

INSIGHTS

FERC Proposes Policy Statement Encouraging RTOs/ISOs to Develop Rules Incorporating State Determined Carbon Prices

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On October 15, 2020, the Federal Energy Regulatory Commission (“FERC” or the “Commission”) issued a [Proposed Policy Statement](#) regarding carbon pricing in organized wholesale electricity markets.

In short, the statement would clarify that the Commission has “jurisdiction over RTO/ISO market rules that incorporate a state-determined carbon price.” The Commission also proposes that it be Commission policy “to encourage efforts to incorporate a state-determined carbon price in RTO/ISO markets.” Commissioner Danly dissented in part, agreeing that FERC has jurisdiction “to entertain section 205 filings that seek to accommodate state carbon-pricing policies, which is a fundamental principle that cannot be doubted,” but describing the issuance of a policy statement “unnecessary and unwise.”

Comments are due by November 16, 2020 (reply comments are due by December 1, 2020).

Background and Technical Conference. The Commission held a technical conference on September 30, 2020 that ultimately gave rise to this policy statement. During that conference, many more stakeholders across the regulated community supported a robust approach to carbon pricing than those that rejected it. Notably, environmental groups were absent from the discussions. This can likely be explained by the groups’ general displeasure with the Commission (and its active role in approving pipelines) as well as a lack of enthusiasm for carbon pricing as an alternative to command and control regulation. Nevertheless, the general support for carbon pricing at the conference was probably helpful to Chairman Chatterjee, who has shown an interest in making FERC a relevant player in the carbon pricing field.

FERC Jurisdiction. With respect to jurisdiction, the Commission clarified that “wholesale market rules that incorporate a state-determined carbon price in RTO/ISO markets can fall within the Commission’s jurisdiction as a practice affecting wholesale rates.” Relying on *FERC v. Elec. Power Supply Ass’n*, 136 S. Ct. 760 (2016), the Commission explained that the facts and

circumstances of any specific filing made pursuant to section 205 of the Federal Power Act (FPA) will determine the Commission's jurisdiction. To exercise jurisdiction, the Commission must determine (a) that the activity directly affects wholesale rates and (b) that the regulation of the activity is not reserved exclusively to the states pursuant to FPA section 201(b). The Commission concluded that incorporation of state-determined carbon prices into RTO/ISO markets can satisfy both of these standards.

Commissioner Danly suggested the Proposed Policy Statement presumes too much in the abstract without a proposal from an RTO/ISO. He described the proposal as "a non-binding, blanket dismissal of potential jurisdictional concerns," to which the Commission replied it is simply "proposing a framework for applying [its] jurisdiction, not ... preemptively dismissing potential jurisdictional concerns." (internal quotations omitted)

Encouraging Efforts to Incorporate State-Determined Carbon Prices. Referencing insights gleaned from the September 30, 2020 technical conference, the Commission proposes to "encourage" efforts to incorporate a state-determined carbon price into RTO/ISO markets. FERC noted that participants at the conference identified various benefits that could arise from such incorporation, including development of technology-neutral, transparent price signals and providing greater market certainty to attract investment. In the Commission's view, states have taken the lead in efforts to address climate change through, among other policies, putting a price on Carbon – the Commission noted that 11 states "impose some version of carbon pricing." Thus, the Commission sees its role as encouraging the smooth incorporation of state policies on carbon pricing into the organized, wholesale markets.

Considerations for Evaluation of Section 205 Proposals. The Commission specifically seeks comments addressing the below questions related to what may be germane to the Commission's evaluation of section 205 filings related to carbon pricing.

- How, if at all, do the relevant market design considerations change depending on the manner in which the state or states determine the carbon price (e.g., price-based or quantity-based methods)? How will that price be updated?
- How does the FPA section 205 proposal ensure price transparency and enhance price formation?
- How will the carbon price or prices be reflected in LMP?
- How will the incorporation of the state-determined carbon price into the RTO/ISO market affect dispatch? Will the state-determined carbon price affect how the RTO/ISO co-optimizes energy and ancillary services? Are any reforms to the co-optimization rules necessary in light of the state-determined carbon price?
- Does the proposal result in economic or environmental leakage? How does the proposal address any such leakage?

