

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

Refinements to Policies and Procedures  
for Market-Based Rates for  
Wholesale Sales of Electric Energy,  
Capacity and Ancillary Services by  
Public Utilities

Docket Nos. RM14-14-000

**COMMENTS OF THE  
TRANSMISSION ACCESS POLICY STUDY GROUP**

The Transmission Access Policy Study Group (“TAPS”) submits the following comments in response to the June 19, 2014, Notice of Proposed Rulemaking (“NOPR”) in the above-captioned proceeding.<sup>1</sup> TAPS appreciates the Commission’s concern with reducing the administrative burden on the Commission and public utilities that have or seek authorization to sell at market-based rates (“MBRs”). NOPR P 10. The critically important countervailing consideration is that in regulating MBR authority, the Commission must continue to safeguard consumers from the exercise of market power and other anticompetitive harm. Thus, while TAPS does not oppose the vast majority of the modifications proposed in the NOPR, TAPS raises the following concerns.

- TAPS urges the Commission to not eliminate the submission of indicative screen information for purposes of assessing horizontal market power in RTO regions. The Commission should not eliminate the reporting of important information on market concentration and seller market power at a time of unprecedented change in the industry. To the extent the market mitigation measures now in place may be effective to mitigate market power today, that may not true going forward, and the Commission should not blind itself to the extent of seller market power in a particular RTO. Further, highly concentrated markets lend themselves to particular

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<sup>1</sup> Refinements to Policies and Procedures for Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities, Docket No. RM14-14-000, 147 FERC ¶ 61,232, (June 19, 2014)(“NOPR”), available at <http://www.ferc.gov/whats-new/comm-meet/2014/061914/E-6.pdf>.

anticompetitive abuses such as improper coordinated behavior that may not be adequately policed or remediated by current market mitigation measures. The Commission should not, and cannot, properly delegate its regulatory screening responsibilities to private actors.<sup>2</sup> The Commission should not and cannot properly rely on Commission-approved market monitoring and mitigation in organized markets or market forces to safeguard against the exercise of market power in bilateral and forward markets.

- TAPS is concerned about the NOPR's proposed change in the reporting of long-term purchases to require applicants under the MBR program to report all of their long-term firm purchases of capacity and energy in their indicative screens regardless of whether the seller has operational control over the generation. This change may well result in inaccurate reporting and mask the market power of large sellers where they retain control over the resource(s). NOPR P 79.
- TAPS is concerned that the NOPR's proposal to use an annualized capacity factor to discount the capacity counted in the screens associated with a firm energy purchase may not accurately reflect the contribution to the purchaser's market power at peak. NOPR P 79 & n.98.
- TAPS opposes the NOPR's proposed elimination of the generation site acquisition reporting requirement given the dramatic changes in resource mixes, and in particular, the potential import of access to gas pipeline facilities. NOPR PP 89-91.

TAPS supports APPA's comments in this proceeding, which address each of the foregoing considerations in detail. TAPS submits the instant limited comments to highlight the proposed change of greatest concern: the elimination of the submission of indicative screens for purposes of assessing horizontal market power.

### **INTEREST OF TAPS**

TAPS is an association of transmission-dependent utilities in more than 35 states, promoting open and non-discriminatory transmission access.<sup>3</sup> TAPS members have a vital interest in the proper competitive functioning of wholesale power markets including the prevention of the exercise of market power in wholesale capacity, energy and

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<sup>2</sup> *Cal. ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1017 (9th Cir. 2004).

<sup>3</sup> Tom Heller, Missouri River Energy Services, chairs the TAPS Board. Jane Cirrincione, Northern California Power Agency, is the TAPS Vice Chair. John Twitty is the TAPS Executive Director.

ancillary markets. TAPS members have long been concerned about structural changes in the electric industry that could adversely affect competition, rates or regulation, or could expose customers to harm from unmitigated market power. TAPS has commented on nearly all major Commission rulemakings, including those pertaining to market-based rates. For example, TAPS, together with APPA, successfully advocated that the Commission continue to require sellers in areas with Commission approved market-monitoring and mitigation to provide generation market-power analyses in Docket RM04-7-000, the Order 697 proceedings.<sup>4</sup>

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<sup>4</sup> Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities, Order No. 697, PP 289-90, 72 Fed. Reg. 39,904 (July 20, 2007), FERC Stats. & Regs. ¶ 31,252 (2007), *clarified*, 72 Fed. Reg. 72,239 (Dec. 20, 2007), 121 FERC ¶ 61,260 (2007) (“Order No. 697”), *on reh’g*, Order No. 697-A, 73 Fed. Reg. 25,832 (May 7, 2008), FERC Stats. & Regs. ¶ 31,268 (2008), *clarified*, 124 FERC ¶ 61,055 (2008), *on reh’g*, Order No. 697-B, 73 Fed. Reg. 79,610 (Dec. 30, 2008), FERC Stats. & Regs. ¶ 31,285 (2008), *on reh’g and clarification*, Order No. 697-C, 74 Fed. Reg. 30,924 (June 29, 2009), FERC Stats. & Regs. ¶ 31,291 (2009), *corrected*, 128 FERC ¶ 61,014 (2009), *clarified*, Order No. 697-D, 75 Fed. Reg. 14,342 (Mar. 25, 2010), FERC Stats. & Regs. ¶ 31,305, *clarified*, 131 FERC ¶ 61,021 (2010), *reh’g denied*, 134 FERC ¶ 61,046 (2011), *reh’g denied*, 143 FERC ¶ 61,126 (2013), *review denied sub nom. Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), *cert. denied sub-nom. Pub. Citizen, Inc. v. FERC*, 133 S. Ct. 26 (2012).

## COMMENTS

### **I. THE COMMISSION SHOULD NOT ELIMINATE SELLER SUBMISSION OF INDICATIVE SCREEN INFORMATION IN RTO REGIONS**

The Commission seeks comment on its proposed revision to Commission regulation Section 35.37, concerning required market power analysis, to provide:

In lieu of submitting the indicative screens, Sellers in regional transmission organization and independent system operator markets with Commission-approved market monitoring and mitigation must include a statement that they are relying on such mitigation to address any potential horizontal market power concerns.

NOPR P 37. The NOPRs proposed elimination of seller submission of indicative screen information in markets with Commission-approved monitoring and mitigation constitutes a fundamental change in the Commission's regulation and oversight of MBR authority.

The Commission has previously found that the "submi[ssion of] indicative screens provides an additional check on the potential for market power." NOPR P 32. In weighing the benefits and burdens at issue, the Commission noted that "any administrative burden of submitting such analyses is outweighed by the additional information gleaned with respect to a specific seller's market power." *Id.* P 33 (quoting Order No. 697-A, P 110).

At a time of unprecedented industry change, the Commission proposes to put all of its eggs in one basket and rely upon Commission-approved monitoring and mitigation as a sole and complete check on the exercise of seller market power, regardless of the scope and nature of the seller market power at issue. This proposal is a major step in the wrong direction. The Commission "approves applications to sell electric energy at market-based rates only if the seller and its affiliates do not have, or adequately have

mitigated, market power.” *La. Energy & Power Auth. v. FERC*, 141 F.3d 364, 365 (D.C. Cir. 1998). The Ninth Circuit affirmed the Commission’s grant of MBR authority based in significant part on the Commission’s own ongoing review of transaction data and regulatory screening of seller market power. *Lockyer*, 383 F.3d at 1013-17.

The fundamental premise underlying the Commission’s proposal is that the monitoring and mitigation measures in place today, as implemented by the RTO market monitors, are a complete and sufficient check on the exercise of seller market power for the indefinite future. But the Commission cannot have reasonable confidence that such mitigation measures (even assuming they are sufficient today) will necessarily afford wholesale purchasers sufficient protection in the RTO markets of the future. *Cf. Lockyer*, 383 F.3d at 1017 (“FERC’s initial determination with respect to ... market power ... may bear little or no relation to the realities of subsequent circumstances”).

It is a basic tenet of competition law that competition remedies should be tailored to the particular harm, or anticipated harm at issue. *See e.g.*, U.S. Dep’t of Justice Antitrust Division Policy, Guide to Merger Remedies at 2-4 (2011).<sup>5</sup> Consistent with this principal, the Commission has approved market power mitigation measures that vary between and within RTOs.<sup>6</sup> The Commission has not adopted a one size fits all approach, but has instead approved mitigation measures relative to the particular circumstances at issue. It has further recognized that the particular mitigation measures

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<sup>5</sup> *See also United States v. Microsoft Corp.*, 253 F.3d 34, 107 (D.C. Cir. 2001) (relief “should be tailored to fit the wrong creating the occasion for the remedy); *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 726 (1944) (“The test is whether or not the required action reasonably tends to dissipate the restraints and prevent evasions”).

<sup>6</sup> *See, e.g.*, MISO Tariff, Module D (differences in mitigation between broad and narrowly constrained areas), available at <https://www.midwestiso.org/Library/Tariff/Pages/Tariff.aspx>. Compare CAISO Tariff § 39, (use of pathway analysis for purposes of market mitigation).

currently in place *may not* constitute an adequate safeguard against seller market power, but instead only give rise to a “rebuttable presumption that the existing mitigation is sufficient to address any market power concerns.” NOPR P 31 n.27 (quoting Order 697-A, P 111).

Because the adequacy of market mitigation measures is a function of the particular “market power concerns” (*id.*) at issue, it does not make sense for the Commission to dispense now with the filing of horizontal market power screens. The use of such screen information is basic to competition regulation<sup>7</sup> and is a matter of longstanding Commission practice. Information as the scope and nature of seller market power may well prove to be of vital importance going forward. The electric industry as a whole, and the generation sector in particular, is experiencing fundamental change.

Chairman LaFleur observed in 2013:<sup>8</sup>

[T]he country is undergoing really significant changes in power supply due to the boom in natural gas, due to environmental regulations, and due to the renewable standards in so many states. So I think we’re entering a period where we just can’t count on being long, and we’ll start stress-testing our capacity markets. So it’s appropriate to look under the hood and see how they’re working.

Testifying before Congress in April 2014, Commissioner Moeller stated that “our nation is undergoing an unprecedented change in the electricity sector in a very compressed time

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<sup>7</sup> See, e.g. U.S. Dept. of Justice and the Federal Trade Commission, Horizontal Merger Guidelines at 3 (2010) (“The Agencies give weight to the merging parties’ market shares in a relevant market, the level of concentration, and the change in concentration caused by the merger”).

<sup>8</sup> *In re Technical Conference on Centralized Capacity Markets in Regional Transmission Organizations and Independent System Operators*, Docket No. AD13-7-000 Tr. 12:16-23 (Sept. 25, 2013) (“Technical Conference”). Chairman LaFleur was a Commissioner (and not Chairman) at the time of the Technical Conference.

frame.”<sup>9</sup> According to U.S. Energy Information Association data, since the year 2000: 1) natural gas has gone from supplying 16 percent of the nation’s electricity to some 30 percent today; 2) electric production from renewable resources has increased by some 33 percent during that same period; while 3) electricity produced by coal-fired generation has decreased from some 52 percent to 37 percent.<sup>10</sup>

Coincident with the transformation of the generation fleet are changes in the level of generation supply, raising questions of resource adequacy.<sup>11</sup> These changes are likely to be exacerbated by the EPA’s proposed regulation of greenhouse gases.<sup>12</sup> This supply-side transformation is coming at a time of projected flat or falling demand for much of the wholesale electric market.<sup>13</sup> Thus, the Commission can have little confidence that the prevailing market power concerns of today will look as they do today, even in the relatively near future.<sup>14</sup> At a time of great change and uncertainty, the Commission should not dispense with the currently required reporting of seller market power information. TAPS submits that the reporting burden at issue is modest when compared to the information at issue.

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<sup>9</sup> *Keeping the Lights on – Are We Doing Enough to Ensure the Reliability and Security of the U.S. Electric Grid?*: Hearing Before the S. Comm. on Energy and Natural Resources, 113th Cong. 4 (2014) (Testimony of Commissioner Philip D. Moeller, Federal Energy Regulatory Commission) (“Commissioner Moeller”).

<sup>10</sup> U.S. Energy Information Administration, *Annual Energy Outlook 2014 Early Release Overview* at 14 (Dec. 16, 2013) (“EIA”).

<sup>11</sup> Technical Conference at Tr. 12 (remarks of Chairman LaFleur). “[T]his winter has demonstrated that our margin of surplus generation is narrower and more constrained than many understood.” Commissioner Moeller at 3.

<sup>12</sup> Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34,829 (proposed June 18, 2014).

<sup>13</sup> EIA at 14.

<sup>14</sup> Highly concentrated markets are conducive to anticompetitive cartel behavior such as price-fixing, bid rigging, and agreements to restrict supply. *See In re Flat Glass Antitrust Litigation*, 385 F.3d 350, 361 (3rd Cir. 2004) (concentrated market for standardized product constituted conditions “conducive to collusion”).

Finally, the NOPR's proposed means of assuring the mitigation of RTO seller market power in forward and bilateral markets is of particular concern. The Commission notes that "RTO sellers may have bilateral contracts not subject to Commission-approved monitoring and mitigation." NOPR P 35. Nevertheless, the Commission proposes to rely upon Commission-approved market monitoring and mitigation as a sufficient safeguard against seller market power in forward and bilateral markets because it finds that organized spot market prices are transparent and therefore "discipline[] forward and bilateral markets by revealing a benchmark price and keeping offers competitive." *Id.* This is a problematic and faulty presumption given the non-substitutable nature of the products. *See* NOPR P 76 ("it is unrealistic for franchised public utilities to rely extensively on spot market purchases to serve statutory load obligations").

The NOPR's proposal with regard to forward bilateral markets in RTO regions also represents a significant, unjustified change from Order 697 in this regard. While Order 697 generally relied on the Commission's regulatory screening combined with Commission-approved market monitoring and mitigation to support MBR in bilateral markets, it did so by pointing to the ability of customers to challenge the effective scope and strength of RTO mitigation rules (including with respect to bilateral and forward markets) "in the context of a specific market-based rate application or triennial review" informed by the indicative screen information. Order 697-A, P 115.<sup>15</sup> The NOPR, however, would completely remove this important avenue to assure just and reasonable

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<sup>15</sup> The Commission also noted that customers could challenge the adequacy of existing or proposed RTO mitigation measures. *Id.* However, under the prevailing MBR practices any such challenge would be informed by "the horizontal market power analyses which provide the Commission and the industry with critical information regarding the potential market power of sellers in the market." *Id.* P 109.



rates on bilateral contracts that the Commission has sought to promote. “Markets are not perfect, and one of the reasons that parties enter into wholesale-power contracts is precisely to hedge against the volatility that market imperfections produce. That is why one of the Commission’s responses to the energy crisis was to remove regulatory barriers to long-term contracts.” *Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 547 (2008). The NOPR’s proposed reliance on market forces to discipline market power in bilateral and forwards markets is improper. “[T]he Commission lacks the authority to place exclusive reliance on market prices.” *FPC v. Texaco*, 417 U.S. 380, 400 (1974).

Order 697-A’s pronouncements with respect to bilateral and forward markets are a compelling reason to continue to require the submission of indicative screen data. If the Commission eliminates the filing of horizontal indicative screen information in RTO regions, the Commission will need to revisit Order 697’s treatment of MBR for forward and bilateral sales in RTO regions in light of the removal of an essential element of the support for that disposition, and should strongly consider requiring sellers in those regions seeking, or seeking to maintain MBR to make individualized demonstrations that they lack market power in bilateral or forward markets.

## CONCLUSION

The Commission should take account of TAPS' comments, as well as the more detailed comments of APPA/NRECA, in acting on this Notice of Proposed Rulemaking.

Respectfully submitted,

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