DOCKETED

Docket Number:	16-RGO-01
Project Title:	Regional Grid Operator and Governance
TN #:	211357
Document Title:	Presentation on Legal and Regulatory Background for ISO Regional Governance by Dan Shonkwiler 5-6-16
Description:	N/A
Filer:	Misa Milliron
Organization:	California ISO
Submitter Role:	Public Agency
Submission Date:	5/4/2016 9:42:05 AM
Docketed Date:	5/4/2016

California ISO

Legal and Regulatory Background for ISO Regional Governance

Dan Shonkwiler
Lead Counsel

California Energy Commission
Workshop on ISO Regional Governance
May 6, 2016

The purpose of this presentation is to provide a common legal foundation for discussing governance of a regional ISO.

- Key concepts, issues and precedents
  - Citations at the bottom of the page

- Help identify when additional information or legal analysis may be necessary
  - Will not attempt to locate outer legal boundaries

Four issues are commonly raised in governance proposals and in questions to the ISO.

- Current California statutes regulating ISO governance
- FERC authority over ISO governance
- Section 205 of the Federal Power Act
  - Sharing authority over market rules
- The ISO's tax-exempt status

Current California Statutes Regulating ISO Governance

The California Public Utility Code currently governs selection of the ISO Board.

- Appointed by the Governor subject to confirmation by the Senate

- Section 337 repealed in SB 350 if new governance structure enacted
  - Impact studies
  - Public workshop on studies and proposed governance
  - Governor transmits plan and studies to Legislature for consideration

Cal. Pub. Util. Code §§ 337 & 359.5

FERC Authority over ISO Governance

The ISO may need to demonstrate compliance with certain FERC requirements.

FERC regulates aspects of ISO governance:

- Independence
- Responsiveness of overall governance
- Exercise of section 205 rights (next section)

Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 (1996); Order No. 2000, 65 Fed. Reg. 809 (Jan. 6, 2000), FERC Stats. & Regs. ¶ 31,089 (1999)

FERC also regulates ISO rates, and thus any ISO funding for a committee of state regulators.

- Funded Through Tariff
  - New England States Committee on Electricity
  - Organization of PJM States
- Funded Through Budget
  - Organization of MISO States
  - Southwest Power Pool – Regional States Committee

- Consumer Advocates of PJM States

112 FERC ¶ 61,049 (2005) and 121 FERC ¶61,105 (2007) (NESCOE), 113 FERC ¶ 61,292 (2005) (Organization of PJM States), and 154 FERC ¶ 61,147 (2016) (Consumer Advocates of PJM States)

ISO and RTO governance must be independent of market participants.

- Financial independence
  - ISO, employees and non-stakeholder governors may not have a financial interest in any market participant

- Decision making process must be independent
  - May not be controlled by any market participant or class of market participants

Codified in 18 C.F.R. § 35.34(j)

FERC requires that ISO/RTO governance must be responsive to customers and stakeholders.

- Inclusiveness
  - “[A]ny customer … affected” must be “permitted to communicate its views to the ... board of directors.”
- Fairness
  - “[T]he interests of customers …” must be “equitably considered and “consideration of ... issues [may] not be dominated by any single stakeholder category.”
- Minority positions must be presented to board
- Continuing responsiveness
  - “Mechanisms to … ensure that information exchange and communication [with stakeholders] continue over time.“

Order No. 719, 73 Fed. Reg. 64100 (Oct. 28, 2008), FERC Stats. & Regs. ¶31,281 (2008); codified in 18 C.F.R. § 35.28(g)(6)

The D.C. Circuit's 2004 decision about ISO governance indicates that FERC may regulate these subjects.

- FERC order specified a process to select ISO board
- Court held board selection is outside FERC's authority
  - Not a rate or term of service within section 206
- Court also observed in dicta
  - "If FERC concludes that CAISO lacks the independence or other necessary attributes to constitute an ISO for purposes of Order No. 888, then it need not approve CAISO as an ISO."
- FERC can reject ISO filings for lack of independence

California ISO v. FERC, 372 F.3d 395, 397 (D.C. Cir. 2004)

Section 205 of the Federal Power Act

Proposals to share responsibility for certain market rules with state regulators implicate section 205 of the Federal Power Act.

- Overview of section 205
- Examples
  - Southwest Power Pool
  - Midcontinent Independent System Operator

"Section 205" is 16 U.S.C. § 824d.

Section 205 allows utilities to select their rates from within the range of reasonable rates.

- “Rates” include all terms and conditions of service
- The utility decides which rates to file
- FERC must accept if just and reasonable
- FERC is not authorized to dictate rates within the lawful range

See generally Atlantic City Elec. Co. v. FERC, 295 F.3d 1, 9-11 (D.C. Cir. 2002)

Section 205 provides the filing utility more authority than a party that files a complaint under Section 206.

- Any person may file a complaint under Section 206
- FERC may grant the complaint and block rates only if rates are proven unjust or unreasonable
- Section 206 does not confine a utility’s choice of rates within the just and reasonable range

“Section 206” is 16 U.S.C. § 824e

FERC regulates how public utilities exercise their section 205 rights.

- Rejected section 205 filing that state commission ordered the utility to submit at FERC
  - *Massachusetts Dep't of Public Utilities v. FERC*, 729 F.2d 886 (1st Cir. 1984)
- Order 2000 imposes a condition
  - "RTOs, in order to ensure their independence from market participants, must have the independent and exclusive right to make section 205 filings …"
  - But indicates FERC can be flexible: "the Commission will entertain other approaches so long as they ensure the independent authority of the RTO to seek changes …"

Codified in 18 C.F.R. 35.34 (j)(1)(iii)

The Southwest Power Pool's Regional States Committee has authority to set policy in certain areas.

- Includes one representative from each state commission
- When a majority approves a proposal, RSC directs SPP to file the proposal at FERC
- SPP may include its own alternative proposal
- SPP has never done this
- If the RSC does not approve a policy, SPP may file its own proposal in the RSC subject areas, and has done so

Southwest Power Pool, Inc., 108 FERC ¶61,003 (2004), on reh'g, 110 FERC ¶61,138; SPP Bylaws § 7.2

The RSC has "primary responsibility" for determining regional proposals and the transition process on matters of transmission cost allocation.

- Whether and to what extent participant funding will be used for transmission enhancements
- Whether license plate or postage stamp rates will be used for the regional access charge
- FTR [i.e., CRR] allocation, where a locational price methodology is used
- The transition mechanism to be used to assure that existing firm customers receive FTRs equivalent to the customers' existing firm rights

"Transition process" refers to 2004 transition to RTO

In addition, the RSC determines policy for additional transmission cost allocation issues as well as resource adequacy.

- The approach for resource adequacy across the entire region
- Whether transmission upgrades for remote resources will be included in the regional transmission planning process
- The role of transmission owners in proposing transmission upgrades in the regional planning process

The Organization of MISO States has similar authority over cost allocation for new transmission projects.

- Excludes baseline reliability projects
- Different process and mechanism than SPP
  - OMS may direct MISO to begin a stakeholder process to review proposed changes to cost allocation methodology
  - A commissioner may co-chair the stakeholder process
  - MISO need not file any changes
  - If MISO does file a change, OMS may direct MISO to file an OMS alternative if 66% of members approve

Midwest Independent Transmission System Operator, Inc., 143 FERC ¶ 61,165 (2013); MISO Tariff, Appendix K

The ISO’s Tax-Exempt Status

The ISO may seek a ruling from the IRS about the effect of proposed governance changes on its tax-exempt status.

- ISO working with outside tax counsel
- ISO assets are irrevocably dedicated to charity
- Changes to governance could affect current exempt status
- To obtain a ruling or other form of comfort from the IRS, a governance proposal would need to be complete and final

Questions?