

175 FERC ¶ 61,036
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

[Docket No. AD20-14-000]

Carbon Pricing in Organized Wholesale Electricity Markets

(Issued April 15, 2021)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of policy statement.

SUMMARY: The Commission is issuing this Policy Statement to clarify how it will approach filings under section 205 of the Federal Power Act that seek to incorporate a state-determined carbon price in organized wholesale electricity markets.

DATES: This Policy Statement is effective April 15, 2021.

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SUPPLEMENTARY INFORMATION:

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FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Richard Glick, Chairman;
Neil Chatterjee, James P. Danly,
Allison Clements, and Mark C. Christie.

Carbon Pricing in Organized Wholesale Electricity
Markets

Docket No. AD20-14-000

POLICY STATEMENT

(Issued April 15, 2021)

1. On September 30, 2020, the Commission convened a technical conference on state-determined carbon pricing in organized wholesale electricity markets operated by regional transmission organizations and independent system operators (RTO/ISO) (Carbon Pricing Technical Conference). As discussed further below, the record in this proceeding identified numerous potential benefits of incorporating a carbon price set by one or more states into RTO/ISO markets.¹ On October 15, 2020, the Commission issued a Proposed Policy Statement, and sought comments on whether the information and considerations discussed in the Proposed Policy Statement are appropriate for the Commission to take into account or whether the Commission should consider different or

¹ Panelists that participated in the Carbon Pricing Technical Conference were invited to submit for the record before the conference their choice of testimony in the form of prepared opening remarks, detailed written comments, or both. Any submitted panelist testimony was posted to eLibrary in this docket on October 5, 2020, and a transcript of the conference was posted on October 30, 2020.

additional considerations.² After considering those comments, we issue this Policy Statement to explain how the Commission will approach filings submitted pursuant to Federal Power Act (FPA) section 205³ that propose RTO/ISO market rules that incorporate a state-determined carbon price.

I. Proposed Policy Statement and Comments

2. On October 15, 2020, the Commission issued the Proposed Policy Statement. In the Proposed Policy Statement, the Commission identified certain information and considerations that the Commission believed, based on the record of the Carbon Pricing Technical Conference, may be germane to the Commission's evaluation of an FPA section 205 filing to determine whether an RTO/ISO's market rules that incorporate a state-determined carbon price into RTO/ISO markets are just, reasonable and not unduly discriminatory or preferential. The Commission sought comments on whether the information and considerations discussed in the Proposed Policy Statement are appropriate for the Commission to examine or whether the Commission should consider different or additional considerations.⁴

² *Carbon Pricing in Organized Wholesale Electricity Markets*, 85 FR 66965 (Oct. 21, 2020), 173 FERC ¶ 61,062 (2020) (Proposed Policy Statement).

³ 16 USC 824d.

⁴ Proposed Policy Statement, 173 FERC ¶ 61,062 at P 16.

3. Initial comments were due on November 16, 2020, and reply comments were due on December 1, 2020. The attached Appendix identifies the names of those that submitted comments.⁵

II. Policy Statement

4. This Policy Statement explains how the Commission will approach rate filings submitted under FPA section 205 to establish market rules for incorporating a state-determined carbon price into RTO/ISO markets.⁶ In so doing, we identify a non-binding list of potential considerations that the Commission may use to evaluate such a filing to establish market rules for incorporating a state-determined carbon price into an RTO/ISO market. The Policy Statement makes clear that the Commission will determine whether the filing meets the FPA section 205 standard based on the particular facts and circumstances presented in that proceeding. We believe that this discussion will help RTOs/ISOs and stakeholders considering the value of establishing wholesale market rules that incorporate a state-determined carbon price and help RTOs/ISOs to make appropriate filings with the Commission if they seek to implement such rules.

⁵ This Appendix will not be published in the Federal Register.

⁶ While RTOs/ISOs typically hold FPA section 205 filing rights to change RTO/ISO market rules, the Commission recognizes that in some regions other entities may hold such FPA section 205 filing rights. The Commission intends for this Policy Statement to apply to FPA section 205 filings submitted by any holders of FPA section 205 rights to change RTO/ISO market rules.

5. This Policy Statement addresses only filings pursuant to FPA section 205.⁷ In addition, as this is a policy statement, it provides only a general expression of our policy. It does not establish any binding rule, regulation, or other precedent.⁸ When this Policy Statement is applied in specific cases, parties can challenge or support the application of this Policy Statement in those proceedings.⁹

A. **Background on State Emissions-Reduction Policies and Commission-Jurisdictional RTO/ISO Markets**

6. States are currently taking a leading role in efforts to address climate change by adopting policies to reduce greenhouse gas (GHG) emissions. The electricity sector is a frequent focus of those policies. Several states have adopted laws or regulations that

⁷ This limitation is unchanged from the Proposed Policy Statement, but we reiterate this point here in response to certain comments requesting clarity on whether the Policy Statement has any bearing on proceedings initiated pursuant to FPA section 206. *See, e.g.*, MISO Nov. 16, 2020 Comments at 5; R Street Nov. 16, 2020 Comments at 1-2.

⁸ *See Pac. Gas & Elec. Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974) (“A general statement of policy is the outcome of neither a rulemaking nor an adjudication; it is neither a rule nor a precedent but is merely an announcement to the public of the policy which the agency hopes to implement in future rulemakings or adjudications.”) (footnote omitted).

⁹ *See Inquiry Regarding the Commission’s Policy for Recovery of Income Tax Costs*, 164 FERC ¶ 61,030, at P 6 (2018), *order dismissing clarific’n*, 168 FERC ¶ 61,136 (2019).

require substantial or total decarbonization of the electricity sector in the coming decades.¹⁰ Many others have adopted goals or targets to the same effect.¹¹

7. Placing a value on GHG emissions has emerged as an important market-based tool in state efforts to reduce GHG emissions, including efforts to reduce GHG emissions from the electricity sector. In this Policy Statement, we use the term “carbon pricing” to include both “price-based” methods adopted by states that establish a specific price on GHG emissions as well as “quantity-based” approaches adopted by states that do so indirectly through, for example, a cap-and-trade system.¹² Currently, 12 states impose

¹⁰ Thirteen states—California, Hawaii, Maine, Maryland, Massachusetts, Nevada, New Jersey, New Mexico, New York, Oregon, Vermont, Virginia, and Washington—and the District of Columbia have adopted clean energy or renewable portfolio standards of 50% or greater. *See* C2ES, U.S. State Electricity Portfolio Standards, <https://www.c2es.org/document/renewable-and-alternate-energy-portfolio-standards/>; *see also* Database of State Incentives for Renewables and Efficiency, <https://programs.dsireusa.org/system/program?type=38&>.

¹¹ For example, a number of states—including Colorado, Connecticut, Nevada, Rhode Island, and Wisconsin—have established 100% clean electricity goals or targets by executive order or other non-binding commitment. *See* Natural Resources Defense Council, 100% Clean Electricity Targets, <https://www.nrdc.org/resources/race-100-clean>.

¹² “Price-based” methods, such as a carbon fee, use an explicit charge on each ton of GHG emitted. “Quantity-based” methods, such as a cap-and-trade system, limit the amount of permissible GHG emissions. Cap-and-trade systems establish a total quantity of GHGs that can be emitted collectively by all entities covered by the policy within a fixed period (a cap). “Allowances” are created for each ton of GHG emissions that can be emitted. Covered entities must obtain one allowance for each ton of GHG emitted. Covered entities obtain allowances from either: (1) initial allocation or auctioning of allowances; or (2) trading of allowances. Carbon prices thus emerge from the initial allocation of allowances and the trading of allowances on the secondary market. The term “state-determined carbon price” refers to any state mechanism to place a value on GHG emissions, including but not limited to a charge directly imposed on emissions, and may refer to either a single state or multi-state initiative (e.g., the Regional Greenhouse Gas Initiative (RGGI)). For example, a “state-determined carbon price” may refer to a

some version of carbon pricing.¹³ Those programs include the 11-state RGGI¹⁴ in the Northeast and the cap-and-trade program administered by CARB. Multiple other states are considering adopting a carbon pricing regime,¹⁵ or currently use a carbon price to inform state agency actions.¹⁶ In addition, numerous entities, including RTOs and ISOs, have

value on GHG emissions, set by a state regulation or law, to be applied consistently throughout the electricity industry.

¹³ State carbon pricing programs that are currently implemented include: (1) California's cap-and-trade program (*see* California Air Resources Board (CARB), Cap-and-Trade Program, <https://ww2.arb.ca.gov/our-work/programs/cap-and-trade-program/about>); (2) Massachusetts' cap-and-trade program (*see* Mass. Dept. of Env. Protection, Reducing GHG Emissions under Section 3(d) of the Global Warming Solutions Act, <https://www.mass.gov/guides/reducing-ghg-emissions-under-section-3d-of-the-global-warming-solutions-act>); and (3) the 11-state RGGI, *infra* n.14 (*see* RGGI, Inc., Elements of RGGI, <https://www.rggi.org/program-overview-and-design/elements>). *See* C2ES, U.S. State Carbon Pricing Policies, <https://www.c2es.org/document/us-state-carbon-pricing-policies/>.

¹⁴ Those states are: Connecticut; Delaware; Maine; Maryland; Massachusetts; New Hampshire; New Jersey; New York; Rhode Island; Vermont; and Virginia. RGGI, Inc., <https://www.rggi.org>.

¹⁵ Pennsylvania and Washington are pursuing carbon pricing through rulemakings. Pennsylvania intends to join RGGI (*see* Penn. Dept. of Env. Protection, RGGI, <https://www.dep.pa.gov/Citizens/climate/Pages/RGGI.aspx>), and Washington is seeking to adopt a statewide cap-and-trade program (*see* State of Washington, Dept. of Ecology, Clean Air Rule, <https://ecology.wa.gov/Air-Climate/Climate-change/Greenhouse-gases/Reducing-greenhouse-gases/Clean-Air-Rule>). Fourteen states are currently considering carbon pricing legislation: Connecticut, Georgia, Hawaii, Indiana, Kansas, Maryland, Massachusetts, Montana, New Hampshire, New York, Oregon, Rhode Island, Texas, and Washington (*see* National Conference of Energy Legislators, Carbon Pricing, State Information, <https://www.ncel.net/carbon-pricing/#stateinfo>).

¹⁶ At least 11 states—California, Colorado, Illinois, Maine, Maryland, Minnesota, Nevada, New Jersey, New York, Virginia, and Washington—use a state-determined carbon price as a decision-making tool in various contexts, such as policy analysis, utility integrated resource planning, and retail ratemaking for distributed energy resources. *See*

begun examining approaches to incorporating state-determined carbon prices into wholesale electricity markets.¹⁷

8. As with any state regulation of electricity generation facilities, state efforts to reduce GHG emissions in the electricity sector may affect matters subject to the Commission's jurisdiction.¹⁸ And while the Commission does not directly administer environmental statutes, the Commission may be called upon to review proposals submitted under FPA section 205¹⁹ that address rules that incorporate a state-determined carbon price into RTO/ISO markets.

Policy Integrity, The Cost of Carbon Pollution, States Using the SCC, <https://costofcarbon.org/states>.

¹⁷ This includes, for example, ISO-NE's stakeholder discussions regarding carbon pricing (*see* van Welie Oct. 5, 2020 Opening Comments at 2-3; Tr. 100:1-6 (van Welie); ISO-NE Oct. 5, 2020 Pre-Technical Conference Statement at 6-7); NYISO's carbon pricing draft proposal (*see* Dewey Oct. 5, 2020 Opening Remarks at 3-5; Tr. 89:20-90:3 (Dewey)); NYISO, Carbon Pricing, <https://www.nyiso.com/carbonpricing>); and PJM's Carbon Pricing Senior Task Force (*see* Giacomoni Oct. 5, 2020 Comments at 2-3; Tr. 146:13-147:3 (Giacomoni)); PJM, Carbon Pricing Senior Task Force, <https://www.pjm.com/committees-and-groups/task-forces/cpstf.aspx>).

¹⁸ *See, e.g., Coal. for Competitive Elec., Dynegy Inc. v. Zibelman*, 906 F.3d 41, 57 (2d Cir. 2018), *cert. denied sub nom. Elec. Power Supply Ass'n v. Rhodes*, 139 S. Ct. 1547 (2019) (explaining that the state payments to address environmental externalities at issue in that case had "(at best) an incidental effect" on RTO/ISO markets); *see also FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 776 (2016), *as revised* (Jan. 28, 2016) (*EPSA*) (noting that the federal and state spheres of jurisdiction under the FPA "are not hermetically sealed from each other").

¹⁹ 16 USC 824d(a) ("All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, *and all rules and regulations affecting or pertaining to such rates or charges* shall be just and reasonable.") (emphasis added).

9. RTO/ISO markets already address various matters related to federal and state environmental regulations. For example, the Commission has long permitted generating resources to recover through wholesale rates the costs of complying with environmental regulations, including the costs of emissions pricing regimes.²⁰ Permitting generating resources to recover through wholesale rates in the RTO/ISO markets the costs associated with a state-determined carbon price is consistent with that precedent.²¹

10. The Commission has also accepted filings to establish wholesale market rules that address how a state-determined carbon price operates within markets that encompass more than one state. As one example, CARB administers a multi-sector cap-and-trade program that includes the electricity sector.²² As part of its Western Energy Imbalance

²⁰ See *Policy Statement and Interim Rule Regarding Ratemaking Treatment of the Cost of Emissions Allowances in Coordination Rates*, 59 FR 65,930, at 65,935 (Dec. 22, 1994) FERC Stats. & Regs. ¶ 31,009, at 31,207 (1994) (cross-referenced at 69 FERC ¶ 61,346) (Policy Statement on Costs of Emissions Allowances) (Policy Statement on Costs of Emissions Allowances) (“We will allow the recovery of incremental costs of emission allowances in coordination rates whenever the coordination rate also provides for recovery of other variable costs on an incremental basis.”); see also *Grand Council of Crees v. FERC*, 198 F.3d 950, 957 (D.C. Cir. 2000) (holding that just and reasonable rates may account for a seller’s “need to meet environmental requirements,” which “may affect the firm’s costs”); see generally Peskoe Oct. 5, 2020 Pre-Conference Filing at 1-2 (discussing these orders in greater detail); Konschnik Oct. 5, 2020 Opening Statement at 1; Tr. 25:5-18 (Konschnik) (similar).

²¹ See Peskoe Oct. 5, 2020 Pre-Conference Filing at 1 (“The Commission has recognized that environmental compliance costs are appropriately included in wholesale rates, and there is no basis for the Commission to treat carbon price costs any differently.”).

²² See *supra* n.13. Nineteen other states—Colorado, Connecticut, Hawaii, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Virginia, Vermont, and Washington—and the District of Columbia have adopted economy-wide

Market (EIM), California Independent System Operator Corporation (CAISO) proposed, and the Commission has accepted, tariff provisions to address how resources located outside California offer into the EIM in light of California's carbon pricing regime.²³ Those rules permit a resource to fashion its offers into the EIM such that they include a carbon price if they are dispatched to serve load in California and not include a carbon price if they are dispatched to serve load in the rest of the EIM.²⁴ Similarly, CAISO proposed, and the Commission has accepted, measures for addressing resource shuffling in the EIM²⁵ by more accurately assessing which resources are dispatched to serve load in California.²⁶

decarbonization goals or targets of 50% or greater. *See* C2ES, U.S. State Greenhouse Gas Emissions Targets, <https://www.c2es.org/document/greenhouse-gas-emissions-targets/>.

²³ *Cal. Indep. Sys. Operator Corp.*, 153 FERC ¶ 61,087, at PP 9-11, 57 (2015).

²⁴ *Id.*

²⁵ In this context, CARB determined that CAISO's initial method for accounting for emissions from EIM resources that serve California load incorrectly assumed that the least-emitting resources served California load, when instead some of those resources would have already been dispatched to serve load outside of California. Therefore, there was a "backfill" of higher-emitting resources to serve non-California load, or a "shuffling" of resources. CARB concluded that, but for California's demand in the EIM, those higher-emitting resources would not have been dispatched at all and therefore those emissions should be attributed to serving California load. *See, e.g.*, Wolak Oct. 5, 2020 Comments at 2-3; Hogan Oct. 5, 2020 Comments at 4-5; Tr. 101:16-24 (Wolak).

²⁶ *Cal. Indep. Sys. Operator Corp.*, 165 FERC ¶ 61,050, at PP 7, 17 (2018).

B. Discussion**1. Incorporating a State-Determined Carbon Price into RTO/ISO Markets**

11. In this section, we explain the Commission’s jurisdiction to review RTO/ISO market rules that would incorporate a state-determined carbon price filed under FPA section 205. We also explain that it is the policy of this Commission to encourage efforts of RTOs/ISOs and their stakeholders to explore and consider the value of incorporating a state-determined carbon price into RTO/ISO markets.²⁷

a. Commission Jurisdiction Regarding Rules that Incorporate a State-Determined Carbon Price into RTO/ISO Markets

12. Wholesale market rules that incorporate a state-determined carbon price into RTO/ISO markets can fall within the Commission’s jurisdiction as a practice affecting wholesale rates. Whether the rules proposed in any particular FPA section 205 filing do, in fact, fall under the Commission’s jurisdiction, or whether any such proposal is consistent with FPA section 205, is a determination we will make based on the facts and circumstances in any such proceeding. Accordingly, rather than make any jurisdictional

²⁷ Certain commenters recommend that we refer more broadly to “emissions pricing” or state environmental policies more generally, rather than limiting it to “carbon pricing.” *See, e.g.*, Public Interest Orgs. Nov. 16, 2020 Comments at 2. This Policy Statement is a response to specific issues raised in the record developed at and after the Carbon Pricing Technical Conference. As that record was limited to the specific issue of carbon pricing, we decline to address other state environmental policies as outside the scope of this proceeding.

or merits determination in this Policy Statement, we present a framework for exercising our FPA section 205 jurisdiction.²⁸

13. In *EPSA*, the Supreme Court articulated a two-part test for evaluating whether a Commission action is within its jurisdiction to regulate practices affecting wholesale rates. First, the activity being regulated must “directly affect” wholesale rates.²⁹ Although the Court did not exhaustively define what it means to “directly affect” wholesale rates, it noted that the wholesale market rules established in Order No. 745³⁰ “meet that standard with room to spare.”³¹ As the Court explained, those rules address how demand response resources participate in the RTO/ISO markets, including the levels at which they bid and are compensated.³²

14. Wholesale market rules that incorporate a state-determined carbon price into RTO/ISO markets can satisfy that “directly affect” standard. Like the rules at issue in

²⁸ For these reasons, we reject the suggestion that we are “prejudg[ing] the jurisdictional merits of any future section 205 proposals.” See Danly Concurrence in Part and Dissent in Part at PP 2-3.

²⁹ *EPSA*, 136 S. Ct. at 774 (citing *Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 403 (2004)).

³⁰ *Demand Response Compensation in Organized Wholesale Energy Markets*, Order No. 745, 76 FR 16,657 (Mar 24, 2011), 134 FERC ¶ 61,187, *order on reh’g & clarification*, Order No. 745-A, 137 FERC ¶ 61,215 (2011), *reh’g denied*, Order No. 745-B, 138 FERC ¶ 61,148 (2012), *vacated sub nom. Elec. Power Supply Ass’n v. FERC*, 753 F.3d 216 (D.C. Cir. 2014), *rev’d & remanded sub nom. EPSA*, 136 S. Ct. 760.

³¹ *EPSA*, 136 S. Ct. at 774.

³² *Id.* at 774-75.

Order No. 745, wholesale market rules that incorporate a state-determined carbon price could, depending on the particular circumstances, govern how resources participate in the RTO/ISO market, how market operators dispatch those resources, and how those resources are ultimately compensated.³³ As such, those wholesale market rules can affect wholesale rates in essentially the same way described in *EPSA*.

15. Second, *EPSA* explained that the Commission cannot regulate a matter that FPA section 201(b) reserves for exclusive state jurisdiction, “no matter how direct, or dramatic, its impact on wholesale rates.”³⁴ The Court explained, however, that the effects that wholesale market rules have on retail rates or other matters subject to exclusive state jurisdiction do not, in and of themselves, cause the Commission to exceed its jurisdiction.³⁵ Instead, those effects are the inevitable result of the fact that the FPA

³³ See, e.g., Tr. 23:3-22 (D. Hill); 28:24-29:8, 52:24-53:13 (Pescoe); D. Hill Oct. 5, 2020 Comments at 5-7; Pescoe Oct. 5, 2020 Pre-Conference Filing at 2-3; Price Oct. 5, 2020 Comments at 8-9; Rossi Oct. 5, 2020 Pre-Conference Filing at 3. See generally *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 76 FERC 49,842 (Aug. 11, 2011), 136 FERC ¶ 61,051, at PP 203-224 (2011), *order on reh’g*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh’g and clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *aff’d sub nom. S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014) (requiring that regional transmission planning processes consider transmission needs driven by public policy requirements (which can include state public policies)).

³⁴ *EPSA*, 136 S. Ct. at 775.

³⁵ *Id.* at 776 (“[A] FERC regulation does not run afoul of [section 201](b)’s proscription just because it affects—even substantially—the quantity or terms of retail sales.”).

divides jurisdiction over the electricity sector between the Commission and the states.³⁶

In turning to the specifics of Order No. 745, the Court concluded that the rule did not regulate retail rates because “every aspect of [the rule] happens exclusively on the wholesale market and governs exclusively that market’s rules” and “the Commission’s justifications for regulating demand response are all about, and only about, improving the wholesale market.”³⁷ Under those circumstances, the Court explained, “[section 201(b)] imposes no bar” on Commission authority.³⁸

16. Wholesale market rules that incorporate a state-determined carbon price into RTO/ISO markets can satisfy this standard as well. Such rules would not regulate a matter reserved exclusively to the states under the FPA, or otherwise displace state authority, including state authority over generation facilities.³⁹ Instead, wholesale market rules that incorporate a state-determined carbon price into RTO/ISO markets can “govern exclusively” the wholesale market and do so for the purpose of improving that market.⁴⁰

Rules that meet that standard could affect matters within state jurisdiction, including a

³⁶ *Id.* (“It is a fact of economic life that the wholesale and retail markets in electricity, as in every other known product, are not hermetically sealed from each other. To the contrary, transactions that occur on the wholesale market have natural consequences at the retail level. And so too, of necessity, will FERC’s regulation of those wholesale matters.”).

³⁷ *Id.* (citing *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 385 (2015)).

³⁸ *Id.*

³⁹ *See* 16 USC 824(b).

⁴⁰ *EPSA*, 136 S. Ct. at 776.

state's regulation of generation facilities, without running afoul of section 201(b)'s limitation on the Commission's jurisdiction.⁴¹ Under those circumstances, the state would retain authority over that carbon price as well as other measures for regulating generation facilities, as in the CAISO EIM example discussed above.⁴² For these reasons, incorporating a state-determined carbon price into RTO/ISO markets would not in any way diminish state authority to establish a carbon price or modify an existing state carbon price.⁴³

17. Finally, we note that incorporating a state-determined carbon price into RTO/ISO markets could represent another example of the type of "program of cooperative federalism" that the Court noted with approval in *EPSA*.⁴⁴ RTO/ISO market rules that incorporate a state-determined carbon price could, as discussed above, improve the efficiency and transparency of the organized wholesale markets under Commission jurisdiction by providing a market-based method to incorporate state efforts to reduce GHG emissions, a matter self-evidently under state jurisdiction.

⁴¹ *Id.*

⁴² *See supra* P 10.

⁴³ This position is unchanged from the Proposed Policy Statement, but we clarify this point here in response to certain comments that expressed concern that the Policy Statement could serve to diminish existing state authority. *See, e.g.*, EKPC Dec. 1, 2020 Comments at 2-10; Joint NY Consumers Nov. 16, 2020 Comments at 2; NESCOE Nov. 16, 2020 Comments at 5-6; Ohio Commission Nov. 16, 2020 Comments at 6-7.

⁴⁴ *Id.* at 779-80.

b. **Commission Encouragement of Efforts of RTOs/ISOs and their Stakeholders to Explore and Consider the Value of Incorporating a State-Determined Carbon Price into RTO/ISO Markets**

18. Participants at the Carbon Pricing Technical Conference identified a diverse range of potential benefits that could arise from incorporating a state-determined carbon price into RTO/ISO markets. Those benefits include the development of technology-neutral, transparent price signals within RTO/ISO markets and market certainty to support investment.⁴⁵ In addition, participants explained that carbon pricing is one example of an efficient market-based tool that incorporates state public policies into RTO/ISO markets without in any way diminishing state authority.⁴⁶

19. We agree that proposals to incorporate a state-determined carbon price into RTO/ISO markets could potentially improve the efficiency of those markets.⁴⁷

⁴⁵ See Tr. 24:1-3 (D. Hill), 85:17-21 (Bowring), 95:14-16 (Olson), 171:1-10 (White), 177:1-3 (Mukerji), 219:6-25 (Wadsworth), 261:24-262:5 (“From a pure business perspective, clarity and certainty are so important. And for those of us that are involved in making these long-term capital-intensive investments in energy infrastructure, having this mechanism that can provide long-term price signals for investment would be hugely valuable.”) (Beane), 264:17-19 (Crane), 278:8-10, 279:10-15 (Segal), 283:17-19 (Wiggins), 300:20-301:12 (Beane), 312:22-313:15 (Beane), 314:14-22 (Crane), 317:11-20 (Segal), 326:17-327:7 (Wiggins).

⁴⁶ See, e.g., Tr. 27:7-11, 29:9-24 (Pescoe), 31:15-32:12 (Price), 85:9-21 (Bowring), 200:11-23 (Breidenich).

⁴⁷ See, e.g., Tr. 31:15-25 (Price), 99:16-22 (van Welie), 150:6-23 (Mukerji), 169:5-12. (Hogan), 170:1-15 (Mukerji), 170:20-171:10 (White), 175:5-20 (Rothleder), 219:1-221:4 (Wadsworth), 265:4-21 (Crane), 271:1-5 (T. Hill), 282:15-22 (Tierney).

Accordingly, it is the policy of this Commission to encourage efforts of RTOs/ISOs and their stakeholders—including States, market participants, and consumers—to explore and consider the value of incorporating state-determined carbon prices into RTO/ISO markets.⁴⁸ That encouragement does not indicate a preference for a state-determined carbon pricing approach over other state policies. Whether and how a state chooses to address GHG emissions is a matter exclusively within that state’s jurisdiction. Instead, our intention is only to encourage discussions among RTOs/ISOs and their stakeholders regarding wholesale market rules that would incorporate state-determined carbon pricing, in light of what we view as the potential benefits of carbon pricing.

2. Considerations for Evaluating an FPA Section 205 Proposal to Incorporate a State-Determined Carbon Price into RTO/ISO Markets

20. The Commission will review any FPA section 205 filing that proposes to establish wholesale market rules that incorporate a state-determined carbon price into RTO/ISO markets based on the particular facts and circumstances presented in that proceeding,

⁴⁸ See Proposed Policy Statement, 173 FERC ¶ 61,062 at P 15 (proposing “to make it the policy of this Commission to encourage efforts by RTOs/ISOs and their stakeholders—including States, market participants, and consumers—to explore establishing wholesale market rules that incorporate state-determined carbon prices in RTO/ISO markets”); *see also id.* PP 1, 7.

with the filer bearing the burden of demonstrating that the proposal meets the FPA section 205 standard.⁴⁹

21. Nevertheless, based on our review of the record in this proceeding, we believe that certain questions and issues are likely to arise in any such filing. Below, we identify considerations that we believe may be germane to the Commission's evaluation of an FPA section 205 filing, which filers should consider including, as appropriate, in any FPA section 205 filing to incorporate a state-determined carbon price into RTO/ISO markets.

- a. How, if at all, do the relevant market design considerations change depending on the manner in which the state or states determine the carbon price (e.g., price-based or quantity-based methods)? How would state-determined carbon prices, including any changes to these prices, be reflected in RTO/ISO tariffs or market designs?
- b. How would the FPA section 205 proposal provide adequate price transparency and enhance price formation?
- c. How would the carbon price or prices be reflected in locational marginal prices (LMP)?
- d. How would the incorporation of the state-determined carbon price into the RTO/ISO market affect dispatch? Would the state-determined carbon price affect how the RTO/ISO co-optimizes energy and ancillary services? Would any reforms to RTO/ISO co-optimization rules be necessary in light of the state-determined carbon price? Would any reforms to other market design elements be necessary, such as to market power mitigation rules or other rules that affect whether the market produces just and reasonable rates?

⁴⁹ See, e.g., *Ala. Power Co. v. FERC*, 993 F.2d 1557, 1571 (D.C. Cir. 1993) (stating that “the party filing a rate adjustment with the Commission under § 205 bears the burden of proving the adjustment is lawful”) (citation omitted).

- e. Would the filer's proposal result in economic or environmental leakage?⁵⁰ If so, how might the proposal address any such leakage?
 - f. What elements of the proposal affect the wholesale rates paid by customers? How does the proposal consider this impact and the impact on consumers overall?
22. These considerations are intended to provide guidance to RTO/ISOs and their stakeholders regarding the kinds of issues that the Commission may consider when evaluating FPA section 205 filings that seek to incorporate a state-determined carbon price in RTOs/ISOs. We emphasize that this list is intended to provide guidance but does not alter the Commission's intention to consider the facts and circumstances presented in each proceeding and does not bind or limit the Commission with respect to which considerations the Commission will weigh in applying the legal standard articulated in FPA section 205.

III. Document Availability

23. In addition to publishing the full text of this document in the Federal Register, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through the Commission's Home Page (<http://www.ferc.gov>). At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National

⁵⁰ See Hogan Oct. 5, 2020 Comments at 4; Wolak Oct. 5, 2020 Comments at 2; Singh Oct. 5, 2020 Comments at 2-3. See also Tr. 56:12-57:10 (Price) (generally discussing economic and environmental leakage), Tr. 46:2-18 (Pescoe) (discussing the Commission's jurisdiction over proposals from public utilities to address leakage).

Emergency concerning the Novel Coronavirus Disease (COVID-19), issued by the President on March 13, 2020.

24. From the Commission's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

25. User assistance is available for eLibrary and the Commission's website during normal business hours from the Commission's Online Support at (202) 502-6652 (toll free at 1-866-208-3676) or email at ferconlinesupport@ferc.gov, or the Public Reference Room at (202) 502-8371, TTY (202) 502-8659. E-mail the Public Reference Room at public.referenceroom@ferc.gov.

By direction of the Commission. Commissioner Danly is concurring in part and dissenting in part with a separate statement attached. Commissioner Christie is concurring in part and dissenting in part with a separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Note: the following appendix will not appear in the Federal Register.

Appendix: List of Commenters

Short Name	Full Name
ACORE	American Council on Renewable Energy
AEE	Advanced Energy Economy
Americans for Prosperity, <i>et al.</i>	Americans for Prosperity, Alliance for Wise Energy Decisions, Americans for Tax Reform, Caesar Rodney Institute, Citizens Against Government Waste, Committee for a Constructive Tomorrow, Competitive Enterprise Institute, Energy & Environment Legal Institute, Heritage Action for America, Mississippi Center for Public Policy, National Center for Public Policy Research, Roughrider Policy Center, Texas Public Policy Foundation, The Heartland Institute, and 60 Plus Association
America's Power	America's Power
API	American Petroleum Institute
AWEA, <i>et al.</i>	American Wind Energy Association and the Alliance for Clean Energy – New York
BCSE	Business Council for Sustainable Energy
Brookfield Renewable	Brookfield Renewable Trading and Marketing LP
Buckeye Power	Buckeye Power, Inc.
CAISO	California Independent System Operator Corporation
CAISO Market Monitor	CAISO Department of Market Monitoring
Calpine	Calpine Corporation
CARB	California Air Resources Board
Carbon Free NY	Carbon Free New York
CEA	Canadian Electricity Association
CEI	Competitive Enterprise Institute
Covanta	Covanta Holding Corporation
Cricket Valley	Cricket Valley Energy Center, LLC
David Hill	David R. Hill, Columbia Univ. Center on Global Energy Policy
EDF	Environmental Defense Fund
EI	Edison Electric Institute
EKPC	East Kentucky Power Cooperative, Inc.
ELCON	Electricity Consumers Resource Council
EPSA	Electric Power Supply Association
ETI	Energy Trading Institute

Short Name	Full Name
Eversource	Eversource Energy Service Company, The Connecticut Light and Power Company, NSTAR Electric Company, and Public Service Company of New Hampshire
Exelon	Exelon Corporation
Heritage Foundation	Katie Tubb and Nicolas Loris of The Heritage Foundation
HQUS	H.Q. Energy Services (U.S.) Inc.
IER	Institute for Energy Research
Industrial Customer Orgs.	American Forest & Paper Association and Industrial Energy Consumers of America
Int'l. Energy Credit Ass'n.	International Energy Credit Association
IPPNY	Independent Power Producers of New York, Inc.
ITC Companies	International Transmission Company, Michigan Electric Transmission Company, LLC, ITC Midwest LLC, and ITC Great Plains, LLC
Joint Attys. Gen.	Attorneys General of Massachusetts, California, Delaware, Maryland, Michigan, Minnesota, New Mexico, Pennsylvania, Rhode Island, Wisconsin, and the District of Columbia
Joint California Parties	Pacific Gas & Electric Company, San Diego Gas & Electric Company, and Southern California Edison
Joint Consumer Advocates	Office of the People's Counsel for the District of Columbia, Delaware Division of the Public Advocate, Citizens Utility Board, Maryland Office of People's Counsel, New Jersey Division of Rate Counsel, and Pennsylvania Office of Consumer Advocate
Joint NY Consumers	New York Energy Consumers Council, Inc., Real Estate Board of New York, and Building Owners and Managers Association of Greater New York
LS Power	LS Power Development, LLC
Mass. Atty. Gen.	Massachusetts Attorney General Maura Healey
Michigan Commission	Michigan Public Service Commission
Microsoft	Microsoft Corporation
MISO	Midcontinent Independent System Operator, Inc.
National Grid	National Grid
NEI	Nuclear Energy Institute
NEPGA	New England Power Generators Association, Inc.
NEPOOL	New England Power Pool Participants Committee
NESCOE	New England States Committee on Electricity
NY State Entities	New York State Public Service Commission, New York State Energy Research and Development Authority, and New York Power Authority

Short Name	Full Name
NGSA	Natural Gas Supply Association
NMA	National Mining Association
NRG	NRG Energy, Inc.
Nucor Gallatin	Nucor Steel Gallatin, LLC
NYISO	New York Independent System Operator, Inc.
ODEC	Old Dominion Electric Cooperative
Ohio Commission	Public Utilities Commission of Ohio's Office of the Federal Energy Advocate
PJM	PJM Interconnection, L.L.C.
PJM Power Providers	PJM Power Providers Group
Policy Integrity	Institute for Policy Integrity, New York Univ. School of Law
Public Interest Orgs.	Sustainable FERC Project, Clean Air Task Force, Natural Resources Defense Council, Union of Concerned Scientists, Southern Environmental Law Center, Conservation Law Foundation, and Acadia Center
R Street	R Street Institute
Real Estate Roundtable	The Real Estate Roundtable
RFF	Karen Palmer, Dallas Burtraw, Todd Aagaard, and Kathryne Cleary of Resources for the Future
Roger Caiazza	Roger Caiazza, Private Citizen
Roy Shanker	Roy J. Shanker, Ph.D., Independent Consultant
SAFE	Securing America's Future Energy
SEIA	Solar Energy Industries Association
Shell Energy	Shell Energy North America (US), L.P.
Trane	Trane Technologies plc
Utah Dept. of Commerce	Utah Department of Commerce
Vistra	Vistra Corp.
WPTF	Western Power Trading Forum

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Carbon Pricing in Organized Wholesale Electricity
Markets

Docket No. AD20-14-000

(Issued April 15, 2021)

DANLY, Commissioner, *concurring in part and dissenting in part*:

1. Any party with a rate on file can submit a Federal Power Act section 205¹ filing at any time. I therefore cannot oppose the policy statement's effective acknowledgement that section 205 has yet to be repealed and thus the Commission is obligated to consider such filings, including those related to carbon pricing initiatives.² So, as seemingly unnecessary as it may be to announce a policy of "non-binding . . . potential considerations," I see no basis upon which to oppose that aspect of the policy statement.³

2. Also "non-binding" is the majority's view of our jurisdictional powers as they memorialize them in this policy statement.⁴ I accordingly dissent from the policy statement to the extent it attempts to prejudge the jurisdictional merits of any future section 205 proposals. Congress grants our jurisdiction, and the courts decree its limits when we overstep it. Anyone considering a section 205 filing following this issuance would be well-advised to read the courts' decisions in order to inform themselves as to the proper bounds of a legitimate tariff proposal; interested parties should do the same when formulating protests.

3. Finally, my prior statement in this proceeding that the Commission "ha[s] jurisdiction to entertain section 205 filings that seek to accommodate state carbon-pricing policies" meant no more and no less than that.⁵ The Commission has the duty "to

¹ 16 U.S.C. § 824d.

² See *Carbon Pricing in Organized Wholesale Elec. Mkts.*, 175 FERC ¶ 61,036, at P 4 (2021).

³ *Id.*

⁴ See *id.* PP 8-17.

⁵ Compare *Carbon Pricing in Organized Wholesale Elec. Mkts.*, 173 FERC ¶ 61,062 (2020) (Danly, Comm'r, concurring in part and dissenting in part at P 1), with Exelon Corporation December 1, 2020 Reply Comments, Docket No. AD20-14-000, at

entertain” any section 205 filing. I reiterate now in case any party wishes to disregard my plain meaning: the Commission cannot prejudge whether future section 205 filings designed to accommodate state carbon-pricing initiatives will pass jurisdictional muster.⁶

For these reasons, I respectfully concur in part and dissent in part.

James P. Danly
Commissioner

7-8.

⁶ See *Carbon Pricing in Organized Wholesale Elec. Mkts.*, 173 FERC ¶ 61,062 (Danly, Comm’r, concurring in part and dissenting in part at P 4) (“I would have waited until we had an actual 205 filing before us rather than pre-judging the issue based on unstated assumptions about how such programs might work. It is easy to imagine any number of RTO/ISO carbon-pricing proposals that would violate the Federal Power Act . . .”).

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Carbon Pricing in Organized Wholesale Electricity Markets Docket No. AD20-14-000

(Issued April 15, 2021)

CHRISTIE, Commissioner, *concurring in part and dissenting in part*:

1. I concur that any filing under Section 205 proposing some form of carbon pricing will be evaluated on the facts and circumstances attendant to that filing.¹
2. I dissent from those parts of the Policy Statement² to the extent those provisions may be interpreted to appear to invite proposals for carbon pricing that are inconsistent with the following general principles.³
3. First, it's important to be straightforward with the public about what is being considered in this proceeding. For a government to retain the trust of the people, it is imperative to avoid what George Orwell criticized as language that disguises the truth about government actions behind euphemisms and other distortions.⁴
4. So let's be clear: the term carbon "price" as used in this docket,⁵ and by many commenters advocating for it, is a carbon *tax*. This is not just a matter of semantics. Using terms accurately will not only better serve and inform the public, but is essential to clarify, and avoid obfuscating, the legal – including constitutional – questions regarding this Commission's authority, as discussed further below.

¹ See Policy Statement at PP 20 and 22.

² See, e.g., *id.* PP 11, 17-19.

³ Any future filing will come with its own evidentiary record and be considered individually.

⁴ See, e.g., George Orwell, *Animal Farm* (1945); George Orwell, *Nineteen Eighty-Four* (1949).

⁵ See Policy Statement at P. 7.

5. As advocated by many commenters herein, a carbon “price” is intended – just like the tax it is– to *raise* the price to consumers of a product, in this case an energy resource based on its carbon attributes. Raising the price, of course, is the whole point of the policy.⁶ Whether in the form of an *ad valorem* add-on to the market price, similar to a sales tax, or a price floor set above the market price, or a cap-and-trade system, such as the Regional Greenhouse Gas Initiative (RGGI), the term carbon “price” as used in this Policy Statement and advocated by many in this docket means carbon *tax*.⁷ As one commenter quite accurately describes it:

Regardless of the program design, the carbon price will likely *increase* periodically, either *administratively* through a *pre-set* carbon price schedule or through periodic contraction of the number of emissions allowances introduced into the market, which will tend to *drive up* the price.

...

Incorporating a carbon price in wholesale electricity markets will *raise* [Locational Marginal Prices]⁸

⁶ See, e.g., Public Interest Organizations November 16, 2020 Comments at 3 (“Taxes and supports are equal but opposite measures: *a tax (or fee) increases costs* and thus reduces the quantity of a good or activity the state deems undesirable, while a support lowers costs and increases the quantity of those the state deems desirable. Both are economic policy tools intended to *move a market away from the equilibrium it would have achieved absent policy intervention.*” (emphasis added)).

⁷ I would also note that while RTO/ISO markets may be more administrative constructs than true markets, the goal of these markets is to use the operation of supply and demand to produce prices that reflect the competitive results obtainable in a true market. A carbon “price” is imposed with the obvious intent to *increase* the prices of certain energy resources above those that reflect competitive results, based on a single criterion, carbon content. See, e.g., Institute for Policy Integrity at New York University School of Law November 16, 2020 Comments at 6 (“Because a carbon price would *increase* the production costs of covered sources relative to the production costs of uncovered sources, some production will shift to uncovered sources.” (citation omitted) (emphasis added)).

⁸ Resources for the Future November 16, 2020 Comments at 6, 7 (emphasis added).

6. Of course, use of the euphemism carbon “price” meshes with what may be called the “nothing to see here” argument, which goes something like this: FERC’s sanctioning of carbon “prices” in RTO/ISO markets is part of the natural evolution in the long continuum of FERC’s regulation of wholesale rates under the Federal Power Act,⁹ and carbon “pricing” is simply part of and will improve price formation¹⁰ in FERC-regulated wholesale markets, with the carbon “price” properly added to address an externality.¹¹

7. A carbon *tax*, however, does not cease being a tax just because its ostensible purpose is to address a single externality (while ignoring the universe of other relevant externalities, both positive and negative). Just like litter and bottle taxes enacted by many

⁹ See, e.g., Exelon Corporation December 1, 2020 Reply Comments at 7, n.27 (“At the outset, we note that the Commission is responsible under the [Federal Power Act] to ensure rates, terms and conditions of service are just, reasonable and not unduly discriminatory.”). See also David R. Hill Columbia University Center on Global Energy Policy October 5, 2020 [filed] Statement at 6 (“It is only an incremental additional step to determining that an RTO/ISO rate design may incorporate a price for carbon in recognition of a state-established carbon control program.”); see generally Matthew E. Price October 5, 2020 [filed] Technical Conference Comments (October 2020 Price Comments) at 2 (for example, “so long as the ultimate decision is reached in accordance with the RTO’s internal governance requirements, the Commission’s task is simply to review the outcome of that internal process—the proposed tariff—and decide whether it is reasonable.”).

¹⁰ See, e.g., Resources for the Future November 16, 2020 Comments at 6 (“In general, *carbon pricing policies will help improve price formation by increasing* the offer prices of emitting generators to supply energy and capacity in wholesale markets. Thus, when a carbon-emitting generator is at the margin in these markets, prices will be *higher* than they would be without the carbon policy.” (emphasis added)).

¹¹ See, e.g., Exelon Corporation May 21, 2020 Comments on Request for Technical Conference at 3, 4 (“Pollutants such as carbon dioxide are negative externalities because they impose costs on society, yet the polluter does not have to internalize those costs in its production Carbon pricing is simply the mirror image of [state policies that subsidize certain resources based on environmental attributes], imposing a cost on emitting generation for their negative environmental attributes.”(citation omitted)); The American Wind Energy Association and the Alliance for Clean Energy – New York November 16, 2020 Initial Comments at 3 (“A carbon price would cause market participants to internalize what is currently an externality in wholesale electricity markets, resulting in prices that more accurately reflect the true and total costs of generating electricity at a particular location.”); October 2020 Price Comments at 1.

states and localities to defray the costs of roadside trash pick-up, it's still a tax, not just a minor element of price formation.

8. So let's be honest with the public about what this proceeding is really about and not hide behind the euphemism carbon "price."

9. At this point let me emphasize that simply labeling a carbon tax proposal accurately does *not* determine whether it is good or bad public policy, at either federal or state levels. Indeed, that's not for an administrative agency to decide.

10. At the federal level, Congress could conclude that from an economic standpoint a *federal* carbon tax is a more transparent and less harmful way to decarbonize the economy than a rent-seekers' paradise of subsidies (the euphemism is "policy support"), mandates, wealth transfers and regulatory actions that threaten both reliability and affordable consumer costs.¹² Congress could couple it with rebates to the consumers and taxpayers who will pay it. But those are questions for *Congress* to consider.

11. Some may even call a federal carbon tax the 'textbook solution' to achieving decarbonization. And it may be, if the textbook is an economics textbook. In the United States, however, there is always another textbook that must be consulted when deciding major questions of public policy, and that is the textbook of constitutional law and government.

12. The power to tax is one of the most important powers any government can exercise.¹³ If democracy and self-government mean anything, they mean that only those *elected* by the people should have the power to make the major policy decisions that affect people's lives in such important ways, and the power to tax clearly falls under any concept of major policy decision.¹⁴

¹² See, e.g., David R. Hill, Columbia University Center on Global Energy Policy December 1, 2020 Reply Comments at 5 ("These [set-asides, subsidies and mandates] can serve both to mask the cost of the carbon control measures being enacted, and also make carbon emissions reduction more expensive for consumers than it can be and should be.").

¹³ *McCulloch v. Maryland*, 17 U.S. 316, 439 (1819) ("The power to tax, involves, the power to destroy. . .").

¹⁴ See, e.g., *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) ("Finally, our inquiry into whether Congress has directly spoken to the precise question at issue is shaped, at least in some measure, by the nature of the question presented. Deference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes

13. So the broader question providing context for this and future proceedings goes to the heart of democratic government itself and, that is: *Who should have the power to tax?*

14. And we don't have to answer that question because the Constitution already has. It makes it clear that *only* those elected by the people to the *legislative* branch have this power.¹⁵ Congress can legislate to grant this power to an administrative agency through a clear and specific statute – and take accountability for its decision – but in the case of taxing carbon no one has made a convincing case that Congress has granted this power to FERC.

15. With the above general principles in mind, let's look at four general questions pertinent to this proceeding that are implicitly raised by the Policy Statement and which have been alluded to by the many commenters:

16. Can states impose carbon taxes? As the Policy Statement notes, the answer is clearly yes, under their plenary police powers, as long as they don't attempt to tax transactions where federal law has explicitly pre-empted them. They don't need FERC's permission to impose carbon taxes on retail sales or energy production, if they choose; they can do it now. Several states have already used their sovereign powers to impose carbon taxes, either directly or indirectly.¹⁶ RGGI, adopted by several eastern states, is an example of an indirect carbon tax.¹⁷

17. Can FERC impose a carbon tax at the wholesale level through its power to regulate RTOs/ISOs? As noted above, Congress would have to empower FERC by a clear and specific statute to impose carbon taxes in RTO/ISO markets and no one in this record has presented a convincing argument that Congress has done so.

an implicit delegation from Congress to the agency to fill in the statutory gaps. . . . In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation. *Cf.* Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986) (“A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration”) (citation omitted)).

¹⁵ U.S. Const. Art. 1, § 8.

¹⁶ *See, e.g.*, Policy Statement at nn.12-13.

¹⁷ *See id.* n.12.

18. Can FERC allow an RTO/ISO to impose a carbon tax on wholesale sales of power? To a certain extent, this question implicates the broader question about the nature of RTOs/ISOs. Some argue that they are merely private utilities and FERC's only role is to review a rate filing from an RTO/ISO and to approve the filing unless FERC finds it to be "unjust, unreasonable or unduly discriminatory."¹⁸

19. Rather than being little more than private utilities, however, RTOs/ISOs in their present incarnation were essentially created by FERC, as part of the "restructuring" era of the late 1990s/early 2000s, to carry out FERC-driven rate policies.¹⁹ In form, substance and practice, not to mention in their complex governing structures and processes (especially in multi-state organizations), RTOs/ISOs have evolved to resemble somewhat more the hybrid entities that the British not so lovingly call "QANGOs" (quasi-autonomous non-governmental organizations) than they do purely private utilities. This is especially true with regard to multi-state RTOs/ISOs, in which utilities from many different states participate and in which the interests and policies of those multiple states are implicated. Over the past two decades these organizations have taken on various regulatory roles that are more governmental in nature than private, in some cases literally displacing state regulatory authority.²⁰

¹⁸ See, e.g., October 2020 Price Comments at 2 ("To reject such a Section 205 filing, the Commission would need to conclude that it is unreasonable for a *private* party – the RTO, after all, is *not* a public regulator – to make these choices." (emphasis added)).

¹⁹ See, e.g., *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 (1999) (cross-referenced at 89 FERC ¶ 61,285), *order on reh'g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000) (cross-referenced at 90 FERC ¶ 61,201), *aff'd sub nom. Pub. Util. Dist. No. 1 of Snohomish Cty. v. FERC*, 272 F.3d 607 (D.C. Cir. 2001); *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996) (cross-referenced at 75 FERC ¶ 61,080), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (cross-referenced at 78 FERC ¶ 61,220), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

²⁰ FERC Order Nos. 2222 and 2222-A are the two most recent examples where the RTOs/ISOs displace state regulatory authority, in these examples at FERC's explicit direction. See *Participation of Distributed Energy Resource Aggregations in Markets Operated by Regional Transmission Organizations and Independent System Operators*,

20. So, just as FERC cannot directly impose a carbon tax without a clear grant of congressional authorization, arguably it would be a distinction without a difference for FERC to approve a proposal from an RTO/ISO to *impose* a carbon tax (as opposed simply to *recognizing* an individual state's carbon tax, as discussed below.)

21. This would include efforts by a multi-state RTO/ISO (and its market participants²¹) to address “leakage” (a euphemism for “states that won’t impose carbon taxes”)²² by penalizing resources in states within the RTO that have not imposed a carbon tax;²³ such as, for example, attempting to levelize the costs of state-imposed carbon taxes by imposing a higher offer floor (MOPR anyone?) on untaxed resources from the non-conforming “leakage” states in the RTO/ISO.

22. Can FERC allow an RTO/ISO to recognize carbon taxes imposed by one or more states? If a state has used its sovereign authority to impose a carbon tax, directly or indirectly, and that tax is simply incorporated into the production costs of a resource from that state offered into the RTO/ISO markets, there is no reason for FERC to intervene.²⁴

Order No. 2222, 85 FR 67094, 172 FERC ¶ 61,247, *on reh’g*, Order No. 2222-A, 174 FERC ¶ 61,197 (2021).

²¹ For example, Exelon argues that “[f]ailure to address emissions leakage in a coordinated manner is causing wholesale rates to become unjust, unreasonable and unduly discriminatory.” Exelon Corporation November 16, 2020 Comments at 8.

²² *See, e.g.*, Exelon Corporation December 1, 2020 Reply Comments at 6 (“Instead, resources in states with no carbon price seek to preserve the artificial and unintended advantage that they currently enjoy as a result of other states joining RGGI by opposing Commission action. Thus, their positions in this proceeding are efforts to throw carpet tacks in the path of progress toward properly functioning carbon pricing mechanism(s) that include leakage mitigation.”).

²³ *See, e.g., id.* at 10 (“[T]he Commission must act under section 206 to rectify the [leakage] situation – such as by requiring RTO/ISOs that have states with carbon pricing to implement a leakage mitigation mechanism In other words, the intent and effect of leakage mitigation is *to remove the impact of an unwanted carbon price* from states with no carbon pricing.” (citation omitted) (emphasis in original)).

²⁴ *See, e.g.*, Ari Peskoe October 5, 2020 [filed] Opening Statement at 1 (“The Commission allows sellers to recover in wholesale rates compliance costs associated with emissions regulations, and the Commission would have no basis to prevent regulated entities from passing through the costs of a state-set carbon price.”).

State-imposed regulatory costs, which of course differ from state to state, are already “baked in” to a bidder’s costs and present no cause for FERC’s concern.

23. Just as with proposals to accommodate other state policies, however, consideration of each specific proposal will be highly fact-intensive and one key question will be to determine whether the line has been crossed between simply *recognizing* an individual state’s carbon tax versus *imposing* that state’s tax on generating resources – and consumers – in other states that have *not* consented to be taxed, an especially salient question in multi-state RTOs/ISOs.

24. All future proceedings under Section 205, 206 or other statutory provisions will, of course, come with their own individual evidentiary records and will be judged individually at that future time. To the extent, however, the Policy Statement may be interpreted to invite proposals inconsistent with the general principles stated above, I respectfully dissent.

For these reasons, I respectfully concur in part and dissent in part.

Mark C. Christie
Commissioner