

Energy Bar Association Annual Meeting

Panel Debates Need for Changes in FERC Merger Policy

By Rich Heidorn Jr.

WASHINGTON — Should FERC should begin requiring supply curve analyses in its merger reviews? It's a no-brainer to Cynthia Bogorad, who has attempted to submit them as an intervenor challenging acquisitions.

"I've got black and blue marks to show that that ... has not been a very successful strategy, because you don't have the data or the time to get the data in [the] 60 days" allowed for filing a protest, Bogorad, a partner at Spiegel & McDiarmid, said during a panel discussion at last week's Energy Bar Association annual meeting.

"And the commission has in my experience been very reluctant to accept intervenor analysis. We've presented a strategic bidding analysis in a case that the commission just said, 'No, don't do that.' So, I think ... the commission [requiring merging companies to provide the analyses] would be very important because it's hard to get them in [evidence] otherwise."

The commission said it was considering changes in its merger policy in a September 2016 Notice of Inquiry (RM16-21). It noted that its market power evaluation for mergers, which are regulated under Section 203 of the Federal Power Act, differs from that used in market-based rate applications under Section 205. The commission asked for input on several issues, including whether it should add supply curve and market share analyses to its reviews, and whether it should require applicants to submit consultant reports and other internal reports that assess the competitive effects of the merger, as the Justice Department does. (See [FERC Considers Changes to Market Power Analyses](#).)

FERC currently requires merger applicants to perform a competitive analysis screen unless they can show that the acquisition does not increase their generation capacity in the relevant geographic markets or that the increase is *de minimis*. The screen includes a delivered price test (DPT), which has been essentially unchanged since its introduction in 1996 and generally focuses on the short-term energy market "with far less detail and attention given to the other relevant products," FERC said.



Left to right: panel moderator Eric Korman of Analysis Group, Naeve, Niefer, Bogorad and Pore. | © RTO Insider

False Positives?

Mike Naeve, a partner with Skadden, Arps, Slate, Meagher & Flom, said FERC's screening already prevents acquisitions that have no competitive harm.

"If we decide on top of that we're going to add three or four other screens ... I think there would be a lot more false positives," Naeve said. "And I also think the amount of time and money and effort to prepare and advise clients for these filings [will] go up astronomically. So, the question is: Is the current process so flawed that it needs to be fixed?"

Naeve also was not convinced that FERC needs to adopt DOJ's tools.

"As long as I've been doing this, I don't know [of] a transaction where the commission said this transaction looks fine with us ... and the DOJ, using these other methodologies and tools ... says, 'Oh, there's a problem there FERC that you missed because your methodology is too simple.' I don't think that's ever happened."

Amery Pore, an economist in FERC's Office of Energy Market Regulation, disagreed with Naeve's characterization of the potential changes, which the commission is still reviewing. The comment period in the NOI expired in December 2016.

Flexibility?

"I guess one way to read the NOI would be

to see these additional tests as extra hurdles to jump through," Pore said. "But alternatively, you could think of them as employing the flexibility that was actually considered back in 1996 when the DPT wasn't intended, when it was implemented, to be the screen to use."

"If these were alternative tools to show it really is a false positive and there aren't competitive problems, then I think we would all say that's worth doing," Naeve agreed. "But I would also say you [should not] need to do it in your application unless you have a screen failure."

Naeve said he's seen intervenors opposing mergers submit "very simplistic" supply curve analyses.

"To do it right you have to take into consideration a lot of factors ... like the [generators'] ramp rates [and] minimum run times and minimum down times; the fact that sometimes in an RTO-type market ... a transmission constraint that raises prices on this side of the constraint actually lowers prices on the [other] side of the constraint, so if you have generation there you're actually losing money. ... There's just a lot of factors [that affect] the profitability of withholding."

"That's why it's hard for intervenors to do it in the 60 days they have to protest," Bogorad replied.

Mark Niefer, deputy chief legal adviser in

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Playing the ROE Slot Machine

Industry Awaits FERC Response to Emera Remand

By Rich Heidorn Jr.

WASHINGTON — FERC's delay in responding to a 2017 appellate ruling vacating its order on New England transmission rates has created the risk of an endless series of "pancaked" rate cases, a panel told the Energy Bar Association's annual meeting last week.

The D.C. Circuit Court of Appeals' April 2017 *Emera Maine* ruling overturned FERC's 2014 order setting the base return on equity for a group of New England transmission owners at 10.57%. The court said the commission failed to adequately explain why the previous 11.14% rate was unjust and unreasonable. (See [Court Rejects FERC ROE Order for New England](#).)

"We're in a huge amount of uncertainty right now. The *Emera* decision has essentially taken everything and flipped it up into the air, and now we're all waiting to see what happens next," said **Nina Plaushin**, ITC Holdings' vice president for regulatory, federal affairs and communications. "It's as close to a thriller as you get in doing utility regulation."



In the 2014 ruling, the commission voted 4-0 to change the way it calculates ROEs for electric utilities, moving to a two-step discounted cash flow (DCF) process it has long used for natural gas and oil pipelines that incorporates long-term growth rates. But the commission split 3-1 over its first application of the new formula, tentatively setting the ROE for the New England TOs at three-quarters of the top of the "zone of

reasonableness," a departure from the prior practice that used the midpoint in the range (EL11-66-001). (See [FERC Splits over ROE](#).)

FERC rejected the TOs' argument that the commission lacked authority to change the ROE without showing it is outside the zone of reasonableness.

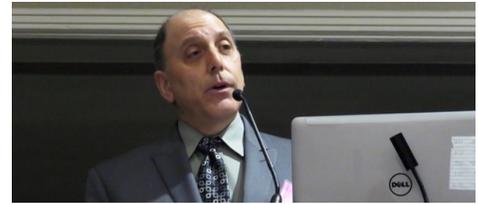
"There's no protection from being in the range [of reasonableness], so any complaint can come in and [cite] a number that's slightly lower than your number and then you're in a hearing," Plaushin said. "And that's why this *Emera* remand is so important, because we need to figure out how we're deciding what goes to hearing and what doesn't. It can't just be that I proved a number different than yours."

Customers filed new complaints even as previous ones were still pending, she noted, because of the 15-month limit on refunds under the Federal Power Act. The clock starts on the date of the utility's rate filing.

Plaushin said the zone of reasonableness can differ based on changes in interest rates and other inputs, or as utilities are added to or subtracted from the proxy group.

In June 2016, she noted, an administrative law judge determined 10.68% as the top of the range in a complaint against MISO TOs. This was little more than three months after another ALJ, ruling on the third complaint against the New England TOs, found the top of the range at 12.19%, with 10.9% as the midpoint.

"It just doesn't seem to make sense. It just has to do with the fact of when they filed. ... [New England] got lucky. They filed when there was a good number. And one of the things the commission will [have] to consid-



David E. Pomper | © RTO Insider

er is: Do you really want to get into a situation where people are trying to game their ROEs by doing multiple filings just so they can track volatility?"

David E. Pomper of Spiegel & McDiarmid, who argued the *Emera* case for Massachusetts, predicted there will be more complaints challenging rates. "I'm certain of that," he said. "There's a lot of ROEs out there that are still way above the cost of equity."

He agreed with Plaushin about the risk of a never-ending cycle of filings.

"I think that probably something we can all agree on is ... if the results of the litigation changes dramatically from case to case, there's something wrong with the way you're reaching decisions," he said. "That creates incentives to keep filing in the hope that you'll get lucky."

"The solution will be in the answer to the remand in *Emera*," Plaushin said in an interview later, acknowledging FERC's response was slowed by its loss of a quorum last year. "Hopefully that will establish better parameters, so we don't have as many serial cases."

Former FERC Commissioner Suedeen Kelly, a partner at Jenner & Block, who moderated the session, noted the increase in ROE challenges since 2011. The panel also featured Robert S. Kenney, Pacific Gas and Electric's vice president of regulated affairs, who discussed the impact of ROEs on his company's ability to adapt to distributed energy resources and protect the grid from cyber threats.

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the Justice Department's Antitrust Division, said it's important to avoid inconsistencies between DOJ and FERC reviews because the potential harm to consumers is so high.

"You're talking about markets that are tens

of billions of dollars in size, such that a very, very small exercise of market power over a very short period of time can impose harm on consumers ... that are in the tens of millions of dollars," he said. "So, my own personal preference when conducting a merger analysis [is] to tend to try to avoid false negatives rather than false positives. I just think the stakes are too high. And I think

history bears that out. If you look back at California — the exercise of market power [during the 2000-2001 [Western Energy Crisis](#)] pretty much put a damper on restructuring in the United States. ... And I think that damper still is in place."

The panel was moderated by Eric Korman, vice president of Analysis Group.