

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

**State Policies and Wholesale Markets Operated)
by ISO New England, Inc., New York) Docket No. AD17-11-000
Independent System Operator, Inc., and)
PJM Interconnection, L.L.C.)**

**POST-TECHNICAL CONFERENCE
REPLY COMMENTS
OF THE
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION**

I. INTRODUCTION AND SUMMARY OF REPLY COMMENTS

The National Rural Electric Cooperative Association (“NRECA”) submits these comments in response to Initial Comments filed in the above-referenced proceeding. NRECA submitted Initial Comments in this proceeding on June 22, 2017 (“NRECA Comments”) and incorporates those prior comments here. NRECA’s Reply Comments address the broad issue of how the Commission should proceed in ensuring that wholesale markets provide adequate, safe, reliable and resilient energy and capacity at just and reasonable rates to consumers, while also taking into account state policies which affect wholesale electricity markets.

The Commission’s initiation of this dialogue for a coordinated and consistent approach to the interaction of state policies and wholesale markets is timely. The number and diversity of opinions taken in Initial Comments in this proceeding demonstrates the significance of these issues. Notably, while participants offered varying opinions on the degree of urgency and level

of action FERC should take, few commenters recommended that FERC do nothing at all.¹ Instead, most commenters urged the Commission to take *some* form of action.

The Initial Comments demonstrated great diversity of opinions on whether and how wholesale market design should be modified in light of “increasing interest by states to support particular resources or resource attributes.”² However, the Commission should expect that individual states will continue to implement policies that will affect wholesale markets. Therefore, NRECA supports the Commission’s efforts in this proceeding to identify potential procedural and substantive paths forward.

For reasons discussed by several participants at the technical conference in this proceeding and in various post-technical conference comments, it is not feasible and certainly is not advisable for the Commission to mandate a specific market design solution at this time. In its Initial Comments on the five paths identified in the Commission’s May 23, 2017 Notice Inviting Post-Technical Conference Comments in this proceeding, NRECA supported Path 1 as the optimal path so that wholesale power markets can become truly competitive and RTO-administered markets are voluntary, residual sources for needed capacity and energy. Realizing that the Commission may not adopt Path 1 anytime soon, NRECA supported Path 2 as a sub-optimal path forward.³ However, based on the Initial Comments in this proceeding, NRECA is even more certain of its recommendation that the Commission should not mandate a substantive outcome at this time, but instead should first, and soon, adopt principles against which further efforts to accommodate state policies in wholesale markets will be measured. The Commission

¹ See, e.g., Post-Technical Conference Comments of Sierra Club submitted in this proceeding on June 22, 2017, which suggested that there is not “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”, but nevertheless supported at least a “limited action approach” by the Commission.

² Notice of Technical Conference issued in this proceeding on March 3, 2017, at 2.

³ NRECA Comments at 10-12.

should also very soon adopt a process whereby ISO New England, Inc. (“ISO-NE”), the New York Independent System Operator, Inc. (“NYISO”) and PJM Interconnection, L.L.C. (“PJM”) each may continue their ongoing stakeholder processes⁴ and either report to the Commission or submit filings to revise their market designs consistent with the principles to be adopted by the Commission. NRECA also continues to support regional technical conferences, so that the Commission can assist in developing solutions that will meet its principles.

II. RECENT COURT OPINIONS ON ISSUES RAISED IN THIS PROCEEDING

At the outset, and as further support of the need for the Commission to issue principles soon, NRECA notes two appellate decisions issued since the filing of Initial Comments in this proceeding, which the Commission should take into account in addressing state policies impacting wholesale markets.

A. Vacatur of Orders Approving PJM Minimum Offer Price Rule Exemptions

First, and most significantly, on July 7, 2017, the U.S. Court of Appeals for the D.C. Circuit issued an opinion in *NRG Power Marketing, LLC v. FERC*, No. 15-1452. In summary, the Court vacated and remanded to FERC orders which established two categorical exemptions from PJM’s Minimum Offer Price Rule (“MOPR”) – the Self-Supply Exemption and the Competitive Entry Exemption.⁵ While it is too early to know the full impact of the Court’s opinion, the significance of this reintroduced threat to self-supply cannot be understated. The use of MOPRs as a tool to address state policies was a core topic during the Technical

⁴ Contrary to indications at the Technical Conference, NRECA submits that the Commission should reiterate its support for RTO stakeholder processes as a valuable forum for diverse market participants, including state regulatory interests, to address issues and attempt a coordinated solution. *See, e.g., Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, FERC Stats. & Regs. ¶ 31,281 at PP 7, 501-515(2008), *order on reh’g*, Order No. 719-A, FERC Stats. & Regs. ¶ 31,292, *order on reh’g*, Order No. 719-B, 129 FERC ¶ 61,252 (2009). *Consolidated Edison Co. of New York, Inc.*, 95 FERC ¶ 61,216 (2001) (FERC “strongly encourage[d] market participants to use the stakeholder process . . .”);

⁵ *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090 (2013); *reh’g denied*, 153 FERC ¶ 61,066 (2015).

Conference in this proceeding, as evidenced by the possible paths outlined by the Commission in its May 23 Notice. As explained in the Pre-Technical Conference Statement of Michael Cocco on behalf of Old Dominion Electric Cooperative (“ODEC”) and in ODEC’s capacity as a member of NRECA, past experience demonstrates that initial reactions to state policies that impact wholesale markets can have significant unintended adverse consequences for customers.⁶ In PJM, when guaranteed clearing for self-supply and an exemption from the MOPR for state-mandated resources were eliminated in 2011, the Commission acknowledged that “the purpose and function of the MOPR is not to unreasonably impede the efforts of resources choosing to procure or build capacity under long-standing business models.”⁷ PJM similarly reiterated that “efforts in this area must be sensitive to the possibility of unintended consequences, and must ensure that legitimate new entry is not deterred.”⁸ The subsequent PJM MOPR Self-Supply Exemption and Competitive Entry Exemption were the mechanisms which the Commission approved in order to address these unintended adverse consequences on load-serving entities (“LSEs”) who procure or build capacity under long-standing business models.

With the D.C. Circuit’s opinion in the *NRG* case, it is uncertain that even these exemptions will be available in PJM. Several commenters in this proceeding have stressed the need for the Commission to ensure that self-supply – through bilateral contracts and/or owned generation – is accommodated and encouraged.⁹ As stated in the Eastern New England Consumer-Owned Systems’ (“ENESCOS”) Comments:

⁶ Cocco Statement at 2-4.

⁷ *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145 at P 208 (2011).

⁸ *Comments of PJM Interconnection, L.L.C. on Technical Conference*, filed in Docket Nos. ER11-2875, *et al.*, on August 29, 2011, at 5.

⁹ *See, e.g.*, PJM’s Initial Comments filed in this proceeding at 11, recommending that the Commission adopt a principle in order to “[r]ecognize that established business models (such as the public power business model) . . . should continue to be respected and accommodated.”); Post-Technical Conference Comments of American Municipal Power, Inc.; Post-Technical Conference Comments of Transmission

The Commission should recognize explicitly that allowing self-supply for vertically-integrated load-serving entities that do not have a mandatory purchase obligation . . . is a fundamental component of ensuring that any centralized auction construct is minimally just and reasonable. Restoration of self-supply should be an integral part of any ultimate implementation of either the “accommodating” or the “integrating” approaches to addressing the impacts of State-directed power supply resource acquisition on the Commission’s centralized auction construct. At such time as the Commission is restored to a quorum and begins to evaluate a way forward for addressing the issues discussed in the Technical Conference, ENESCOS expect that the Commission will need to address the restoration of the right of self-supply to vertically integrated load-serving entities in New England, as it has in other RTOs.¹⁰

For reasons already acknowledged by the Commission and discussed in Initial Comments in this proceeding,¹¹ any action taken by the Commission in this proceeding must include affirmative measures to at least restore and provide for an exemption from the MOPR for self-supply resources by LSEs – if not full guaranteed clearing for self-supply as previously existed in at least PJM.¹² Notably, the Court in the *NRG* proceeding did not vacate FERC’s orders on the merits of the exemptions. Instead, the Court found that FERC exceeded its statutory authority in ruling on the PJM filings which were submitted under Federal Power Act (“FPA”) Section 205.¹³ Therefore, the substance of the exemptions and FERC’s reasons for adopting

Access Policy Study Group; Comments of the New York Power Authority; Post-Technical Conference Comments of Sierra Club; Post-Technical Conference of the Eastern New England Consumer-Owned Systems.

¹⁰ ENESCO Comments filed June 22, 2017 in this proceeding, at 4-5 (citations omitted).

¹¹ See *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090 at PP 107-115 (FERC approved PJM’s Self-Supply Exemption, stating that “. . . as a general matter, providing exemptions for resources properly designated as self-supply when they meet suitable net-short and net-long thresholds is reasonable . . . If a self-supply entity meets a sufficiently large proportion of its capacity needs through its own generation investment, it has little or no incentive to suppress capacity prices.”); see also Cocco Statement at 2-4.

¹² Under the initial PJM MOPR, the clearing exemption for self-supply resources required PJM to “clear” sell offers from self-supply resources, but if the self-supply resource triggered the MOPR, an offer floor and replacement clearing price would be established so that the self-supply resource did not depress clearing prices. See *Motion to Intervene, Protest and Request for Rejection or, in the Alternative, Further Procedures of the National Rural Electric Cooperative Association*, filed March 4, 2011, in Docket Nos. EL11-20-000, *et al.*, at 13-14.

¹³ Specifically, the Court found that FERC exceeded its authority under FPA Section 205 when it suggested modifications to PJM’s filing in order to make the proposal just and reasonable in FERC’s

them remain just and reasonable. NRECA's Initial Comments included principles which addressed this issue.¹⁴

B. State Resource Policies Upheld

Second, on June 28, 2017, the U.S. Court of Appeals for the Second Circuit issued an opinion upholding a final judgment which dismissed challenges to Connecticut's implementation of legislation which, among other things, provided for the Connecticut Public Utilities Regulatory Authority to solicit proposals for renewable energy generation and provided for utilities to enter into wholesale energy contracts with the winning bidders. An underlying complaint also challenged Connecticut's Renewable Portfolio Standard ("RPS"). In the opinion, the Court found that the complainant "failed to state a claim that Connecticut's renewable energy solicitations . . . are preempted by federal law" and "failed to state a claim that Connecticut's [RPS] violates the dormant Commerce Clause."¹⁵ The Court distinguished the Connecticut program from the Maryland program which the Supreme Court found was preempted by the FPA in *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288 (2016), because, according to the Second Circuit, (1) Connecticut's program does not override a FERC-approved capacity auction; and (2) the contracts at issue in the Connecticut case "are the kind of bilateral contracts between utilities and generators that are subject to FERC review for justness and reasonableness . . . [t]hey are, in other words, precisely what the *Hughes* court placed outside its limited holding."¹⁶

While limited to the Connecticut legislation, the opinion demonstrates that states can indeed implement policies regarding resource priorities which impact wholesale markets yet are not preempted by federal law. FERC, therefore, should continue its progress toward addressing

view, because the Court ruled that FPA "Section 205 does not allow FERC to make modifications to a proposal that transform the proposal into an entirely new rate of FERC's own making." Slip Op. at 3.

¹⁴ NRECA Comments at 4-10.

¹⁵ *Id.*, Slip Op. at 4.

¹⁶ *Id.*, Slip Op. at 35.

the interaction of state policies and wholesale markets on a coordinated (but not one-size-fits-all) basis.

II. FERC SHOULD FIRST ADOPT PRINCIPLES

NRECA and others have requested that the Commission adopt principles or issue guidance soon, as states and RTOs are in various stages of policymaking and market design, respectively. Adoption of principles at the outset, against which efforts to accommodate or otherwise take into account state policies in wholesale markets will be measured. Adoption of principles, without a mandated path forward, will address calls by some commenters for the Commission to act immediately,¹⁷ as well as the few calls for FERC to restrain from acting,¹⁸ and those in between.¹⁹

NRECA supported the principles identified by ODEC as the minimum standards for any RTO/ISO measure to accommodate state policies. Those principles are as follows:

1. Maintain a focus on reliable service at just and reasonable rates for end-use customers;
2. Ensure that LSEs' long-term investments in generation are honored and encouraged;
3. Avoid the volatility of repeated, reactionary revisions to market designs;
4. Adopt wholesale market policies which encourage resource diversity and accommodate legitimate state policy objectives; and
5. Allow regional flexibility.

¹⁷ See, e.g., PJM's Initial Comments, urging the Commission to adopt a policy statement providing guidance on Path 2 "reasonably soon after the Commission regains its quorum . . ."

¹⁸ See Post-Technical Conference Comments of Sierra Club submitted in this proceeding on June 22, 2017.

¹⁹ See Post-Technical Conference Comments of the PSEG Companies, submitted in this proceeding on June 22, 2017, at 5 ("The Commission should address the emergent issues it faces related to the preservation of particular technologies needed to address carbon abatement and fuel diversity goals; the Commission need not address every potential issue related to state public policy initiatives at this time").

Several parties also proposed guiding principles.²⁰ Some of the principles recommended by parties are reasonable and in line with the Commission’s statutory obligation to ensure just and reasonable rates, as well as maintain the balance between state and federal jurisdiction.²¹ However, some of the themes and issues raised in comments and principles are neither new nor reasonable, and the Commission should reject attempts by some commenters to use state policies as the basis for another round of sweeping redesign of capacity and energy markets, to their own cause or benefit. For example, the Independent Market Monitor for PJM argues against bilateral contracts an alternative to the mandatory capacity constructs.²² The Market Monitor’s comments are a direct and unreasonable contradiction of statements by the Commission favoring long-term, bilateral arrangements.²³ Bilateral contracts are a mainstay for LSEs like many of NRECA’s members and the Commission should not allow this proceeding to be used to adversely alter these longstanding business models. Instead, the Commission should ensure that changes in market design in reaction to state policies do not create (1) unintended adverse consequences such as threats to longstanding business models of public power entities engaged in self-supply; (2) threats to reliability or resiliency; and/or (3) unjust and unreasonable rates for consumers.

Once the Commission has adopted principles, it should establish regional technical conferences in order to address (1) reforms for immediate implementation as well as longer-term,

²⁰ See Initial Post-Technical Conference Comments submitted by American Municipal Power, Inc., the Transmission Access Policy Study Group, PJM, PSEG, American Electric Power/Dayton Power and Light, and the American Coalition for Clean Coal Energy.

²¹ See, e.g., Post-Technical Conference Comments of American Municipal Power, Inc.; Post-Technical Conference Comments of Transmission Access Policy Study Group

²² Comments of the Independent Market Monitor for PJM filed in this proceeding on June 22, 2017, at 2.

²³ See *Wholesale Competition in Regions with Organized Electric Markets*, Notice of Proposed Rulemaking, 122 FERC ¶ 61,167 at P 130 (2008); see also, *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, FERC Stats. & Regs. ¶ 31,281 at PP 283, 301 (2008) (in order to “facilitate the long-term contracting process by increasing the transparency of potential sellers and buyers of market participants”, the Commission required RTOs and ISOs to develop website bulletin boards for posting long-term buy and sell offers); *order on reh’g*, Order No. 719-A, FERC Stats. & Regs. ¶ 31, 292 (2009).

and (2) transition mechanisms. The regional technical conferences can be held in conjunction with ongoing RTO stakeholder and state efforts. NRECA also recommends that in order to reduce the need for market design by litigation, the Commission require status reports by RTOs on their efforts, so that the Commission can intervene if necessary to facilitate a coordinated accommodation which meets the principles identified above.

III. CONCLUSION

For the reasons discussed in its Initial Comments, NRECA continues to recommend that the Commission (1) adopt the principles recommended by NRECA; (2) direct ISO-NE, NY ISO and PJM to work toward implementation of Path 1 or, in the alternative, Path 2, with the conditions discussed in NRECA's Initial Comments; and (3) direct further RTO/ISO processes, as discussed.

Respectfully submitted,

/s – Randolph Elliott/

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of July, 2017, I have caused a copy of the foregoing to be served upon each person designated on the Official Service List for this proceeding.

/s – Adrienne E. Clair/