Federal Energy Regulatory Commission
Docket AD17-11-000

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Summary

The technical conference under Docket AD17-11-000 has been planned in order to "explore how the competitive wholesale markets can select resources of interest to state policy makers while preserving the benefits of regional markets and economic resource selection," with a particular focus on PJM, NYISO, and ISO-NE.[1] The Sierra Club very much appreciates both the Commission and other stakeholders' diligent efforts to discuss this important issue, and the opportunity to contribute to the conversation through this technical conference. At the outset, we note that although this inquiry is framed in a way that assumes that markets should be designed to select for certain resources that are preferred by state policy makers, the current ideas under discussion within Northeast market stakeholder processes would either mitigate those very resources or lead to unnecessarily increased costs to consumers. We do not think there is sufficient evidence of conflicts between state policy preferences and existing market objectives to justify action by either the Commission or market operators at this time.

The Sierra Club observes that these three markets have all experienced increases in the resources that most benefit consumers—efficiency, demand response, and clean renewable energy like wind and solar—and corresponding declines in both wholesale prices paid by those consumers and in pollution causing significant public health and environmental damage.[2] Installed reserve margins in all three markets are more than adequate, and performance has improved.[3] Both competitive markets and state public policies are working by nearly every metric either the Commission or states have posited as goals.[4]

The concerns being voiced by some market participants—primarily the owners of generating units that have become uncompetitive because they're too dirty, expensive, or inflexible—may be causing both state policy makers and market operators to perceive and react to problems that don't actually exist. The Sierra Club encourages both the states and the Commission not to allow these market participants to recoup millions or billions of dollars from ratepayers to "fix" a problem that only exists in their profit margins. Violating states' rights by allowing private market operators to undermine policies within the states' jurisdiction—even misguided policies such as New York's zero-emission credit ("ZEC") —will likely result in

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[1] https://www.ferc.gov/CalendarFiles/20170413160158-AD17-11-000TC1.pdf
[2] https://www.ferc.gov/market-oversight/reports-analyses/st-mkt-ovr/2016-som.pdf
[3] http://www.nerc.com/pa/RAPA/ra/Reliability%20Assessments%20DL/2016%20Long-Term%20Reliability%20Assessment.pdf
[4] https://www.ferc.gov/industries/electric/indus-act/rto/rto-iso-performance.asp

unjust, unreasonable, and unduly preferential rates.[5]

The Sierra Club believes that even well-intentioned ideas being considered by market operators like NYISO and ISO-NE to assist states in reaching their public policy goals will likely result in unjust and unreasonable rates for customers and unduly preferential compensation for incumbent generators. For example, the New England States Committee on Electricity has understandably expressed concern about the concept of incorporating a carbon price into the market through a mechanism other than that imposed by states through the Regional Greenhouse Gas Initiative or similar programs.[6]

Less well-intentioned proposals under consideration by market operators like PJM and ISO-NE to expand the Minimum Offer Price Rule ("MOPR"), to remove previously granted exemptions to the MOPR, to bifurcate capacity markets, or to otherwise further "mitigate" the effects of legal public policy support for certain resources, have the potential to dramatically raise consumer costs.[7, 8] The Sierra Club largely agrees with the concurring comments of Chairman Bay in the Commission's order in Docket No. ER14-1639-005 that:

> [T]he MOPR not only frustrates state policy initiatives, but also likely requires load to pay twice – once through the cost of enacting the state policy itself and then through the capacity market . . . . The Commission should only apply the MOPR in the uncommon situation when state action is not permitted under federal law.[9]

Instead of further mitigating public policies, the most just and reasonable accommodation for customer and state preferences for particular resources would be to curtail the use of the MOPR.

Comments

Section 201(b)(1) of the Federal Power Act gives states exclusive authority "over facilities used for the generation of electric energy." FERC's jurisdiction and role is to ensure that wholesale prices in interstate markets are just, reasonable, and not unduly preferential. The two realms intersect when states want to shape the mix of resources that exist within their borders or that serve their customers, either due to a preference for certain resource characteristics, to attract or preserve major in-state employers, or to advance the state's view of what is needed for reliability or resource adequacy. These state actions will, to widely varying degrees, affect the clearing prices in wholesale markets, as well as the amount of energy or capacity that the market needs to procure.

[5] https://www.nrdc.org/sites/default/files/suport-nys-promote-clean-energy-amicus-brief-20161209.pdf
[6] http://nepool.com/uploads/IMAPP_20170517_NESCOE_Memo_20170407.pdf
[7] http://www.pjm.com/~/media/committees-groups/stakeholder-meetings/grid-2020-focus-on-public-policy-market-efficiency/meeting-materials/20160816-potential-alt-solution-to-the-min-offer-price-rule-for-existing-resources.ashx
[8] https://www.iso-ne.com/static-assets/documents/2017/04/iso_caspr_highlights_april_2017.pdf
[9] https://www.iso-ne.com/static-assets/documents/2017/02/er14-1639-005_02-03017_order_deny_rehearing_renewables.pdf

FERC has approved mechanisms to mitigate the impacts of certain kinds of customer and state actions on wholesale markets, most prominently, the MOPR. Recently enacted state policies to support certain kinds of generators have ignited discussions as to whether mitigation mechanisms like the MOPR should be expanded. The difficulty of figuring out whether to use existing tools to address state subsidies is made clear when considering *which* state subsidies would be addressed. A wide array of state actions affect the cost of building and operating any kind of generation. Some state actions are overt in this respect, such as recent actions in New York and Illinois creating zero emission credits,[10] and the Maryland and New Jersey laws that were the subject of *Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288 (2016). Other state policies benefit or hamper generation less obviously, such as land use and siting policies, tax incentives, targeted job training programs, and lax enforcement of environmental laws.[11] State-level integrated resource planning and enabling vertically integrated regulated utilities to recover operating and capital costs from ratepayers also have a significant impact on the availability and cost of existing and new generation.

We propose that it is only appropriate to mitigate the impact of state actions that (1) would be preempted by the Federal Power Act or (2) those that reflect abuse of market power. Otherwise, we do not perceive any defensible threshold dividing state policies that must be mitigated from those that are too remote to be mitigated. If the state's action is permissible under the Federal Power Act, then it would not be appropriate for FERC to require or allow a wholesale market operator to undermine that policy through mitigation. In this regard, we are strongly influenced by former Chairman Norman Bay's concurrence in the Commission's recent order resolving a complaint about NYISO's treatment of special case resource participation in the capacity market.[12] As Bay remarks, the Supreme Court's recent decision in *Hughes* makes "clear that states are permitted to enact a wide range of policy choices that can affect the wholesale market."[13] As such, it becomes problematic, and shows a lack of respect for federalism, for FERC to require mitigation based on state policies that affect wholesale markets but do not so intrude upon FERC's role in ratesetting that they would be preempted.[14]

A critical role for FERC in ensuring that wholesale prices are just and reasonable has always been to protect against abuses of market power. One justification that has been offered for mitigating the effects of state subsidies is that such subsidies amount to the exercise of buyer-side market power.[15] We agree that it is essential to mitigate *actual* buyer-side market power, but encourage the Commission to undertake a more careful examination of the evidence as to whether buyer-side market power is exercised in capacity or energy markets and develop

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[10] New York's zero emissions credits were created through an administrative process (s*ee* N.Y. Pub. Serv. Comm'n, Case 15-E-0302, *Order Adopting a Clean Energy Standard* (Aug. 1, 2016)), while Illinois' was enacted via legislation (Future Energy Jobs Bill, Public Act 99-0906, signed Dec. 7, 2016)).
[11] http://pjm.com/~/media/committees-groups/task-forces/ccppstf/20170421/20170421-item-04-kwa2-subsidy.ashx
[12] Docket No. EL16-92-000.
[13] Docket No. EL16-92-000, Bay concurring opinion at 2.
[14] *Id.* at 2-4.
[15] *Id.* at 3.

appropriate screens to be applied whenever a mitigation mechanism is premised upon the existence of such power. As former Chairman Bay observed, "[t]he Commission simply assumes [buyer-side market power] exists. The Commission has not explored or tested these assumptions in its orders, and it does not know whether they are true."[16]

There are several reasons RTOs should not attempt to mitigate state actions that don't rise to the level of FPA preemption or demonstrate abuse of market power. First, mitigation of state action to some degree undermines those policies and therefore interferes with states' broad authority when it comes to generation. The Supreme Court's decision in *FERC v. Electric Power Supply Association* shows that the federal government does not have exclusive jurisdiction over practices affecting wholesale rates.[17] Thus, state policies may permissibly "affect" wholesale rates, particularly where the target of those policies is generation, a role that the Federal Power Act expressly assigns to states. Given that participation in wholesale markets by load-serving entities is determined by states,[18] organized market operators that attempt to correct for (i.e., undermine) state policies run the risk of encouraging states to exit those markets entirely.

Second, FERC should be wary that attempts to mitigate state policies may not produce rates that are any more just and reasonable. Mitigation mechanisms such as minimum offer price rules introduce their own problems to the market such as deterring new entry. Additionally, when resources subject to the MOPR do not clear the market, certain customers will be required to pay twice for that capacity. Finally, applying MOPRs to existing capacity resources simply because those resources receive some kind of subsidy, as has been suggested by some market participants, is a blunt instrument given the wide variety in the value of subsidies that resources can receive. Where the net impact to consumers of mitigating state action is unclear, FERC should tend towards not interfering with state policy.

The premise with which FERC convenes this technical conference—that "competitive wholesale markets [could] select resources of interest to state policy makers"—seems to us a departure from the fundamental purpose of wholesale markets and a fraught undertaking. At the outset, most wholesale markets cover more than one state; as such, for market operators to select resources of interest to state policy makers, there would have to be some degree of agreement among the policy makers in different states as to what resources are "of interest" and to what extent those states want to favor those resources.

Even in situations where states may agree about which resources are preferred (or in the case of a single-state ISO), that does not mean that state policy can be more effectively pursued by relinquishing control over state policy to a FERC-jurisdictional entity. The New England States Committee on Electricity recently submitted a memorandum expressing concerns about

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[16] *Id.*
[17] 136 S. Ct. 760, 773-79 (2016).
[18] *See generally* FERC Orders 888/889.

proposals for an ISO-NE-administered carbon pricing in energy markets.[19] Despite these states' long-standing programs to implement carbon pricing, they do not support, at this time, incorporating carbon prices into energy markets. Specifically, the memorandum outlines concerns that doing so would require the states to forego the ability to fine-tune programs or mitigate consumer cost impacts. It can also render the achievement of state objectives vulnerable to disputes over the legality of RTO/ISO or FERC action in this space. Finally, they note that such a market design would create a revenue stream for all non-carbon-emitting resources whether they need it or not, thereby increasing costs to consumers with little gain in terms of reduced carbon.

Our caution regarding wholesale markets incorporating design elements to help achieve state goals is not inconsistent with the idea that wholesale market operators should continually examine their tariffs in light of experience and open stakeholder engagement to identify ways in which market rules might unjustifiably limit the participation of certain resources in ways that impede the achievement of state policy.

We close by echoing the sentiments expressed by two authors representing rural electric cooperatives that, in examining whether and how organized markets should mitigate state policies, it is necessary to move away from assumptions that

> (1) state policies are somehow external to the proper functioning of markets, (2) they therefore inherently interfere with efficient market outcomes, and (3) those policies should therefore be marginalized to the greatest extent possible in the design of markets. If we recognize instead that state policy reflects buyer-side preferences, then those policies can be seen less as interference with the market and more as a tool for incorporating demand-side preferences into markets."[20]

Wholesale markets unavoidably function against the backdrop of state *and federal* policies that aim to address externalities of energy production and generation, address consumer demand, and achieve other societal aims. FERC and the operators of wholesale markets should seek neither to counter each and every state policy that could affect the market, nor to assume for itself the role of pursuing those state goals.

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[19] Memorandum from New England States Committee on Electricity to NEPOOL (Apr. 7, 2017), *Feedback to NEPOOL on Long-Term "Achieve"-style IMAPP proposals.*

[20] Lawrence Berkeley National Laboratory, *Future Electric Utility Regulation: The Future of Centrally-Organized Wholesale Electricity Markets*, LBNL-1007226 (Mar. 2017), at page 19, fn.30 (portion of report written by Jay Morrison and Paul Breakman, National Rural Electric Cooperative Association).