

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

State Policies and Wholesale Markets
Operated by ISO New England Inc.,
New York Independent System
Operator, Inc., and PJM
Interconnection, L.L.C.

Docket No. AD17-11-000

POST-TECHNICAL CONFERENCE REPLY COMMENTS OF TAPS

The Transmission Access Policy Study Group (“TAPS”) appreciates the opportunity to reply to post-technical conference comments in this docket.

A. The Commission Should Not Impose a One-Size-Fits-All Solution or Set a Deadline for the Eastern RTOs to Act

With the exception of a handful of commenters, the post-technical conference comments counsel against imposing a “one-size-fits-all” solution.¹ TAPS agrees. As TAPS has noted,² ISO-NE, NYISO, and PJM (collectively, “eastern RTOs”) are each in a different place with respect to the issues they face, the urgency of those issues, and the status of efforts to address them. This dissimilarity of circumstances renders attempts to reconcile state policies with eastern RTO market designs particularly ill-suited to a top-down, cookie-cutter solution.

¹ See, e.g., Post-Technical Conference Comments of the NYISO at 3; Post-Technical Conference Comments of Dominion Energy Servs. at 5 (“Dominion”); Initial Post-Technical Conference Comments of Indep. Power Producers of N.Y. at 10 n.25; Post-Technical Conference Comments of Am. Elec. Power Co. & the Dayton Power & Light Co. at 3 (“AEP/Dayton”); Initial Post-Technical Conference Comments of Avangrid at 7; Initial Post-Technical Conference Comments of the Am. Wind Energy Ass’n at 7 (“AWEA”); Initial Comments of Nat’l Rural Elec. Coop. Ass’n at 3, 10 (“NRECA”); Post-Technical Conference Comments of Am. Mun. Power at 12 n.23 (“AMP”); Post-Technical Conference Comments of Duquesne Light Co. at 7 (“Duquesne”).

² Post-Technical Conference Comments of TAPS at 1 (“TAPS Initial Comments”).

For the same reason, the Commission should not impose an artificial deadline by which the eastern RTOs must file proposals to address state policies, as some commenters urge.³ An arbitrary deadline would truncate stakeholder processes already underway, and inevitably would result in proposals that lack meaningful input from and vetting by states and stakeholders. Such premature proposals would spur protracted litigation and intensify, rather than alleviate, regulatory uncertainty.

B. There is Significant Support for a Path 1 Approach

Contrary to attempts during the conference to dismiss Path 1 as extreme, a substantial number of commenters indicated support for scaling back or eliminating minimum offer price rules (“MOPRs”).⁴ Such broad support among various industry stakeholders makes clear that there is nothing “extreme” about Path 1. Rather, as many commenters note, Path 1 would serve the Commission’s resource adequacy objectives in a manner that respects state and local policies, appropriately recognizes the contributions of states and load-serving entities (“LSEs”) to resource adequacy, and avoids penalizing customers by making them pay twice to meet the same resource adequacy need.

³ See, e.g., Initial Post-Technical Conference Comments of PJM at 12 (“PJM”); Duquesne at 7; Post-Technical Conference Comments of Dynegy at 4-5 (“Dynegy”); Post-Conference Technical Comments of Elec. Power Supply Ass’n at 14 (“EPSA”).

⁴ See, e.g., Comments of the N.Y. Power Auth. at 1; Post-Technical Conference Comments of the N.Y. State Pub. Serv. Comm’n at 7-8 (“NYPSC”); Post-Technical Conference Comments of the Md. Pub. Serv. Comm’n at 10-11 (“Md. PSC”); Am. Pub. Power Ass’n Post-Technical Conference Comments at 9 (“APPA”); AMP at 4; Initial Comments of Old Dominion Elec. Coop. at 2 (“ODEC”); Post-Technical Conference Comments of the Nuclear Energy Inst. at 6-7; Post-Technical Conference Comments of the PSEG Cos. at 9; Post-Conference Comments of Cliff Hamal at 3-4; Post-Technical Conference Comments of Michael Panfil, Env’tl. Def. Fund at 13-14 (“EDF”); Post-Technical Conference Comments of Sierra Club at 8.

C. There is Widespread Recognition that Bilaterals Can Achieve Resource Adequacy While Satisfying State Policy Goals

Many commenters recognize the importance of self-supply and long-term bilateral arrangements as mechanisms for achieving resource adequacy while meeting state policy goals. PJM, for example, urges the Commission (at 11) to require that RTO proposals to address state policy initiatives “[r]ecognize that established business models (such as the public power business model) and established state regulatory processes (such as cost of service regulation) should continue to be respected and accommodated.” According to AEP/Dayton (at 5-6), “an approach that allows primary reliance on self-supply and bilateral purchase of capacity, and uses the RTO capacity market as a source of supply for residual capacity needs, is appropriate,” and is among those under consideration in the early stages of the PJM dialogue on a market design that appropriately values all resources while accommodating state public policy goals.⁵

Claims that restrictive eastern RTO capacity constructs are needed to protect load are ill-founded. The PJM Independent Market Monitor’s assertion that bilateral markets “expose all participants to market power,” and its suggestion that all load should

⁵ See also Initial Post-Technical Conference Comments of the Eversource Cos. at 8 (bilaterals, including self-supply, should be allowed to obtain a capacity supply obligation and should not be subject to the MOPR); Post-Technical Conference Comments of James F. Wilson at 2-3 (“Wilson”) (RTOs should shift away from existing eastern RTO administrative capacity constructs, and “err on the side of less not more MOPR intervention in the near term”); Joint Initial Post-Technical Conference Comments of Clean Energy Indus. at 3 (bilateral contracts “are essential parts of competitive markets in most industries” and should be respected by the Commission); APPA at 2, 7-9 (recommending “transition from mandatory capacity markets to a voluntary residual market, with a greater reliance on bilateral procurement and the ability to self-supply”); AMP at 4-7 (recommending transition to bilateral construct with residual auctions); NRECA at 5-6 (footnote omitted) (“consumers will fare better in competitive wholesale power markets where [LSEs] can first meet their requirements through voluntary measures such as long-term, bilateral contracts, and then turn to the RTO-administered capacity and energy markets for residual needs”); Post-Technical Conference Comments of the E. New England Consumer-Owned Sys. at 4 (“ENECOS”) (urging restoration of self-supply in ISO-NE); Post-Technical Conference Comments of Ne. Pub. Power Ass’n at 4 (“NEPPA”) (advocating reinstatement of self-supply in ISO-NE’s capacity market, allowing long-term bilateral contracts between load and resources, and transition to a voluntary capacity market).

therefore be forced into a mandatory capacity market construct of its design, is paternalistic and self-aggrandizing.⁶ We strongly disagree that eastern RTO capacity constructs, with their MOPRs and inability to integrate state and local policies, are better for us than the structure we want—i.e., bilateral arrangements, supplemented by a residual auction.

The Commission has recognized that long-term bilaterals “are an important element of a functioning electric power market,” and that “[b]oth buyers and sellers should be able to create portfolios of short-, intermediate-, and long-term power supplies to manage risk and meet customer demand.”⁷ As Xcel Energy Services explains, bilateral markets are competitive and currently work well in many regions.⁸ Competitive bidding processes are often used; and for long-term arrangements, the LSE option to self-build provides a backstop against the exercise of generator market power.⁹ Most importantly,

⁶ Comments of the Indep. Mkt. Monitor for PJM at 2.

⁷ Wholesale Competition in Regions with Organized Elec. Mkts., Order No. 719, 73 Fed. Reg. 64,100, P 278 (Oct. 28, 2008), FERC Stats. & Regs. ¶ 31,281 (2008) (subsequent history omitted).

⁸ Comments of Xcel Energy Servs. at 5-6 (“Xcel”). Indeed, the Commission’s decision to eliminate cost-based ratemaking and grant market-based rate authority to almost all wholesale generators pre-dates the creation of RTOs and was premised on the Commission’s conclusion that generators that lack market power in short-term markets also lack market power in long-term bilateral markets. *See* Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities, Order No. 697, 72 Fed. Reg. 39,904, P 122 (July 20, 2007), FERC Stats. & Regs. ¶ 31,252 (2007), *on reh’g*, Order No. 697-A, 73 Fed. Reg. 25,832, PP 279-280, 285 (May 7, 2008), FERC Stats. & Regs. ¶ 31,268 (2008) (rejecting requests to generically alter indicative screens or the delivered price test (“DPT”) for market power to allow different product analyses for short-term versus long-term power, with the result that sellers that pass the screens/DPT are allowed to sell at market-based rates in the long-term without any examination of whether they possess market power from a long-term power perspective) (subsequent history omitted). If that premise is invalid, broader changes to protect consumers from generator market power are needed.

⁹ Xcel at 5. *See* Order No. 697-A, P 279 (“Even if a seller is found to have market power in the short-term, that market power can be mitigated or eliminated [in long-term markets] by the meaningful opportunity for other sellers to enter the market in order to compete with the seller and drive down prices.”). *See also id.* P 285 (buyer access to bid-based, short-term RTO markets subject to Commission-approved mitigation will discipline a seller’s attempt to exercise market power in long-term contracts).

the bilateral market enables LSEs to buy the products they actually want—taking into account preferences for long-term price certainty, fuel diversity, environmental attributes, scarcity, and other factors that cannot be satisfied by the uniform short-term capacity product offered by RTO markets.¹⁰

D. Commenters that Claim Preemption of State Policies or a Strong MOPR are Needed to “Protect” the Market Actually Seek Dramatic Changes to the Market

RTO markets were created and have operated for years against a backdrop of existing state policies and programs, as well as wide-ranging federal subsidies benefiting certain resources and fuels.¹¹ Commenters arguing state policies should now be preempted, or that state-favored resources should be subject to a strong MOPR in order to “protect” markets, are actually asking the Commission to fundamentally change those markets.¹² They propose radical intervention: that environmental and other policies be treated as something for the Commission to mitigate,¹³ and that the Commission use its rate authority to favor certain types of resources by re-writing or negating state policies and programs, contrary to the Federal Power Act’s respect for states.

Notwithstanding their significant administrative, non-market characteristics, eastern RTO capacity markets should be flexible enough to co-exist with state policies

¹⁰ See Clean Energy Indus. at 2.

¹¹ TAPS Initial Comments at 11; ENECOS at 5-6; Post-Technical Conference Comments of the Solar Energy Indus. Ass’n at 5-6 (incentives and subsidies exist for all types of generators); Pre-Technical Conference Statement of Jennifer Chen, Sustainable FERC Project at 2-3.

¹² See Comments of the Nat. Gas Supply Ass’n at 4 (“NGSA”); Comments of Invenergy at 9-11 (“Invenergy”); Dynegy at 2-3; Post-Technical Conference Comments of Calpine Corp. at 4-5 (“Calpine”); Initial Post-Technical Conference Comments of LS Power Assocs. at 1 (“LS Power”); NRG Energy Comments at 7 (“NRG”).

¹³ See, e.g., Comments of Rob Gramlich, Grid Strategies at 3-4, 6 (“Gramlich”) (public policy has been treated as exogenous, “not something for the Commission to mitigate or undo”).

and federal subsidies without such extreme measures.¹⁴ Even Invenergy and NRG—both of which recommend Path 5 and expanded MOPRs, but own generation that benefits from certain state renewable policies—argue that there is no need for the Commission to interfere with those particular policies, because they are compatible with existing markets.¹⁵ Their gerrymandered recommendations implicitly concede that eastern RTO capacity markets can function and provide efficiency benefits while respecting public policies, highlighting the extent to which their position is driven by administrative rent-seeking, rather than the desire to protect competitive market fundamentals.

The bulk of commenters supporting Path 5 or its even more extreme variant (“a sixth path”—i.e., that the Commission “preempt and wholly reject” state actions¹⁶) represent natural gas interests¹⁷ and seek market changes to shield their investments from consumer preferences and the normal operation of supply and demand forces in the face of oversupply. Consumer and state policy decisions have been moving toward renewable resources and carbon reduction, and large investments have been made to meet that demand. Commenters supporting preemption of state policies and expanded MOPRs nevertheless want the Commission to force consumers to pay top dollar to buy their generation instead—even if those consumers are already contributing their fair share of capacity resources through bilaterals and self-supply. The so-called “robust buyer-side

¹⁴ See Wilson at 5 (markets are not so fragile that they need to be protected from every state action); Gramlich at 2 (“Prices have been deemed just and reasonable even when public policies affected them.”).

¹⁵ Invenergy at 4, 8; NRG at 8-9, 12.

¹⁶ NGSA at 4 (urging the Commission “to select a sixth path . . . to preempt and wholly reject actions that intrude on and harm the wholesale power market”).

¹⁷ For example: Invenergy, Dynegy, Calpine, LS Power, NGSA, Competitive Power Ventures, NRG.

mitigation mechanisms” that Dynegy envisions (at 4) have nothing to do with mitigating buyer-side market power, and everything to do with revising market rules to benefit certain generators that do not deliver the environmental and other attributes that many consumers and states want.

The Commission should reject this approach. It would fundamentally undermine state sovereignty—which states in the proceeding strongly protest¹⁸—and depart from federalism principles underlying the FPA.¹⁹ It will also burden businesses and consumers by forcing them to pay twice to meet the same capacity need.²⁰ And it would fuel oversupply by artificially elevating auction clearing prices and funneling auction revenues to particular types of generation, even when ample capacity is available from lower cost sources.²¹ Instead, as urged by many commenters, buyer-side market

¹⁸ See, e.g., Post-Technical Conference Comments of Conn. Dep’t of Energy & Envtl. Prot. at 3, 15 (“CT DEEP”); Md. PSC at 4-5, 10-11, 14-15; NYPSC at 5-6 (the Commission should ensure that electric wholesale markets harmonize with state policies that advance legitimate state interests).

¹⁹ TAPS Initial Comments at 5; Md. PSC at 14-15; Post-Technical Conference Comments of NRDC & Sustainable FERC Project at 10; AWEA at 4; Clean Energy Indus. at 2; CT DEEP at 3; EDF at 13; Post-Technical Conference Comments of Exelon Corp. at 2 (“Exelon”).

²⁰ Post-Technical Conference Comments of the Am. Forest & Paper Ass’n at 3 (Path 5 is “punitive to ratepayers”); *id.* at 7-8 (any market reforms should “accommodate orderly entry of new resources into the market to avoid having consumers pay twice to support duplicative capacity”); Comments of the PJM Indus. Customer Coal. (“Subsidized resources should clear the capacity market so that consumers that are saddled with the additional costs of these resources should not lose their capacity value; in other words, consumers should not be required to pay twice for capacity.”); NEPPA at 3 (under the MOPR, “[n]ot-for-profit entities and others who would otherwise be interested in developing resources now risk having to pay twice for capacity—once for the resource they have financed, and once for resources selected by the market if the owned resource fails to clear”); APPA at 12 (“an expanded MOPR also increases the risk of overbuilding and double-payment for capacity”); ODEC at 3 (urging the Commission to “ensure against load paying twice for capacity”).

²¹ The D.C. Circuit’s recent decision in *NRG Power Marketing, LLC v. FERC*, No. 15-1452 (July 7, 2017) (“Slip Op.”), includes background on how MOPRs work, but it did not address the substantive merits of either the MOPR exemptions originally proposed by PJM, or the MOPR exemptions ultimately required and approved by the Commission in that case. The court’s introductory dicta should not be over-read. It warns that bids reflecting state subsidies may result in lower short-term clearing prices, which in turn “may reduce the supply of electricity in the long run.” Slip Op. at 5-6. But those effects—lower clearing prices and resulting long-term reductions in supply—will only occur if there is an existing oversupply condition;

mitigation should be limited to addressing buyer-side market *power*²²—not treated as a general license to set administered prices for all existing and new resources.

E. Calls for Major Changes to RTO Energy Markets are Premature

Some commenters recommended that the Commission “solve” eastern RTO *capacity* market problems by making major changes to RTO *energy* markets.²³ TAPS urges caution.²⁴ Changes that alter or undermine the basic economic principles underlying RTO energy markets could destroy their efficiency benefits.²⁵ In any event, such changes would not resolve the core issue of the interplay of state policies and RTO markets—the focus would simply be shifted from capacity to energy markets.²⁶

The record of this proceeding does not support major generic changes to RTO energy markets. For example, it is unclear how the various new attributes discussed at the

and they are exactly what basic economic theory states *should* occur in oversupply conditions to bring a market back into equilibrium.

The Court’s dicta referring to the impact of state subsidies on generator bids and characterizing such bids as “below-cost” (*id.*) also fails to take into account the complicating factors developed in the record of this proceeding—for example, the pervasiveness of state and federal subsidies (*see, e.g.*, comments cited *supra* note 11); the failure of eastern RTO capacity markets to recognize the negative externalities produced by some generators, or to compensate generators for critical attributes that state policymakers, consumers, and market participants value (e.g., fuel diversity, resilience, and environmental attributes); and the adverse impacts of the MOPR in terms of forcing oversupply and burdening consumers and businesses with double-payment to meet the same capacity need. As a result, the court’s reference to “below-cost bid[s]” overlooks key factors affecting the actual cost of generation. Slip Op. at 5-6.

²² *See, e.g.*, NYPSC at 8-9; Dominion at 3; Gramlich at 6; Exelon at 10-11.

²³ *See, e.g.*, Invenergy at 6-9; NRG at 15-17; Post-Technical Conference Comments of Andrew G. Place, Pa. Pub. Util. Comm’n at 2-3; Post-Technical Conference Comments of Shell Energy at 6-12, 14; EPSA at 10-12.

²⁴ *See* TAPS Initial Comments at 1 n.1 (noting energy markets generally work well).

²⁵ *See, e.g.*, Pre-Technical Conference Statement of William W. Hogan at 2 (a short-term market design based on bid-based, security-constrained, economic dispatch with locational prices and financial transmission rights “is the only way to organize a short-term electricity market that adheres to the principles of open access and non-discrimination,” and calls for market changes to address increasing out-of-market interventions should not conflate short-run operations and long-run investments).

²⁶ *See, e.g.*, Calpine at 3 (opposing ability of subsidized units to participate unmitigated in energy markets).

conference and in comments—e.g., “fuel diversity,” “resilience,” or resource “flexibility”—would be defined, measured, and compensated in energy markets. It is also unclear how locational marginal pricing principles could be reconciled with suggestions that energy prices be propped-up to address increasing amounts of renewable generation with zero marginal cost. The key advantage of markets is their ability to generate efficient outcomes from the rational, self-interested decisions of large numbers of producers and consumers, whose individual preferences are revealed by their observed behavior. Modifications that second-guess individual market participant decisions, substitute administered offer prices for revealed preference, or deviate from marginal cost/marginal benefit principles, undermine RTO energy markets by making them less transparent and by introducing new inefficiencies, undue discrimination, and opportunities for manipulation and exercise of market power. The Commission should not initiate consideration of such actions that risk sacrificing the benefits of efficient pricing.

The Commission should exercise particular caution because energy market changes geared toward addressing eastern RTO capacity market defects may have unanticipated impacts if applied in other regions where LSEs have retained an obligation to serve and/or to bring adequate resources to the grid. To date, energy market price formation reforms have applied to all RTO energy markets,²⁷ and the Commission has

²⁷ Settlement Intervals & Shortage Pricing in Mkts. Operated by Reg’l Transmission Orgs. & Indep. Sys. Operators, Order No. 825, 81 Fed. Reg. 42,882 (June 30, 2016), FERC Stats. & Regs. ¶ 31,384 (2016); Offer Caps in Mkts. Operated by Reg’l Transmission Orgs. & Indep. Sys. Operators, Order No. 831, 81 Fed. Reg. 87,770 (Dec. 5, 2016), FERC Stats. & Regs. ¶ 31,387 (2016). *See also* Uplift Cost Allocation & Transparency in Mkts. Operated by Reg’l Transmission Orgs. & Indep. Sys. Operators, 82 Fed. Reg. 9539 (proposed Feb. 7, 2017), FERC Stats. & Regs. ¶ 32,721 (proposed 2017).

sought to maintain consistency between RTO energy markets to reduce seams issues.²⁸ Before new, broadly applicable price formation changes are considered, they must be carefully scrutinized for unintended consequences and likely impacts.

Finally, RTOs are still in the process of implementing the rules that resulted from the energy market price formation rulemaking proceedings, and pending NOPRs propose additional changes. At minimum, the Commission should complete its evaluation of already-proposed changes and allow any rules that emerge from that process to be implemented, with their impacts evaluated, before considering more changes.

Respectfully submitted,

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July 14, 2017

²⁸ See Order No. 831, PP 15, 39, 41.