Decision Creates Uncertainties

Federal Appeals Court Ruling Delays Course Of Cogeneration Plans with Electric Utilities

By William F. Cockrell and J. Daniel Hall

COGENERATORS and electric utilities are carefully considering the implications of a recent decision of the United States Court of Appeals for the District of Columbia.

The decision, American Electric Power Service Corporation vs. FERC ("American Electric"), invalidated the Federal Energy Regulatory Commission's (FERC) "full avoided cost" rule. The rule requires the states to set rates for purchases of electricity from a qualifying cogenerator or small power producer facility built after the enactment of the Public Utility Regulatory Act of 1978 (PURPA) and the Federal Power Act, as amended and added to by Section 210 of PURPA.

The Court of Appeals upheld the remaining two of the challenged provisions:

- A rule allowing a cogenerator to engage in a "simultaneous purchase and sale" by which the utility is deemed to have purchased all of the cogenerator's power, including that used by the cogenerator for its own power production, and to have sold back to the cogenerator the power used by the cogenerator internally.

- A FERC decision not to invoke use criteria in determining whether cogenerators are qualifying facilities under PURPA. (The commission had decided against limiting oil- and gas-fired cogeneration facilities.)

Despite the court's opinion, the FERC's full avoided cost and interconnection rules legally remain in effect. The FERC has filed a petition with the court for a rehearing, an action which stays any order or mandate implementing the court's Jan. 22 opinion.

American Electric represents a victory for electric utility companies. The decision may generate considerable uncertainty among state regulatory bodies in the process of reviewing electric rates to cogenerators.

Utility commissions may well defer their review until FERC reinterprets its rules or legal appeals are available. (Recently the government filed a petition for reconsideration of the ruling.

Cogenerators are confronted with considerable uncertainty as to economic projections for cogeneration projects that they can no longer assume that rates charged to utilities which purchase power from them pursuant to PURPA will be 100 percent of the avoided costs. In fact, it seems clear that under the American Electric decision, there will be less than 100 percent of avoided costs. Consequently, cogenerators must reassess present financial and contractual positions regarding interconnection arrangements with utilities.

American Electric was brought by a group of electric utilities who challenged the advantage given to cogenerators and small power producers under four FERC rules implementing Section 210 of PURPA (which addresses cogeneration issues).

Another Ruling

In addition to vacating the full avoided cost rule the Court of Appeals overturned a regulatory provision which gives a blanket grant of authority to cogenerators to "interconnect" with utilities without meeting certain procedural requirements designed to ensure utilities under the Federal Power Act, as amended and added to by Section 210 of PURPA.

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