



Response to the Nine FERC Commissioners' Open Letter

June 12, 2007

The American Public Power Association (“APPA”) and the Electricity Consumers Resource Council (“ELCON”) by this letter are responding to the May 31, 2007 “Open Letter to Policy Makers” released by former Federal Energy Regulatory Commission (“FERC”) Commissioners Vicky A. Bailey, Linda Breathitt, Nora Mead Brownell, James J. Hoecker, Jerry J. Langdon, William L. Massey, Elizabeth Anne Moler, Donald F. Santa and Pat Wood III (the “Nine Commissioners”). While the Nine Commissioners’ letter does not mention our respective organizations, reports in the trade press of the press conference where the letter was released indicate that certain of the former Commissioners identified our organizations by name, and made clear that the letter is intended to respond to our positions on electric industry restructuring.¹

Wholesale power markets in regions with Regional Transmission Organizations (“RTOs”) and the restructured retail markets they support are not working all that well. Many in the industry—not just our respective organizations—are seriously questioning them, privately if not publicly. It is therefore unfortunate that the Nine Commissioners chose in their letter to assume a defensive posture, rather than to open a dialogue on how wholesale power markets might be reformed.

We have many reactions to the Nine Commissioners’ letter. Among them are the following:

- **“Competition” Is in the Eye of the Beholder; Just Because You Question the Nine Commissioners’ Version of It Doesn’t Mean You Oppose “Competition.”**

The Nine Commissioners seem to operate on the assumption that either you must support competition (as they define it) or you hate competition—there is no in-between. In fact, APPA and ELCON have been strong supporters of “competition,” as *we* define it. For example, APPA and ELCON strongly support open access transmission service as a platform to support wholesale market competition. We supported Order Nos. 888 and 889 ten years ago. We have supported Order No. 890, the Commission’s current initiative to update and improve the Order No. 888 open access transmission tariff regime. APPA and ELCON also note that some regions of the country, *e.g.*, the West outside of California, have well-developed wholesale power markets without either RTOs or retail access regimes. “Competition” comes in many forms, not just the one flavor that the Nine Commissioners support.

¹ See, *e.g.*, Platt’s *Electric Power Daily*, “Nine ex-FERC members lobby on behalf of competitive markets,” Friday, June 1, 2007 issue at 1.

- **Blaming the States’ Implementation of Retail Competition Is Not a Useful Exercise.** The Nine Commissioners, perhaps naturally for former federal regulators, try to cast blame on the states for perceived shortcomings in their retail access regimes. They cite the states’ inclusion of “below-market long-term rate caps,” and “different conditions for different customers.” Those features, however, were included because of policymakers’ and consumer representatives’ concerns that retail restructuring otherwise would not benefit smaller consumers. Moreover, it took many stakeholders and many compromises to develop these retail access programs. Regulated investor-owned utilities and their unregulated generation affiliates agreed to those regimes and all the attached conditions, including the rate caps. Many electric consumers paid substantial stranded costs to their regulated utilities for these same generation assets as part of the rate cap bargain. Moreover, unregulated generation affiliates of regulated utilities in restructured markets have made literally billions of dollars on formerly rate-based generation assets.² Simply put, it is not useful to denigrate the states for past policy decisions that cannot now be undone. Rather, we should concentrate on where state and federal regulators can go from here to mitigate the acknowledged problems in retail access regimes and the wholesale power markets that underpin them.
- **Lower Costs are in the Eye of the Beholder (Or He Who Pays for the Study).** The Nine Commissioners assert that competition has saved customers billions of dollars. But the specific dollar amounts they cite point towards their reliance on studies that have themselves been seriously questioned, a point that the Nine Commissioners omit.³ Simply reciting these dollar figures over and over again does not make them true. For claims of lower costs to be meaningful to policymakers, they must be verifiable and must result in pocketbook savings to electric consumers (not just profits for generation company shareholders).
- **Higher Fuel Costs Are Not the Whole Story Behind Price Increases.** The Nine Commissioners also cite increased fuel costs, coupled with the lifting of rate caps, as the culprit behind price increases. Higher fuel costs are indeed part of the story, but they are not all of it. Ken Rose, Senior Fellow with the Institute of Public Utilities at Michigan State University, has prepared a paper explaining why fuel price increases do not entirely explain wholesale electric price increases, illustrating the disproportionate impact that natural gas prices have on electricity prices, and pointing out that market design and strategic actions by suppliers also need to be examined.⁴ And although restructured and regulated regions of the country face the same fuel price increases, rates in regions with regulated retail rates have been

² Edward Bodmer, “The Electric Honey-pot: The Profitability of Deregulated Generation Companies,” February 5, 2007, available on APPA’s website at: <http://www.appanet.org/aboutpublic/index.cfm?ItemNumber=16772>.

³ John Kwoka, “Restructuring the U.S. Electric Power Sector: A Review of Recent Studies,” November 2006, available at: <http://www.appanet.org/pressroom/index.cfm?ItemNumber=18402>.

⁴ Kenneth Rose, “The Impact of Fuel Costs on Electric Power Prices,” June 2007, <http://www.appanet.org/files/PDFs/ImpactofFuelCostsonElectricPowerPrices.pdf>.

lower for many years and remain so now. The primary premise upon which restructuring was sold to state policymakers and retail consumers—lower rates—has not been realized. No amount of *post hoc* rationalization about increased efficiencies and other benefits of competition can mask the fact that this did not happen, or that some power suppliers are making very substantial profits even while power prices are increasing.

- **Demand Response Can Be Accommodated Under a Variety of Scenarios.** The Nine Commissioners argue that RTOs are the best way to support demand response. But demand response can be supported (or not supported) under both RTO and individual utility scenarios. ELCON for its part believes that RTOs have not taken all the steps they can fully to support demand response. APPA notes that many of its members have undertaken very substantial demand response programs without RTOs. There is no one “right” way to do demand response programs.
- **“Customer Testimonials” Are Few and Far Between.** The Nine Commissioners cite “satisfied customers” as evidence that “something is working.” This Panglossian approach to customer satisfaction notwithstanding, customer reaction to retail restructuring in the main has been overwhelmingly negative.⁵ One need only read the comments that large customer groups submitted to the Electric Energy Market Competition Task Force⁶ or survey the current status of retail competition in Connecticut, Delaware, Illinois, Maryland, Maine, Massachusetts, Ohio, Rhode Island, the reregulation legislation recently enacted in Virginia and the reassessment now afoot in Michigan to understand that retail electric customers are not happy.⁷ And while Wal-Mart may be pleased with its supply options, most retail customers and their representatives in restructured states, including state consumer advocate

⁵ The results of annual customer satisfaction surveys of approximately 6,000 large end-users with their electric suppliers for the year 2006 by TQS Research, Inc., a nationally recognized research firm, show that restructuring has thus far failed to deliver any positive results that one would reasonably expect to be measured by such surveys had competition occurred. Specifically, for the past nine years, the customer service scores in Regulated States are consistently higher than those in Deregulated States for every factor measured in those surveys. This is counter-intuitive if any degree of “competition” had, in fact, been successful. See, “Supplemental Comments of the Electricity Consumers Resource Council,” filed in *Conference on Competition in Wholesale Power Markets*, Docket No. AD07-7-000 (March 12, 2007) at 3–6 (discussing the TQS Research results).

⁶ See, e.g., “Comments on Electric Energy Market Competition Task Force Draft Report on Behalf of Coalition of Midwest Transmission Customers, NEPOOL Industrial Customer Coalition, PJM Industrial Customer Coalition, Industrial Energy Users of Ohio, Industrial Energy Consumers of Pennsylvania, and West Virginia Energy Users Group,” in *Electric Energy Market Competition Task Force*, Docket No. AD05-17-000, June 26, 2006.

⁷ See, e.g., “Power Deregulation Brought Few Bargains,” AP story dated April 21, 2007 by Ryan Keith (“Not one of the 16 states—plus the District of Columbia—that have pushed forward with deregulation since the 1990s can call it a success. In fact, consumers in those states fared worse than residents in states that stuck with a policy of regulating their power industries.”).

offices, Attorneys General, and groups such as the Consumer Federation of America and AARP, are not. Moreover, wholesale buyers in restructured RTO markets, including many members of our respective organizations, are also quite vocal about their dismay regarding their power supply choices. When power generators have to tell power buyers that they really are living in the best of all possible power supply worlds, contrary to the evidence before the buyers' own eyes, something is wrong.

APPA and ELCON have publicly raised their concerns about restructured wholesale power markets and resulting high retail rates. ELCON issued two white papers in 2005 and 2006;⁸ APPA issued a 2004 whitepaper⁹ and, through its Electric Market Reform Initiative ("EMRI"), has commissioned a series of research studies and papers dealing with various aspects of electric industry restructuring.¹⁰ Neither organization has advocated a return to the "good ol' days."¹¹ Rather, ELCON has proposed a list of essential pre-conditions that are necessary to revamp wholesale power markets if the Locational Marginal Pricing ("LMP") construct is to provide real competition. APPA has funded a substantial body of research on restructured electric markets and made that research public, to inform debate and foster a dialogue with policymakers and other industry stakeholders regarding possible market reforms.

APPA and ELCON believe that those in the industry reaping profits from the current power supply markets in RTO regions and retail access states need to understand the views of wholesale customers and retail consumers in those states, since they are paying the corresponding bills. It would be more helpful to work together to develop constructive market reforms than to deny the real problems that exist, or characterize those who question the current state of such markets as "subsidy seekers" and "whiners with no solutions."¹² Given that many of the Nine Commissioners now are employed by or represent the "haves" in the electric utility industry, they are uniquely positioned to contribute to such a dialogue.

⁸ See, "Problems in the Organized Markets," Electricity Consumers Resource Council, April 2005, available at: <http://www.elcon.org/Documents/Publications/ELCONSpecialReportApril2005.pdf>; and "Today's Organized Markets—A Step Toward Competition or an Exercise in Re-regulation?," Electricity Consumers Resource Council, December 4, 2006, available at: <http://www.elcon.org/Documents/Publications/12-4piom.pdf>.

⁹ See, "Restructuring at the Crossroads: FERC Electric Policy Reconsidered," American Public Power Association, December 2004, available on APPA's website at: <http://www.appanet.org/files/PDFs/APPAWhitePaperRestructuringatCrossroads1204.pdf>.

¹⁰ EMRI research papers are available at: <http://appanet.org/aboutpublic/index.cfm?itemnumber=16772>.

¹¹ *Electric Power Daily*, June 1, 2007 issue at 10 (quoting Elizabeth Moler characterizing the positions of APPA and ELCON).

¹² *Electric Power Daily*, June 1, 2007 issue at 10 (quoting Elizabeth Moler characterizing the positions of APPA and ELCON); Transcript of February 27, 2007 Technical Conference in FERC Docket No. AD07-7 at 110, Statement of Elizabeth Moler on behalf of Exelon Corporation ("We're certainly aware of the criticisms of competition in organized markets. But I would point out that those who criticized them have not offered any solutions. They simply whine.").