20190318-5122 FERC PDF (Unofficial) 3/18/2019 4:47:26 PM

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Refinements to Horizontal Market Power Analysis for Sellers in Certain Regional Transmission Organization and Independent System Operator Markets	Docket No. RM19-2-000

COMMENTS OF THE AMERICAN ANTITRUST INSTITUTE, THE AMERICAN PUBLIC POWER ASSOCIATION, AND THE NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION

Diana L. Moss, Ph.D.
President
Randy Stutz
Vice President of Legal Advocacy
AMERICAN ANTITRUST INSTITUTE
1025 Connecticut Avenue, N.W.
Washington, DC 20036
202-828-1226

Delia Patterson
SVP, Advocacy & Communications and
General Counsel
John E. McCaffrey
Regulatory Counsel
AMERICAN PUBLIC POWER ASSOCIATION
2451 Crystal Drive, Suite 1000
Arlington, VA 22202
202-467-2900

Randolph Elliott
Senior Director, Regulatory Counsel
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION
4301 Wilson Blvd., 11th Floor
Arlington, VA 22203
703-907-6818

March 18, 2019

Table of Contents

I. Overview 1

II. Interests of Commenters 4

III. Comments 6

A. The Commission's analysis of sellers' horizontal market power is critical to the Commission's market-based rate program. 6

B. Ongoing competitive concerns in wholesale power markets undermine the Commission's renewed proposal to abolish the analysis of horizontal market power for many market-based rate sellers. 8

C. The existing multi-regional, RTO/ISO-based regime for monitoring and mitigating market-based rate seller market power is an inadequate surrogate for Commission oversight of markets. 14

1. RTO/ISO market monitoring and mitigation does not provide a mechanism for the Commission to collect information on market-based rate sellers' potential market power. 14

2. RTO/ISO market monitoring and mitigation cannot lawfully substitute for the Commission's regulation of wholesale electricity markets required by the Federal Power Act. 18

3. RTO/ISO market monitoring and mitigation does not provide a mechanism to ensure just and reasonable rates for bilateral sales of electricity at wholesale. 23

D. The Commission would lose its ability to directly collect important data and analysis essential to its mandate to promote competition and protect consumers. 26

IV. Recommendations 29

A. The Commission should retain a means to collect market power screen data for important practical, legal, and policy reasons. 29

B. The Commission should not act on this proposed rulemaking before it has acted on related pending rulemakings in Docket Nos. RM16-17-000 and RM16-21-000. 30

C. The Commission should also consider a more comprehensive re-examination of its market-based rate program. 32

20190318-5122 FERC PDF (Unofficial) 3/18/2019 4:47:26 PM

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Refinements to Horizontal Market Power Analysis for Sellers in Certain Regional Transmission Organization and Independent System Operator Markets	Docket No. RM19-2-000

COMMENTS OF THE AMERICAN ANTITRUST INSTITUTE, THE AMERICAN PUBLIC POWER ASSOCIATION, AND THE NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION

The American Antitrust Institute (AAI), the American Public Power Association (APPA), and the National Rural Electric Cooperative Association (NRECA) jointly submit these comments on the Commission's Notice of Proposed Rulemaking (NOPR) in this docket.[1] The Commission proposes significant changes to its policies and procedures governing public utilities' market-based rate authority. These comments address the implications of the Commission's proposals for competition and consumers in wholesale electricity markets.

I. Overview

In the NOPR, the Commission proposes to amend its regulations concerning the horizontal market power analysis required for a public utility to obtain or retain the authority to sell wholesale energy, ancillary services, and capacity at market-based rates. Specifically, the NOPR would eliminate the requirement for public utilities to submit horizontal market power screens for sales in regions where a Regional Transmission Organization (RTO) or Independent System Operator (ISO) administers energy, ancillary

[1] 165 FERC ¶ 61,268 (2018), 84 Fed. Reg. 993 (Feb. 1, 2019).

services, and capacity markets subject to Commission-approved RTO/ISO monitoring and mitigation.[2] If the RTO/ISO does not administer a capacity market, horizontal market power analyses would be required only if a public utility seeks authority to sell capacity at market-based rates, but not if the public utility's market-based rate authority is limited to energy and ancillary services.[3] In lieu of submitting horizontal market power analyses, public utilities "may state that they are relying on Commission-approved market monitoring and mitigation to address potential horizontal market power sellers may have …."[4] The Commission states that "these exemptions will reduce the burden on market-based rate sellers while preserving appropriate Commission oversight of its market-based rate program."[5]

AAI, APPA, and NRECA respectfully disagree that the NOPR strikes a proper balance between alleviating regulatory burdens and guarding against the harmful effects of market power in wholesale electricity markets. Horizontal market power analyses provide valuable information to the Commission and the public concerning the possession and potential exercise of market power by public utilities with market-based rate authority. The Commission and the courts have long emphasized the important role of horizontal market power analysis in the Commission's market-based rate framework. Indeed, the present NOPR states that "indicative screens remain an important tool for determining whether a seller has market power" in RTOs/ISOs that do not administer

---

[2] NOPR at P 43.

[3] *Id.* at P 44.

[4] *Id.* at PP 43, 44.

[5] *Id.* at P 45.

capacity markets[6] and proposes to continue to require sellers outside RTOs/ISOs to submit them.[7]

The Commission's mandate to promote competition and protect consumers in wholesale electricity markets is paramount. Because RTO/ISO monitoring and mitigation is an inadequate substitute for Commission oversight, AAI, APPA, and NRECA do not support the present proposal simply to eliminate the requirement that market-based rate sellers submit horizontal market power screens to the Commission. To the extent the Commission believes its current market power screening in these regions "yields little practical benefit,"[8] it should refine its *ex ante* analyses of the ability of individual sellers to exercise market power in the evolving organized wholesale markets. The way to reduce unnecessary regulatory burdens on market-based rate sellers is to modernize and improve—not eliminate—the Commission's collection of this information.

Moreover, the Commission already has a pending rulemaking (Docket No. RM16-17-000) and a pending notice of inquiry (Docket No. RM16-21-000) concerning its collection of data and information related to market-based rates.[9] As such, the Commission should not adopt the instant proposal while earlier important and closely related proposed changes to its market-based rate program remain pending. Accordingly,

---

[6] *Id.* at P 50.

[7] *Id.* at P 43 n.78.

[8] *Id.* at 45.

[9] *See Data Collection for Analytics and Surveillance and Market-Based Rate Purposes*, Docket No. RM16-17-000, 156 FERC ¶ 61,045 (2016) (notice of proposed rulemaking) ("Data Collection NOPR"); *Modifications to Commission Requirements for Review of Transactions Under Section 203 of the Federal Power Act and Market-Based Rates Under Section 205 of the Federal Power Act*, Docket No. RM16-21-000, 156 FERC ¶ 61,214 (2016) (notice of inquiry) ("Market Power NOI").

20190318-5122 FERC PDF (Unofficial) 3/18/2019 4:47:26 PM

AAI, APPA, and NRECA urge the Commission to terminate this rulemaking and complete the pending proceedings in the Data Collection NOPR and Market Power NOI.

Once the matters in these pending proceedings are resolved, the Commission could consider issuing a further notice of inquiry as a prelude to a future proposed rulemaking. The notice of inquiry could solicit public comment on any further required re-assessment of the competition analysis the Commission requires to support its grants of market-based rate authority, particularly in RTO and ISO markets, and how that information can improve the quality and consistency of the Commission's analysis of market power across the many areas where the Commission exercises authority to promote competition and protect consumers.

II. Interests of Commenters

AAI is an independent, nonprofit organization. The AAI's mission is to promote competition that protects consumers, businesses, and society. It serves the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of competition policy. AAI has provided legal and economic analysis, commentary, and testimony on mergers, market design, energy policy, and competition policy involving the energy industries since the organization's founding in 1998.

APPA is the national service organization representing the interests of the nation's 2,000 not-for-profit, community-owned electric utilities. Public power utilities are located in every state except Hawaii. They collectively serve over 49 million people and account for 15 percent of all sales of electric energy (kilowatt-hours) to ultimate customers. Public power utilities are load-serving entities, with the primary goal of

20190318-5122 FERC PDF (Unofficial) 3/18/2019 4:47:26 PM

providing the communities they serve with safe, reliable electric service at the lowest reasonable cost. Public power utilities operate in all of the Commission-approved RTOs and ISOs. Many participate directly in the organized wholesale electric markets of an RTO or ISO, while others are served by a wholesale supplier – sometimes a joint action agency or another public power utility – that participates in these markets. Although public power utilities own almost 10 percent of the nation's electric generating capacity, they purchase nearly 70 percent of the power used to serve their communities.

NRECA is the national service organization representing the interests of the nation's nearly 900 member-owned, not-for-profit rural electric utilities. America's electric cooperatives provide electric service to approximately 42 million people across 47 states. Rural electric cooperatives account for about 12 percent of all electric energy (kilowatt-hours) sold in the United States. NRECA's member cooperatives include 831 distribution cooperatives and 62 generation and transmission (G&T) cooperatives. Distribution cooperatives provide power directly to their end-of-the-line member-consumers. The G&T cooperatives generate and transmit power to nearly 80 percent of the distribution cooperatives and are owned by these distribution cooperatives. Other distribution cooperatives receive power from other generation sources within the electric utility sector. Distribution and G&T cooperatives share an obligation to serve their members by providing safe, reliable, and affordable electric service. NRECA has long supported Commission policies to ensure just and reasonable rates for jurisdictional wholesale sales and transmission service and to foster competitive wholesale electricity markets.

20190318-5122 FERC PDF (Unofficial) 3/18/2019 4:47:26 PM

III. Comments

A. The Commission's analysis of sellers' horizontal market power is critical to the Commission's market-based rate program.

The Commission's policies and regulations governing market-based rates have, from the outset, contained mechanisms aimed at determining, on an *ex ante* basis, whether an entity has the ability to exercise horizontal market power in wholesale markets.[10] Building on policies introduced in the Commission's *AEP Power Marketing* decisions,[11] Order No. 697 revised and codified two indicative horizontal market power screens, a pivotal supplier screen and a wholesale market share screen. The indicative screens were adopted "to identify the sellers that raise no horizontal market power concerns and can otherwise be considered for market-based rate authority,"[12] and were purposely designed to be "conservative," as sellers who failed one or both of the indicative screens would have the opportunity to rebut the presumption of market power that resulted from such screen failure.[13]

---

[10] *See, e.g.*, *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252 at PP 7-11, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, *clarified*, 124 FERC ¶ 61,055, *order on reh'g*, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), *order on reh'g*, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009), *order on reh'g*, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010), *aff'd sub nom. Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), *cert. denied*, 133 S. Ct. 26 (2012).

[11] *See AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018, *order on reh'g*, 108 FERC ¶ 61,026 (2004).

[12] Order No. 697 at P 62.

[13] *See id.* at PP 62-64. The pivotal supplier screen "evaluates the potential of a seller to exercise market power based on uncommitted capacity at the time of the balancing authority area's annual peak demand," assessing "whether the market demand can be met absent the seller during peak times." *See id.* at P 35. The wholesale market share screen "measures for each of the four seasons whether a seller has a dominant position in the market based on the number of megawatts of uncommitted capacity owned or controlled by the seller as compared to the uncommitted capacity of the entire relevant market." *See id.* at P 34. Order No. 697 explains that this screen "is also useful in measuring market power because it measures a seller's size relative to others in the market, in particular, the seller's share of generating capacity uncommitted after accounting for its obligations to serve native load." *See id.* at P 65. Order No. 697 emphasizes the value of utilizing both screens, noting that they "measure different aspects of market power," and that

The Commission has emphasized the essential role that its *ex ante* market power screening plays in ensuring just and reasonable rates under the Commission's market-based rate program. Indeed, the Commission's *ex ante* screening for seller-specific market power provides the legal linchpin for concluding that market-based rates by public utilities can satisfy the Federal Power Act's (FPA) just and reasonable standard. As the Commission explained in Order No. 697-A:

> When the Commission determines that a seller lacks or has mitigated market power, it is making a determination that the resulting rates will be established through competitive forces, not the exercise of market power, and thus will fall within a zone of reasonableness which protects customers against excessive rates, on the one hand, but allows the seller the opportunity to recover costs and earn a reasonable rate of return, on the other hand.[14]

The courts have specifically relied on the existence of seller-specific, *ex ante* market power screening in upholding the Commission's use of market-based rates. In *Blumenthal v. FERC*, for example, the D.C. Circuit held that the Commission could lawfully rely on its prior determination that an individual seller lacked or had mitigated its market power, coupled with post-transaction reporting, but an RTO assessment of the competitiveness of its markets was not required.[15] The Ninth Circuit, in affirming Order

"[t]aken together, the indicative screens can measure a seller's market power at both peak and off-peak times." *See id.* (footnote omitted).

[14] Order No. 697-A at P 409. *See also id.* (explaining that the Commission "exercises its statutory responsibility under the FPA to ensure that market-based rates are just and reasonable through the dual requirement of an *ex ante* finding that the seller lacks or has mitigated both horizontal and vertical market power and post-approval oversight through reporting requirements and ongoing monitoring" (footnote omitted)); Order No. 697 at P 70 (stating that "market-based rate assessments are used to determine the *ability to exercise*, not the *exercise of*, market power. The Commission need not wait passively until market power is exercised. Rather, it is incumbent on the Commission to set policies that will ensure that rates remain just and reasonable under section 205 of the FPA. Requiring sellers to submit screens that analyze the sellers' potential to exercise market power is consistent with such a policy.").

[15] *Blumenthal v. FERC*, 552 F.3d 875, 882 (D.C. Cir. 2009); *see also California ex rel. Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004).

No. 697 against a facial challenge, similarly accepted the principle that screening of individual sellers for market power supported the Commission's presumption that resulting sales would be at just and reasonable rates.[16] The court emphasized in this regard that the Commission "require[d], through a screening process, the collection of empirical data on sellers' market power before it authorizes the filing of market-based rates."[17]

As discussed below, the NOPR's proposal to dispense with *ex ante* screening in certain RTO and ISO markets would deprive the Commission and the public of critical information regarding sellers' ability to exercise market power and would undercut the lawfulness of public utility sellers' market-based rate tariffs in RTO and ISO regions.

B. Ongoing competitive concerns in wholesale power markets undermine the Commission's renewed proposal to abolish the analysis of horizontal market power for many market-based rate sellers.

The NOPR proposes to remove the requirement for most existing and prospective market-based rate sellers in RTO and ISO regions to file horizontal market power analyses with the Commission. This proposal resuscitates, in large part, the Commission's 2014 proposal in Docket No. RM14-14-000 to relieve market-based rate sellers in RTO/ISO markets of the requirement to file horizontal market power analyses.[18]

---

[16] *Mont. Consumer Counsel*, 659 F.3d at 917; *see also id.* at 919 (stating that "[w]here sellers do not have market power or the ability to manipulate the market (alone or in conjunction with others), it is not unreasonable for FERC to presume that rates will be just and reasonable.").

[17] *Id.* at 917; *see also id.* ("FERC has adopted a rigorous screening process to detect market power").

[18] *Refinements to Policies and Procedures for Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, 147 FERC ¶ 61,232 at PP 35–40 (2014) (notice of proposed rulemaking).

The Commission received significant feedback opposing that proposal from a variety of commenters—including AAI, APPA, and NRECA—which raised substantive legal, enforcement, and policy arguments as to why the Commission's screening of market-based rate sellers' horizontal market power should be retained.[19] Based on these arguments, the Commission concluded in Order No. 816 that the Final Rule would "not adopt the NOPR proposal … allowing sellers in RTO/ISO markets to rely on market monitoring and mitigation in lieu of submitting indicative screens."[20]

The Commission's 2014 proposal would have eliminated the requirement to file horizontal market power analyses with the Commission for all market-based rate sellers in all RTO/ISO markets. As noted above, the instant NOPR is slightly narrower: it would eliminate the requirement for market-based rate sellers to submit horizontal market power analyses if the RTO/ISO administers energy, ancillary services, and capacity markets subject to Commission-approved RTO/ISO monitoring and mitigation.[21] If the RTO/ISO does not administer a capacity market, market-based rate sellers would have to submit horizontal market power analyses if they seek authority to sell capacity at market-based rates.[22] In either case, in lieu of submitting horizontal market power analyses, sellers

---

[19] *See* Comments of the American Antitrust Institute, Docket No. RM14-14-000 (Sept. 23, 2014); Comments of the American Public Power Association and National Rural Electric Cooperative Association, Docket No. RM14-14-000 (Sept. 24, 2014). The instant NOPR summarizes these and other criticisms of the 2014 proposal. *See* NOPR at PP 10–21.

[20] *Refinements to Policies and Procedures for Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 816, 153 FERC ¶ 61,065 at P 365 (2015), *order on reh'g,* Order No. 816-A, 155 FERC ¶ 61,188 (2016). *See also id.* at P 27.

[21] NOPR at P 43. This currently includes four RTOs: ISO New England, the New York Independent System Operator, PJM Interconnection, L.L.C., and the Midcontinent Independent System Operator. *See id.* at P 40.

[22] *Id.* at P 44. This currently includes the California Independent System Operator and the Southwest Power Pool. *See id.* at P 41.

20190318-5122 FERC PDF (Unofficial) 3/18/2019 4:47:26 PM

"may state that they are relying on Commission-approved market monitoring and mitigation to address potential horizontal market power sellers may have …."[23]

Although the proposals differ, there are a number of important observations about the Commission's attempts to roll back requirements for market-based rate sellers to submit horizontal market-based analyses over the time that has elapsed between "NOPR 1.0" and "NOPR 2.0." First, the implications of the Commission's latest proposal remain effectively the same in regard to the Commission's mandate to oversee wholesale power markets to promote competition and protect consumers. As noted by commenters in the previous proceeding, eliminating the Commission's *ex ante* market power analysis fundamentally impairs the agency's ability to promote competition and protect consumers.

Second, it remains that the effect of the proposal will be to further distance the Commission from oversight of the competitive issues that arise in the organized wholesale electricity markets. The Commission has already largely outsourced the oversight of monitoring and mitigation to independent market monitors and the RTOs/ISOs. The Commission is thus one layer removed from the workings of wholesale markets and eliminating its *ex ante* market power screening of even the largest generators would seem to further the Commission's already significant distance from this crucial area of oversight.

Third, nothing of substance involving competition in wholesale power markets has changed or improved in the last three and a half years that would warrant terminating

[23] *Id.* at PP 43, 44. Sellers would still have to file initial applications for market-based rate authority, triennial updates, and change-in-status filings as currently required, but without any horizontal market power screen analysis. *See id.* at P 46.

20190318-5122 FERC PDF (Unofficial) 3/18/2019 4:47:26 PM

the requirement that market-based rate sellers submit periodic horizontal market power analyses with the Commission. Indeed, it is arguably now more important than ever that the Commission retain the requirement to collect horizontal market power analyses from market-based rate sellers.

This imperative is punctuated by the fact that the RTO/ISO capacity markets are home to a significant volume of transactions. Between 2013 and 2016, for example, the Government Accountability Office (GAO) estimated capacity markets commitments in the four RTOs at $51 billion.[24] The stakes associated with any potential competitive and consumer abuse relating to the exercise of market power in markets involving this level of commerce, without doubt, far exceed the projected burden reduction of approximately $2.2 million estimated by the Commission.[25] By comparison, the PJM market monitor has recently filed a complaint at the Commission asserting that PJM's capacity market revenues for delivery year 2021/2022 were increased by over $1.2 billion dollars, or 15.3%, because of inflated, noncompetitive supplier bids that could not be "mitigated" under the PJM tariff.[26]

The NOPR itself does not discuss the size or significance of the RTO/ISO wholesale markets for which the Commission would forgo collecting market power screen information. But the Commission's website states that "two-thirds of the nation's

---

[24] Government Accountability Office, Electricity Markets: Four Regions Use Capacity Markets to Help Ensure Adequate Resources, but FERC Has Not Fully Assessed Their Performance, at 29 (Dec. 2017) ("GAO Report"), available at https://www.gao.gov/assets/690/688811.pdf.

[25] NOPR at P 76.

[26] *See Independent Market Monitor for PJM v. PJM Interconnection, L.L.C.*, Docket No. EL17-47-000 (filed Feb. 21, 2019). AAI, APPA, and NRECA cite this complaint only to give an indication of the stakes the potential exercise of horizontal market power in capacity markets and do not take a position here on the merits of the complaint or the particular remedies it seeks.

electric load is served in RTO regions."[27] The NOPR does estimate the number of sellers that would be affected, and that, too, appears to be significant: the Commission states that in recent years, market-based rate sellers in RTOs/ISOs have made about 130 indicative-screen filings each year,[28] and the Commission estimates that its proposal would eliminate 105 of them each year (72 in new market-based rate applications and 33 in triennial market power analysis updates).[29]

Moreover, concern about strategic withholding in capacity markets heightens the imperative that the Commission retain its *ex ante* analysis of sellers' market power.[30] We need look no further than the Commission's own deliberations on the effectiveness of market monitoring and mitigation involving capacity withholding. For example, one market participant withheld a significant amount of capacity from the New England ISO's 8th forward capacity auction in 2014, driving up prices to supra-competitive levels.[31] Issuances in the Commission proceeding to investigate this incident illustrate concerns over the ability of existing monitoring and mitigation regimes to adequately police the exercise of market power. For example, Commissioners Clark and Bay wrote:

> The ISO-New England's (ISO-NE) forward capacity market (FCM) is unique in that the auction results are subject to Commission review under the just and reasonable standard. This review process was part of a

---

[27] https://www.ferc.gov/market-oversight/mkt-electric/overview.asp (visited Mar. 14, 2019). The Commission staff's 2015 *Energy Primer* cites the same statistic. *Energy Primer* 40, 58 (Nov. 2015), available at https://ferc.gov/market-oversight/guide/energy-primer.pdf.

[28] NOPR at P 45.

[29] NOPR at P 75.

[30] Letter from the American Antitrust Institute to U.S. Department of Justice Assistant Attorney General William J. Baer and Federal Trade Commission Chairwoman Edith Ramirez re: Antitrust Tools for Challenging Capacity Withholding in Wholesale Electricity Markets, July 22, 2014, *available at* http://www.antitrustinstitute.org/content/aai-encourages-antitrust-enforcers-challenge-capacity-withholding- wholesale-electricity.

[31] Federal Energy Regulatory Commission, *Order to Show Cause,* (Sept. 16, 2014) 148 FERC ¶ 61,201.

> carefully negotiated settlement meant to allay stakeholder concerns over the market's design. Here, there is evidence suggesting the exercise of market power, and it is uncontroverted that the market power, if it existed, was not mitigated.[32]

Market power concerns in RTO/ISO markets were also illustrated by an anticompetitive "swap" agreement between KeySpan and Morgan Stanley in the mid-2000s. The swap employed a scheme to hedge revenue risks from competitive bidding and entry of new generators in the New York ISO, with the effect of keeping prices at supra-competitive levels, notwithstanding new entry.[33] While the Commission Staff found no tariff or market manipulation violation, the Commission approved strengthened market mitigation measures to prevent a repeat of the episode.[34]

In light of demonstrated and potential abuses of market power in regional markets, abolishing the Commission's *ex ante* analysis of a seller's market power appears particularly ill-conceived. Removal of the requirement would be a very attractive prospect for sellers seeking to obtain or retain market-based rate authority, including those that possess market power. But it is likely to be a losing proposition for competition and consumers, and for the Commission, in performing vital oversight of competition in the nation's wholesale electricity markets.

Rather than eliminate its collection of this important information in RTO/ISO regions, the Commission should explore ways to reduce any unjustified reporting burden

---

[32] Statement by Commissioner Tony Clark and Commissioner Norman Bay, Federal Energy Regulatory Commission, ISO New England, Inc., Docket No. ER14-1409, September 16, 2014.

[33] The U.S. Department of Justice challenged this conduct under the antitrust laws. *See, e.g.*, Complaint, at 2-3, United States v. Morgan Stanley, 11-CIV-6875 (S.D.N.Y. September 11, 2011), *available at* http://www.justice.gov/atr/cases/f275700/275762.pdf. The government's consent order obtained relief of $4.8 million. See Final Judgment, at 2, United States v. Morgan Stanley, 11-CIV-6875 (S.D.N.Y. August 7, 2012), available at https://www.justice.gov/atr/case-document/file/505016/download.

[34] *New York Independent System Operator, Inc.,* 131 FERC ¶ 61,170 (2010).

for industry while seeking to refine and strengthen its ability to identify the ability of sellers to exercise market power in the increasingly complex organized wholesale markets. We suggest a path forward in section IV below.

C. The existing multi-regional, RTO/ISO-based regime for monitoring and mitigating market-based rate seller market power is an inadequate surrogate for Commission oversight of markets.

1. RTO/ISO market monitoring and mitigation does not provide a mechanism for the Commission to collect information on market-based rate sellers' potential market power.

The Commission and the courts have long emphasized the crucial role that *ex ante* screening of a seller's potential horizontal market power plays in ensuring that market-based rates are just and reasonable.[35] Indeed, in upholding Order No. 697, the Ninth Circuit relied on the fact that the order "requires, through a screening process, the collection of empirical data on sellers' market power before it authorizes the filing of market-based rates."[36] Without offering a Commission-administered replacement for the current *ex ante* screening mechanisms, the NOPR once again proposes to eliminate the market power screening requirement in certain RTO and ISO markets based primarily on the existence of Commission-approved market monitoring and mitigation.

Importantly, the Commission specifically declined in Order No. 697 to eliminate the indicative screens for sellers in RTO and ISO markets, even though Commission-approved market monitoring and mitigation was in place in those markets when the rule

---

[35] *See supra* section III.A.

[36] *Mont. Consumer Counsel v. FERC*, 659 F.3d at 917 ("FERC has adopted a rigorous screening process to detect market power").

was issued.[37] Though agreeing that such monitoring and mitigation "provides protection against a seller's ability to exercise market power,"[38] the Commission concluded, "it cannot replace the horizontal market power analyses *which provide the Commission and the industry with critical information regarding the potential market power of sellers in the market*."[39]

Now, however, the Commission suggests a fundamental change in course, proposing to dispense with the requirement to submit indicative screens in certain RTO/ISO markets based on "the Commission's previous findings that RTO/ISO monitoring and mitigation adequately mitigate a seller's market power and the availability of other data regarding horizontal market power."[40] The Commission's proposal is inconsistent with its previous conclusion that, even where RTO/ISO monitoring and mitigation is in place, the indicative screens provide "critical information regarding the potential market power of sellers in the market."[41]

Nothing in the NOPR or the Commission's existing regulations would require RTOs/ISOs or market monitors to collect the "critical information" that would no longer be received through the pivotal supplier and the wholesale market share screen filings. This is not a situation where the Commission is eliminating a duplicative data collection or reporting obligation to reduce regulatory burdens; the Commission is proposing to eliminate the requirement to provide information that the Commission has previously

[37] Order No. 697 at P 290; *see also* Order No. 697-A at PP 109-110.

[38] Order No. 697-A at P 109.

[39] *Id.* (emphasis added).

[40] NOPR at P 27.

[41] Order No. 697-A at P 109.

found to be "critical" to market power assessment, even with RTO/ISO market monitoring and mitigation in place.

Order No. 719,[42] as the Commission notes, requires market monitors to submit annual and quarterly market reports,[43] but the reporting requirements are not uniform and are left to the discretion of the RTO/ISO or market monitor.[44] Moreover, the reports do not have to provide any seller-specific market power data similar to the information included in market-based rate sellers' screen filings.[45] Under Order No. 719 and the Commission's regulations, for example, RTO/ISO market monitors are not obligated to collect and report individual entity market shares and market concentration data. The Commission notes in the NOPR that RTO/ISO market monitors report "a variety of competition metrics,"[46] but acknowledges that "[t]he market reports for each RTO/ISO do not reference the indicative screens."[47]

The Commission does not propose to require the market monitors to remedy this omission. Indeed, the NOPR makes no proposals whatsoever on what the RTOs/ISOs or the market monitors must report to the Commission annually or quarterly, continuing to leave this to their discretion under Order No. 719. Moreover, the NOPR does not propose

---

[42] *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, FERC Stats. & Regs. ¶ 31,281, at P 424 (2008), *order on reh'g*, Order No. 719-A, FERC Stats. & Regs. ¶ 31,292 (2009), *order on reh'g*, Order No. 719-B, 129 FERC ¶ 61,252 (2009).

[43] NOPR at P 31 n.60.

[44] *See* Order No. 719 at P 414 ("While an RTO or ISO is free to propose in its tariff details of the information it desires its MMU to provide, we will not require any particular menu.").

[45] *See* Order No. 719 at P 424 (explaining that "[t]he information to be provided in the MMU reports . . . may be developed on a case-by-case basis, but is generally to consist of market data and analyses of the type regularly gathered and prepared by the MMU in the course of its business, subject to appropriate confidentiality restrictions."); *see also* 18 C.F.R. § 35.28(g)(3)(ii)(B) (2018).

[46] NOPR at P 31 (footnote omitted).

[47] *Id.* at P 31 n.61.

any alternative, perhaps less burdensome mechanism for the Commission to obtain this information from market-based rate sellers. Instead, the Commission's proposal is that henceforth market-based rate sellers would be permitted to operate in these regions without any Commission screening of their potential ability to exercise horizontal market power.

The other information that sellers are required to submit in seeking to obtain or retain market-based rate authority cannot substitute for the elimination of the indicative screens.[48] Information on the generation and transmission assets of the seller and its affiliates, the asset appendix required by 18 C.F.R. § 35.37(a)(2), and certain ownership and affiliate information, while welcome and important in its own right, is fundamentally different in character from the data and analysis included in the indicative screen filings. The information that sellers would still file could offer a ballpark idea of the share of generation capacity owned or controlled by a seller and its affiliates in a particular region, but, divorced from any analytical framework designed to identify a seller's ability to exercise market power in specific markets or submarkets, such basic affiliate and market share information does not provide a sufficient *ex ante* screen for horizontal market power.

It is also worth pausing to highlight the continued stay – now in its fourth year – of the requirement in 18 C.F.R. § 35.37(a)(2) to submit an organizational chart when a seller seeks to obtain or retain market-based rate authority.[49] AAI, APPA, and NRECA

---

[48] *See* NOPR at PP 46-47, 62-64.

[49] *Refinements to Policies & Procedures for Market-Based Rates for Wholesale Sales of Elec. Energy, Capacity & Ancillary Servs. by Public Utilities*, 153 FERC ¶ 61,337 (2015). *See also* Order No. 816-A at P 47; NOPR at P 46 n.81.

urge the Commission to remove the stay on the organizational chart requirement, regardless of whether the Commission adopts the NOPR. But particularly if the Commission were to eliminate the indicative screen requirement based in part on "the availability of other data regarding horizontal market power,"[50] it would be proper to reinstitute the organizational chart requirement. The organizational chart required by 18 C.F.R. § 35.37(a)(2) provides greater transparency concerning a seller's affiliate relationships and in a format superior to affiliate lists or narrative descriptions of corporate relationships.[51]

2. *RTO/ISO market monitoring and mitigation cannot lawfully substitute for the Commission's regulation of wholesale electricity markets required by the Federal Power Act.*

The Commission's proposal is flawed both practically and legally because it would substitute RTO/ISO market monitoring and mitigation for Commission screening of market-based rate seller horizontal market power. By dispensing with the indicative screens, the Commission would be "relying on Commission-approved RTO/ISO market monitoring and mitigation to address potential horizontal market power Seller may have in those markets."[52]

However, the existing RTOs/ISOs and their market monitoring units are not public agencies or regulators. The RTOs/ISOs are private, regulated public utilities under

---

[50] NOPR at P 27.

[51] If the Commission were to eliminate the indicative screen requirement as proposed in the NOPR, AAI, APPA, and NRECA submit that this would more than offset any incremental burden associated with removing stay on the organizational chart requirement. *See* Order No. 816-A at P 47 (noting that the Commission was extending the stay to "allow the Commission more time to fully consider the benefits and burdens associated with the corporate organizational chart requirement.").

[52] NOPR at P 43 (quoting proposed 18 C.F.R. § 35.37(c)).

the FPA.[53] Although the Commission's existing regulations require that RTOs/ISOs provide for the monitoring of markets that the RTO/ISO operates or administers,[54] RTO/ISO market monitoring units are private entities—RTO/ISO employees or independent contractors—not de facto extensions of the Commission's staff.[55]

In a recent opinion which found that the PJM market monitor did not have standing to participate in the appeal, the D.C. Circuit emphasized the distinction between PJM's Independent Market Monitor, which "is not a creature of statute and operates under no affirmative duty imposed by public law,"[56] and a public regulator such as the Commission.[57] PJM has cited the court's opinion in disputing the PJM market monitor's authority to bring complaints against the RTO on market-related issues.[58]

And in an opinion issued on December 28, 2018, just eight days after the Commission issued the NOPR in this proceeding, the D.C. Circuit remanded Commission orders that had obfuscated the responsibilities of the Commission, ISO New England (ISO-NE), and the ISO-NE market monitor in mitigating horizontal market power in the ISO's forward capacity market.[59] The court held that only the Commission—not the ISO or its market monitor—had authority to evaluate whether a capacity seller's offer was just

---

[53] *See Cal. Indep. System Operator v. FERC*, 372 F.3d 395 (D.C. Cir. 2004) (Commission lacks authority to order ISO public utility to replace its board of directors); *Pennsylvania-New Jersey-Maryland Interconnection*, 103 FERC ¶ 61,170, at PP 16–21 (2003) (explaining why PJM is a public utility).

[54] 18 C.F.R. § 35.34(k)(6) (2014).

[55] *See Elec. Power Supply Ass'n v. FERC*, 391 F.3d 1255, 1265 (D.C. Cir. 2004).

[56] *Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223, 1234 (D.C. Cir. 2018).

[57] *Id.* at 1233.

[58] *See, e.g.*, *PJM Interconnection, L.L.C.*, Docket No. EL19-27-000, Motion to Dismiss, or in the Alternative, Answer of PJM Interconnection, L.L.C. (Jan. 25, 2019). As with the complaint pending in Docket No. EL19-47-000, *see supra* footnote 26, AAI, APPA, and NRECA do not take a position here on the merits of the complaint, the particular remedies it seeks, or PJM's motion to dismiss.

[59] *Exelon Corp. v. FERC*, 911 F.3d 1236 (D.C. Cir. 2018).

and reasonable under the FPA or instead constituted unlawful physical withholding and should be subject to mitigation, and the court remanded with the direction that the Commission clarify its orders.[60] In an order on remand, the Commission clarified its orders in conformance with that understanding of the statute.[61] While the Commission noted that the ISO New England market power mitigation procedure at issue was "unique among RTOs/ISOs that administer capacity markets,"[62] the court's decision, based on the unambiguous requirements of the FPA, draws into question the Commission's assumption that it can rely on RTO/ISO marketing monitoring units to adjudicate the lawfulness of seller conduct and whether seller rates are just and reasonable under the FPA.

To the contrary, no court has sanctioned the NOPR's method of delegating the responsibility for ensuring just and reasonable rates to the ISOs and their market monitoring units. The FPA relies on public regulation, not private enforcement, as the means to ensure just and reasonable rates for wholesale sales of electricity. In section 205 of the FPA, Congress delegated to the Commission the responsibility to ensure that all wholesale electric rates of public utilities are just and reasonable. This is the only statutory standard for the lawfulness of wholesale rates.[63] This Commission (subject to judicial review) is the only body that can apply and enforce this statutory standard.[64] The Commission cannot subdelegate this core statutory duty to the regulated public utility

---

[60] *See id.* at 1244.

[61] *See ISO New England Inc.*, 166 FERC ¶ 61,060 (2019).

[62] *Id.*, P 4.

[63] *Morgan Stanley Capital Group v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 545 (2008).

[64] *Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251 (1951).

itself—no matter how independent from other market participants the Commission may require that public utility to be, and no matter how expert or disinterested the public utility's staff and contractors may be.

In *U.S. Telecom Association v. FCC*,[65] the D.C. Circuit remanded an FCC order delegating to state commissions certain functions regarding the unbundling of rates of competing telecommunications companies. The court held that the FCC could not subdelegate its statutory responsibilities to an outside party, whether public or private:

> When a statute delegates authority to a federal officer or agency, subdelegation to a subordinate federal officer or agency is presumptively permissible absent affirmative evidence of a contrary congressional intent. But the cases recognize an important distinction between subdelegation to a subordinate and subdelegation to an outside party. The presumption that subdelegations are valid absent a showing of contrary congressional intent applies only to the former. There is no such presumption covering subdelegations to outside parties. Indeed, if anything, the case law strongly suggests that subdelegations to outside parties are assumed to be improper absent an affirmative showing of congressional authorization.
>
> …
>
> We therefore hold that, while federal agency officials may subdelegate their decision-making authority to subordinates absent evidence of contrary congressional intent, they may not subdelegate to outside entities—private or sovereign—absent affirmative evidence of authority to do so.[[66]]

In the NOPR, the Commission states that it "does not believe that the Commission has subdelegated its responsibility with respect to RTO/ISO markets; to the contrary, it has approved RTO/ISO proposed rules that help ensure that rates for sales in RTO/ISO markets are just and reasonable."[67] We respectfully submit that this *ipse dixit* is an

---

[65] 359 F.3d 554 (D.C. Cir. 2004).

[66] 359 F.3d at 565, 566 (citations omitted).

[67] NOPR at P 69.

20190318-5122 FERC PDF (Unofficial) 3/18/2019 4:47:26 PM

insufficient analysis of the Commission's statutory responsibilities. The courts have sustained the Commission's authority to allow market-based rates under the FPA with the understanding that the Commission had a mechanism for *ex ante* screening of sellers' market power as well as *ex post* monitoring of their sales.[68] As already noted, RTO/ISO market monitors do not engage in the *ex ante* screening of sellers' market power that the Commission proposes to stop doing. While the Commission has accepted RTO/ISO market rules, including market power-mitigation rules, as just and reasonable, the NOPR cites no Commission finding in those orders that RTO/ISO market monitoring can substitute for the Commission's *ex ante* screening market power of sellers seeking to obtain or retain market-based rate authority.

The NOPR also notes that the Commission has granted or continued the market-based rate authority of sellers on a case-by-case basis by relying on RTO/ISO market rules to mitigate their market power.[69] But the Commission now proposes to abandon its own case-by-case analysis by making a blanket finding that RTO/ISO market monitors can mitigate the market power of all existing and future sellers in these RTO/ISO regions, irrespective of market shares, pivotal-supplier status, or market concentrations. The NOPR identifies no basis under the FPA for the Commission to subdelegate its responsibilities to ensure just and reasonable rates under section 205 of the FPA to the public utilities Congress charged it to regulate, much less to private contractors of those same public utilities.

---

[68] *Mont. Consumers Counsel*, 659 F.3d at 917; *Blumenthal*, 552 F.3d at 882.

[69] NOPR at P 45.

3. RTO/ISO market monitoring and mitigation does not provide a mechanism to ensure just and reasonable rates for bilateral sales of electricity at wholesale.

The proposed rule has a further legal infirmity that precludes its adoption in its present form. The market-based rate tariffs of public utility sellers in RTO/ISO regions authorize sales of energy, capacity, and ancillary services in bilateral markets within RTO/ISO footprints as well as the RTO/ISO-administered markets and auctions. The proposed rule would authorize public utilities in all RTO/ISO regions to sell in bilateral markets within RTO/ISO footprints without filing any market power analysis and without any Commission finding as to their market power. But nothing in the proposed rule would ensure that these bilateral sales would be just and reasonable and not the product of seller market power.

The NOPR would eliminate the Commission's *ex ante* screening of seller market power required by the courts and replace it with a non sequitur: a statement by market-based rate sellers that they are "relying on Commission-approved market monitoring and mitigation to address potential horizontal market power Sellers may have in those markets,"[70] even though their bilateral sales transactions are not subject to any Commission-approved market monitoring and mitigation.

The NOPR acknowledges that these bilateral sales "are not monitored or mitigated by RTOs/ISOs" but argues that "the proposal will not give rise to market power concerns with respect to bilateral transactions …."[71] The NOPR's defense is to hypothesize that the very existence of RTO/ISO markets ensures competitive bilateral

[70] *See* NOPR at P 43 (quoting proposed 18 C.F.R. § 35.37(c)).

[71] *Id.* at P 56.

markets. "Thus, if RTO/ISO energy (e.g., day-ahead and real-time) markets and capacity markets are competitive, and Commission-approved monitoring and mitigation sufficiently protects against the exercise of market power in these markets, then bilateral markets for the same product should also be competitive."[72] The Commission asserts that RTO/ISO markets "can provide an alternative to bilateral sales, thereby helping to discipline prices on bilateral contracts" by providing a "benchmark" price for load-serving entities seeking such contracts, although the Commission concedes that the RTOs/ISOs are "not necessarily a perfect substitute for bilateral sales," especially for a "non-standardized, long-term contract."[73] Nonetheless, the Commission concludes that "the existence of competitive RTO/ISO markets is expected to provide a strong incentive for sellers in bilateral markets to offer at competitive prices."[74]

The NOPR provides no factual or legal support for its claims that private monitoring and mitigation of RTO/ISO markets will indirectly ensure just and reasonable rates in non-RTO/ISO markets. The NOPR quotes statements in that regard from Order Nos. 697 and 816, but in both of those orders the Commission expressly declined to adopt the measure now proposed.[75] In fact, no prior Commission order or court decision supports this proposition.

The proposed rule would rely on market forces alone to prevent the exercise of seller horizontal market power in bilateral sales in RTO/ISO regions. To this extent, the NOPR is plainly unlawful under court precedent. Given the anticompetitive conditions

---

[72] *Id.* at P 58.

[73] *Id.* at P 59 & n.90.

[74] *Id.* at P 59.

[75] *Id.* at P 60.

that led to the enactment of Part II of the FPA,[76] "Congress could not have assumed that 'just and reasonable' rates could conclusively be determined by reference to market price."[77] As the D.C. Circuit has noted, "both we and the Ninth Circuit have held that FERC violates its oversight duty when it imposes no reporting requirements on generators and instead resorts to 'largely undocumented reliance on market forces as the principal means of rate regulation.'"[78]

The NOPR's claim that RTO/ISO markets will discipline market power in long-term bilateral markets is unsubstantiated and illogical. Centralized RTO/ISO capacity markets provide sellers a single choice—and an allocation of the RTO/ISO's capacity costs for a single forward period. This is a far cry from a long-term, non-standardized capacity contract needed by a load-serving entity seeking to provide rate stability for its retail customers. Recognizing this, the Commission's Order No. 719 requires RTOs/ISOs to dedicate a portion of their websites for market participants to post offers to buy or sell power on a long-term basis (one year or more), with the goal of promoting use of long-term bilateral contracts not available in RTO/ISO markets.[79] While one can debate the success of that requirement, it undercuts the Commission's logic here. In particular, purchases from RTO/ISO-run capacity auctions are not a substitute for self-supply arrangements and long-term bilateral capacity purchases to meet the individual needs of

[76] *See Gulf States Utils. Co. v. FPC*, 411 U.S. 747, 758 (1974).

[77] *FPC v. Texaco*, 417 U.S. 380, 399 (1974).

[78] *Blumenthal v. FERC*, 552 F.3d at 882–83 (quoting *Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486, 1508 (D.C.Cir.1984) (footnote omitted) and citing *Pub. Util. Dist. No. 1 v. FERC*, 471 F.3d 1053, 1082 (9th Cir.2006) (holding that FERC could not defer to bilateral energy contract without adopting any monitoring mechanism), *aff'd sub nom. Morgan Stanley v. Pub. Util. Dist. No. 1*, 554 U.S. 527 (2008)).

[79] 18 C.F.R. § 35.28(g)(2) (2014). *See* Wholesale Competition in Regions with Organized Electric Markets, Order No. 719, 73 Fed. Reg. 64,100 (Oct. 28, 2008), *order on reh'g*, Order No. 719-A, 74 Fed. Reg. 37,776 (July 29, 2009), *order on reh'g*, Order No. 719-B, 129 FERC ¶ 61,252 (2009).

load-serving entities, as APPA and NRECA have long argued elsewhere.[80] As is now widely recognized, RTO/ISO capacity markets have not been designed to achieve goals such as fuel diversity or environmental goals.[81] RTO/ISO market-monitoring and mitigation measures will not discipline prices in markets for non-substitutable products.

D. The Commission would lose its ability to directly collect important data and analysis essential to its mandate to promote competition and protect consumers.

Exempting market-based rate sellers from providing market power analysis deprives the Commission of valuable information that supports the agency's ability to fulfill its mandate to promote competition and protect consumers. Such analysis provides information for regulators on changes in the structure of wholesale markets and the ability and incentive of sellers to exercise market power. By removing the requirement, the Commission is also foregoing a valuable source of information that is complementary to market power analysis collected in other areas of the Commission's jurisdiction. These include merger analysis, transmission policy, and policies relating to the certification of gas pipelines that also have interests in generation assets.

These examples highlight the fact that as the federal regulatory authority, the Commission remains the one and only body with the mandate and authority to oversee the functioning and performance of the nation's wholesale electric power markets. The

---

[80] *See* Initial Brief of APPA and NRECA on Minimum Offer Price Rule Issues, *Midwest Indep. Transmission Sys. Operator, Inc.*, Docket No. ER11-4081-001 (Oct. 11, 2013); Post-Technical Conference Comments of APPA, Centralized Capacity Markets in Regional Transmission Organizations and Independent System Operators, Docket No. AD13-7-000 (Jan. 8, 2014); Post-Technical Conference Comments of the National Rural Electric Cooperative Association, Centralized Capacity Markets in Regional Transmission Organizations and Independent System Operators, Docket No. AD13-7-000 (Jan. 8, 2014).

[81] *See, e.g., Calpine Corp. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236 (2018) (order instituting section 206 proceeding to reform PJM capacity market), *reh'g pending.*

20190318-5122 FERC PDF (Unofficial) 3/18/2019 4:47:26 PM

Commission's mandate thus includes ensuring that market design and monitoring and mitigation approaches across different RTOs/ISOs have a degree of consistency that will serve to promote competition and protect consumers. The Commission's own analysis from 2014 and 2017 GAO report supports the notion that this has been problematic for the Commission.[82] The Commission's oversight function is particularly critical in a country with a diversity of regional fuel sources, transmission networks, and state regulatory systems. The proposal to relieve sellers of the requirement to file important market power analysis would create a significant "tear" in the fabric of the Commission's ability to perform this vital oversight.

The loss of market power analysis in the market-based rate domain will also reduce needed transparency and impair the Commission's ability to assess changes in wholesale markets over time and perform comprehensive analysis of competitive conditions within and across wholesale electricity markets under both RTO/ISO and bilateral trading models. The 2017 GAO report highlights exactly why the Commission should retain its requirement for market-based rate sellers to file market power analysis: "FERC has not fully assessed the overall performance of capacity markets. In particular, FERC has not established performance goals for capacity markets, measured progress against those goals, or used performance information to make changes to capacity markets as needed."[83]

---

[82] *See* GAO Report at 17. *See also* Price Formation in Organized Wholesale Electricity Markets: Staff Analysis of Energy Offer Mitigation in RTO and ISO Markets, Docket No. AD14-14-000 (Oct. 2014), available at https://www.ferc.gov/legal/staff-reports/2014/AD14-14-mitigation-rto-iso-markets.pdf.

[83] GAO Report, "Highlights" (unpaginated).

The proposal to dispense with *ex ante* market power screening would also make it more difficult for the Commission and intervenors to challenge market-based rate applications, as the NOPR recognizes.[84] In suggesting that reliance on the presumption that market monitoring and mitigation are sufficient to address market power concerns, the NOPR observes that the Commission and intervenors can rebut this presumption in individual cases.[85] Under the current framework, however, the sufficiency of RTO/ISO market monitoring and mitigation is only placed at issue *after* a seller fails one or both of the indicative screens, resulting in a presumption that the seller has market power.[86] But, as the NOPR concedes, a party challenging market-based rate authority would now be required to demonstrate, *as a threshold matter*, that the seller has market power.[87] This burden shift to market-based rate challengers, coupled with elimination of the requirement to submit information that might be used to satisfy that burden, constitutes a fundamental reordering of the Commission's market-based rate approval framework that will make it more difficult to challenge market-based rate applications.

In sum, the foregoing adverse effects of abolishing market power analysis requirements would directly impact policies governing competitive issues in wholesale markets and in shaping future competition policy initiatives.

---

[84] *See* NOPR at P 53 & n.87.

[85] *Id.* at P 53.

[86] *See id.* at P 8.

[87] *Id.* at P 53 (explaining that "[t]he challenging party would bear the burden of proof to demonstrate that the seller has market power and that such market power is not addressed by existing Commission-approved RTO/ISO market monitoring and mitigation.").

IV. Recommendations

A. The Commission should retain a means to collect market power screen data for important practical, legal, and policy reasons.

For the important practical, legal, and policy reasons explained above, AAI, APPA, and NRECA strongly recommend that the Commission retain *some* mechanism for screening whether market-based rate sellers in RTO/ISO regions may exercise horizontal market power in centralized and bilateral wholesale electricity markets. This is not to say that the present indicative horizontal market power screen requirements and procedures, which have been in place for some years now, necessarily provide the Commission and public with the right information and are the best way to obtain that information. But the Commission should not simply stop collecting such information, stop monitoring sellers' ability to exercise horizontal market power, and trust private entities—RTOs/ISOs and their market monitoring units—to address the matters under a patchwork of inconsistent and constantly changing market rules.

Moreover, while the instant proposal would eliminate a regulatory obligation for a substantial number of market-based rate sellers in RTO/ISO regions, the NOPR is far from a well-targeted means of reducing regulatory burdens that may be truly unwarranted. For instance, smaller market-based rate sellers in RTO/ISO regions without capacity markets, and those located outside RTO/ISO regions, may have the ability to exercise horizontal market power, but under different circumstances than larger sellers, yet they still have to file the same horizontal market power screens as much larger

sellers.[88] A better approach to reducing the regulatory burden while maintaining the Commission's collection of necessary market power data would be to refine the collection mechanism and target the collection to the competitive threat posed by the seller. We recommend that the Commission explore these possibilities in connection with a broader re-examination of the market-based rate program as suggested below.

B. The Commission should not act on this proposed rulemaking before it has acted on related pending rulemakings in Docket Nos. RM16-17-000 and RM16-21-000.

It would be unreasonable to eliminate the Commission's *ex ante* analysis of sellers' horizontal market power as proposed in the NOPR while the Commission is also considering earlier proposed changes to its regulations addressing market-based rates and market power monitoring in the Data Collection NOPR (Docket No. RM16-17-000) and the Market Power NOI (Docket No. RM16-21-000).[89] The NOPR, if adopted, would *reduce* the information available to the Commission for assessing and monitoring the ability of sellers to exercise market power at the same time the Commission is evaluating whether the Commission's existing market power information requirements and analyses are *sufficient*.

The Market Power NOI sought input on "whether the Commission's analyses of market power under [FPA] section 203 and of market-based rate applications are effective at identifying the potential for the exercise of market power, and if not, what

[88] Commission-jurisdictional G&T electric cooperatives (i.e., cooperatives that are not entities described in section 201(f) of the FPA, 16 U.S.C. § 824(f)) with market-based rate authority must comply with the filing and reporting requirements of Commission's market-based rate program.

[89] *See supra* note 9.

improvements can be made."[90] The Commission specifically asked about the efficacy of the pivotal supplier screen, and sought input on potential improvements.[91] The Commission should not scale back the use of the indicative screens until it completes this assessment.

In the Data Collection NOPR, the Commission proposed changes to its regulations for two related but distinct purposes: to collect certain new data – "Connected Entity Information" – from market-based rate sellers and other entities for the Commission's use in market analytics and surveillance; and to revise the data market-based rate sellers must submit to obtain or retain authority to make market-based sales – "MBR Information" – and require it to be submitted in the same manner as the Connected Entity Information.[92] The Commission proposed to consolidate the Connected Entity Information and MBR Information in a relational database to be used for analytics and surveillance as well as administering the Commission's existing regulation of MBR sellers.[93]

AAI, APPA, and NRECA believe that establishment of the relational database would be an important policy innovation that could assist the Commission "in identifying legal and financial connections between market participants, detecting anomalous market behavior, and enforcing the Commission's regulations to protect the integrity of wholesale power markets and ensure just and reasonable rates."[94] The Commission has

---

[90] *See* Market Power NOI at P 11.

[91] *See id.* at P 23.

[92] *See* Data Collection NOPR at PP 11-12.

[93] *See id.* at P 14.

[94] *See Data Collection for Analytics and Surveillance and Market-Based Rate Purposes*, Docket No. RM16-17-000, Comments of the American Public Power Association at 4 (Sept. 19, 2016).

previously recognized the increasing complexity of ownership structures in the electric utility industry.[95] Concerns over such complexity and the need for adequate tools to monitor ownership and control of generating resources counsel against changing the Commission's regulations to reduce the entity-specific information collected through the indicative screens at this time.

Setting aside the instant NOPR to complete the work already pending in the Data Collection NOPR and the Market Power NOI would be the appropriate way for the Commission to proceed.

C. The Commission should also consider a more comprehensive re-examination of its market-based rate program.

Once the Data Collection NOPR and the Market Power NOI proceedings are resolved, the Commission should consider issuing a further notice of inquiry to solicit public comment on any further required re-assessment of the competition analysis the Commission requires for market-based rate sellers, particularly in RTO and ISO markets. Such a notice of inquiry could solicit comments on the structure and content of the competition analysis and other information the Commission should require in allowing market-based rates consistent with the just-and-reasonable standard of the FPA.

This pathway to a new NOI could aim at three major goals. One is to improve the quality and consistency of market power analysis for market-based rate authority in

---

[95] *See*, *e.g.*, *Ownership Information in Market-Based Rate Filings*, 153 FERC ¶ 61,309 at P 6 (2015) ("MBR NOPR"); *Collection of Connected Entity Data from Regional Transmission Organizations and Independent System Operators*, 152 FERC ¶ 61,219 at P 6 (2015) ("Connected Entity NOPR"). Notably, the Commission subsequently terminated both the MBR NOPR and the Connected Entity NOPR, explaining that it would address the issues raised in these NOPRs in the Data Collection NOPR. *See Ownership Information in Market-Based Rate Filings*, 156 FERC ¶ 61,047 (2016); *Collection of Connected Entity Data from Regional Transmission Organizations and Independent System Operators*, 156 FERC ¶ 61,046 (2016).

today's increasingly complex markets, including an assessment of any problematic inconsistencies in market monitoring and mitigation across various RTOs. A second is to reconcile market power analysis for purposes of market-based authority across the other areas where the Commission exercises authority to promote competition and protect consumers, including merger review and transmission policy. Third would be to reduce truly unnecessary regulatory burdens, especially for smaller entities.

AAI, APPA and NRECA suggest that a technical conference would be an effective tool to collect and synthesize expertise and commentary on these important issues and would serve valuably to inform Commission policy moving forward.

Respectfully submitted,

/s/ Diana L. Moss

Diana L. Moss, Ph.D.
President
Randy Stutz
Vice President of Legal Advocacy
AMERICAN ANTITRUST INSTITUTE
1025 Connecticut Avenue, N.W.
Washington, DC 20036
202-828-1226
dmoss@antitrustinstitute.org
rstutz@antitrustinstitute.org

/s/ John E. McCaffrey

Delia Patterson
SVP, Advocacy & Communications and
General Counsel
John E. McCaffrey
Regulatory Counsel
AMERICAN PUBLIC POWER ASSOCIATION
2451 Crystal Drive, Suite 1000
Arlington, VA 22202
202-467-2900
jmccaffrey@publicpower.org

/s/ Randolph Elliott

Randolph Elliott
Senior Director, Regulatory Counsel
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION
4301 Wilson Blvd., 11th Floor
Arlington, VA 22203
703-907-6818
randolph.elliott@nreca.coop

March 18, 2019

20190318-5122 FERC PDF (Unofficial) 3/18/2019 4:47:26 PM

Document Content(s)

AAI-APPA-NRECA Comments FERC RM19-2_final_20190318.PDF................1-35