

FERC Order Offers Opening For State Aid To Power Projects

By **Seth Lucia** (April 6, 2021, 4:29 PM EDT)

On March 18, the Federal Energy Regulatory Commission issued an order^[1] providing the first significant guidance on the application of the minimum offer price rule, or MOPR, to a renewable project in PJM Interconnection LLC's territory that is eligible to receive financial support under state law.

In the order, FERC concludes that tax relief available to a solar project under a Virginia pollution control statute is excluded from the MOPR's definition of "state subsidy," because the tax relief is generally available to a range of different businesses, and is not directed at the PJM capacity market.^[2]



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The order fills in gaps from more general statements in earlier MOPR orders — and notably rejects the position of PJM and its independent market monitor, which had earlier reached the opposite conclusion after reviewing the same Virginia statute, as part of an internal PJM process to provide nonbinding guidance to market participants.^[3]

The MOPR remains controversial, and FERC may eventually enact reforms that alter the rule. In the meantime, FERC's recent order provides guidance that shows how a state statute can provide support for electric generation facilities in certain circumstances without triggering the MOPR.

State Subsidies Under MOPR

In prior orders that enacted MOPR, FERC concluded that a PJM resource (other than those eligible for certain exemptions) entitled to receive a state subsidy is subject to a minimum offer price restriction for any capacity offered by the resource in the PJM market.^[4]

The MOPR orders define "state subsidy" broadly, to include most forms of financial benefit under state law that support the development or continued operation of a capacity resource in PJM. However, FERC specifically excluded from the definition of "state subsidy" state support for general industrial development and local siting support, on the basis that such support was generally available to a variety of businesses in an area, and not "tethered to or directed at" the wholesale capacity or energy markets in PJM.^[5]

FERC also declined a request to clarify that any state, county or local property tax relief would not constitute a state subsidy under MOPR.^[6] As a result, the orders enacting the MOPR left open the

question of how FERC would approach state statutes providing tax relief to generation projects — especially when the tax relief does not expressly target industrial development or local siting support.

Tax Relief Under the Virginia Pollution Control Statute

Following the enactment of the MOPR, Hollow Road Solar LLC filed a petition with FERC for a declaratory order to confirm that state tax relief for a solar project under development in Frederick County, Virginia, would not trigger MOPR restrictions as a state subsidy.[7]

The Virginia pollution control statute does not have an industrial development purpose, and instead provides tax relief to "any property ... used primarily for the purposes of abating or preventing pollution." [8] The statute also contains provisions that specifically discuss the application of tax relief to solar facilities.

Prior to the Hollow Road proceeding at FERC, PJM and its market monitor had reviewed the same Virginia pollution control statute, and concluded that the tax relief was a state subsidy under FERC's MOPR orders. PJM and its market monitor took the view that the absence of an industrial development purpose, and the statute's provisions that refer specifically to solar facilities, defeated FERC's basic requirement that any exclusion of state support from MOPR must be generally available to a broad range of businesses and facilities.[9]

A Clearer Picture of State Support Permissible Under MOPR

In the order, FERC finds that the tax relief under the Virginia pollution control statute does not constitute a state subsidy, and is therefore not covered by MOPR. Several key aspects emerge from the order that allow FERC to reach this conclusion.

The statute applies broadly.

FERC finds that the state statute is generally available to equipment and facilities of various businesses, not just to electric generation projects. It applies broadly to a range of pollution control equipment, not just facilities involved in the generation of electric energy.

Similarly, tax relief under the statute is available to a broad range of businesses and facilities, including some entities that are not even capable of participating in PJM energy or capacity markets. Accordingly, FERC concludes that the Virginia pollution control statute is not nearly directed at or tethered to the PJM capacity market.[10]

The statute meets FERC's industrial development carveout standard.

The state statute meets FERC's analytical standard used to justify excluding industrial development and local siting support from the definition of "state subsidy" — even if the statute itself does not qualify as an industrial development statute or law promoting local siting support.

Rather than taking a restrictive view that would require a state statute to have an industrial development or local siting purpose to meet the carveout from the definition of "state subsidy," FERC clarifies that the Virginia statute meets the same analytical standard for the industrial development carveout — even if the law is not designed to promote industrial development or local siting support.[11]

The statute does not create a separate classification of property for tax purposes.

The state law's specific reference to renewable equipment does not create a separate classification of property for taxation purposes. So FERC is not troubled by the law's specific reference to solar facilities.

FERC notes that the statute in this case does not provide a solar facility with a favored property classification — and the reference to solar does not diminish the statute's general availability to equipment outside of generation facilities. Rather, according to FERC, the reference to solar equipment is part of a nonexhaustive list of sample technologies that also includes equipment unrelated to electric generation or the PJM capacity market.[12]

Allowing state support does not create a loophole.

FERC dismisses concerns that its holding in this case creates an unintended loophole in the MOPR's definition of "state subsidy."

According to FERC, its holding is consistent with the MOPR, because the definition of "state subsidy" was never intended to cover every form of state financial assistance, and the definition will continue to apply to forms of support that it was always intended to address.[13]

Why the MOPR Remains Controversial

While FERC granted Hollow Road's petition in this case, the order also shows that MOPR remains controversial, and continues to divide FERC.

For example, the order prompted a dissent from Commissioner James Danly, who characterizes his approach as a "plain text" reading. Danly concludes that the law's repeated references and specific provisions related to solar facilities disqualify the statute from being generally available, even though the statute refers to other eligible technologies outside of electric generation.[14]

Despite the continuing controversy surrounding the MOPR, the order from the Hollow Road case provides guidance to understand FERC's approach to state statutes providing support to generation projects without triggering the definition of "state subsidy" under the MOPR.

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[1] Hollow Road Solar LLC, 174 FERC ¶ 61,200 (2021) (Order).

[2] Id. at 22, 24.

[3] PJM maintains a list containing PJM's and its market monitor's nonbinding opinions of whether certain state programs are deemed a state subsidy. The state programs that PJM and the market monitor review are submitted by stakeholders.

[4] See *Calpine Corp. v. PJM Interconnection LLC*, 169 FERC ¶ 61,239 (2019), order on reh'g and clarification, 171 FERC ¶ 61,035 (2020).

[5] See *Calpine Corp. v. PJM Interconnection LLC*, 169 FERC ¶ 61,239 at PP 67-68, 83 (2019), order on reh'g and clarification, 171 FERC ¶ 61,035 at PP 106-109 (2020).

[6] *Id.* at P 109.

[7] The state statute involved in this case is the Virginia Certified Pollution Control Equipment and Facilities Section of the Virginia Code on Taxation, Va. Code Ann. § 58.1-3660.

[8] Order at P 23 (citing Va. Code Ann. § 58.1-3660 (B)).

[9] *Id.* at P 10.

[10] *Id.* at PP 22-24.

[11] *Id.* at PP 11, 28.

[12] *Id.* at PP 23, 26.

[13] *Id.* at P 29.

[14] *Id.*, (Danly, Comm'r, dissenting at PP 2-4).