transmission organizations: the PJM Interconnection and Southwest Power Pool. The author of this article discusses the compliance orders.

The Federal Energy Regulatory Commission (“FERC”) in 2018 adopted a rule aimed at clearing away obstacles to participation by electric storage resources in wholesale markets administered by Regional Transmission Organizations (“RTOs”) and Independent System Operators (“ISOs”).¹ FERC has issued orders addressing the compliance filings of two RTOs: the PJM Interconnection² (“PJM”) and Southwest Power Pool³ (“SPP”). The FERC compliance orders will be of keen interest to storage resources and other market participants in PJM and SPP.

BACKGROUND

The 2018 FERC rule required each RTO to revise its tariff to establish a participation model for electric storage resources that recognizes their physical and operational characteristics. The participation models must do the following:

- Ensure that electric storage resources are eligible to provide all services that they are technically capable of providing.
- Ensure that storage resources can be dispatched and can set the wholesale market clearing price as both a wholesale seller and wholesale buyer.
- Account for the physical and operational characteristics of storage resources through bidding parameters or other means.
- Set a minimum size requirement not to exceed 100 kW for participa-

* Wilbur C. (Bud) Earley, a non-lawyer senior advisor at Covington & Burling LLP, provides analysis and advice on a wide range of federal and state energy regulatory issues, including transaction and rate issues, regional transmission organization tariffs and rules, interconnection, retail choice and demand response for electricity customers, natural gas pipelines and hydroelectric facility licenses, and LNG export authorizations. He may be reached at bearley@cov.com.

¹ For brevity, this article will use the term RTO to refer to both RTOs and ISOs.

² <https://www.ferc.gov/whats-new/comm-meet/2019/101719/E-2.pdf>.

³ <https://www.ferc.gov/whats-new/comm-meet/2019/101719/E-1.pdf>.

tion in the organized wholesale markets.

- Specify that the sale of energy from the market to a storage resource that the resource sells back to the market must be at the wholesale market clearing price.

THE PJM AND SPP COMPLIANCE ORDERS

FERC's orders on the compliance filings found that both proposals generally meet the objectives of the storage rule. FERC did find, however, that each proposal required additional provisions or clarifications and directed further compliance filings from the RTOs. Most of the compliance issues address highly technical aspects of storage operation and market participation. FERC directed PJM to take the following actions, among other things:

- Propose tariff language that specifies the three different modes of operations in which storage resources may be dispatched: continuous mode; charge mode; and discharge mode.
- Modify the tariff to more appropriately account for a storage resource's state of charge conditions through bidding parameters or other means in both its day-ahead and real-time market dispatch.⁴
- Propose tariff provisions that describe the metering and accounting practices for storage resources.
- Revise the tariff to state that PJM will not charge a distribution-connected storage resource for charging energy if the distribution utility is unwilling or unable to net out from the host customer's retail bill any energy purchases associated with the storage resource's wholesale charging activities.
- Explain how PJM's metering and accounting practices will allow for participation in retail and wholesale markets and to make any necessary tariff changes to ensure the separation and proper accounting of wholesale and retail uses.

FERC directed SPP to take the following actions, among other things:

- Remove a proposed tariff section that appears to apply to storage resources that choose to aggregate supply or provide support for that section. FERC states that resource aggregation is outside the scope of

⁴ The state of charge represents the amount of energy stored by an electric storage resource in proportion to the limit on the amount of energy that it can store, typically expressed as a percentage. The state of charge as a bidding parameter is the level of energy that an electric storage resource is anticipated to have available at the start of the market interval rather than the end.

this compliance filing because the rulemaking orders did not address the aggregation of storage or other resources.

- Include in the tariff criteria for allowing storage resources to choose to participate as supply or demand for a given market interval.
- Include a basic description of SPP’s metering methodology and accounting practices for storage.
- Explain how the tariff allows storage resources to participate in both wholesale and retail markets, or alternatively, revise the tariff to allow storage resources that provide retail services to also participate in SPP’s wholesale markets. (The tariff does not explicitly state that storage resources are allowed to participate in both retail and wholesale markets).

FERC also directed each RTO to include in its tariff the rules and practices regarding minimum run-time requirements, and initiated separate proceedings to address those requirements. The rulemaking orders required that each RTO have tariff provisions allowing a storage resource to provide all services that it is technically capable of providing. A resource is “technically capable” of providing a service if the resource can meet all of the technical, operational, and/or performance requirements that are necessary to reliably provide that service. One of those requirements is meeting the minimum amount of time a resource must “run” if it is called upon.

COMMISSIONER MCNAMEE’S CONCURRENCES

One issue that was particularly contentious in the rulemaking proceeding was whether FERC has jurisdiction to apply the rule to storage resources located on the distribution system and “behind the meter” for retail service. In the rulemaking orders, FERC held that it has exclusive jurisdiction over the wholesale markets and the criteria for participation in those markets, including market rules for participation of resources connected at distribution-level voltages or behind the meter. State regulators, utilities, and others argued that FERC does not have the authority to override existing state laws or tariff requirements that prohibit or limit a storage resource interconnected with the distribution system or behind a retail meter from directly accessing the wholesale market. This issue is now the subject of judicial review.⁵

Commissioner McNamee had dissented in the rehearing of the 2018 rulemaking order, arguing that FERC exceeded its authority in the storage rule by depriving the states of the ability to determine whether distribution-level

⁵ See *Nat’l Ass’n of Regulatory Comm’rs v. FERC*, Nos. 19-1142 and 19-1147.

storage resources may use distribution facilities so as to access the wholesale markets. The commissioner wrote a separate concurrence to each compliance order discussed here, stating that he approved the compliance filings to the extent they comply with the commission's orders adopting the rule; he also noted that the orders are pending judicial review and reiterated his view that the commission should have allowed an opt-out provision for states.