

**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
AMERICAN PUBLIC POWER ASSOCIATION**

I. INTRODUCTION

The American Public Power Association (“APPA”) submits these Reply Comments in order to address questions posed in the Commission’s May 23, 2017 Notice Inviting Post-Technical Conference Comments (“Notice”) in the above-referenced proceeding. In addition to approximately 50 separate pre-technical conference comments and the approximately 560-page transcript from the two-day technical conference, over 80 sets of initial post-technical conference comments were filed in this proceeding. In order to provide a framework for moving forward, whether immediate or less urgent, APPA first recommends a path forward for the Commission which will allow for immediate action as necessary but in a manner which will allow the Commission to avoid market design by litigation and unintended adverse consequences. Further, the diversity of participants and their positions on the issues posed by the Commission, and some issues not specifically raised by the Commission, is far too broad for these reply comments which the Commission has limited to no more than 10 pages. Therefore, rather than address the merits of all of the positions taken, APPA provides comment on certain general positions taken in comments.

APPA explained in its Initial Comments that the capacity constructs in PJM Interconnection, L.L.C. (“PJM”), ISO-New England (“ISO-NE”) and the New York ISO (“NYISO”) have failed in achieving the goal of creating incentives for investment in needed generation, while also allowing for the continued use of self-supply and bilateral contracts to satisfy capacity obligations.”¹ APPA further suggested that the Commission should first conduct an assessment of whether capacity markets are working to achieve resource adequacy in an optimal and cost effective manner, and then transition from mandatory capacity markets to a voluntary, residual market with greater reliance on bilateral procurement and self-supply.² With this proposal in mind, APPA prefers Path 1 but realizes that the Commission likely will not move to a MOPR-free market design. Therefore, APPA supports Path 2, as well as the principles recommended by Michael Cocco of Old Dominion Electric Cooperative and Brian Forshaw.³ Finally, APPA supported the need for the Commission to resolve these issues as soon as possible, and offered its long-term expectations.⁴ Many of APPA’s positions were shared by other commenters, as discussed further below.

II. REPLY TO SPECIFIC ISSUES RAISED IN INITIAL COMMENTS

A. The Commission Should First and Quickly Adopt Principles

As APPA explained in its Initial Comments,⁵ the capacity markets have never reached a steady state where market participants have been satisfied with these constructs, nor has there been an adequate performance evaluation or demonstration of the benefits of these constructs.

¹ APPA Initial Comments at 4; *see also*, *RTO Capacity Markets and Their Impacts on Consumers and Public Power*, APPA Issue Brief, February 2016.

² *Id.* at 5-7.

³ Pre-conference comments of Brian Forshaw, Connecticut Municipal Electric Energy Cooperative, New Hampshire Electric Cooperative, and Vermont Public Power Supply Authority.

⁴ APPA Initial Comments at 7-15.

⁵ *Id.* at 3-7.

This lack of a consensus of the benefits is reflected in the comments received, where few attempted to demonstrate any net benefits. The only efforts to claim a successful outcome for these constructs are statements regarding the investment dollars for new transmission and/or megawatts of new generation that has been developed.⁶ As APPA has often explained, such claims of the success of market outcomes are misleading, at best.⁷ It is difficult, if not impossible, for entities other than those with access to data to separate the levels of investment that are truly due to capacity constructs. Some investments result from incentives outside the capacity markets, while some increased capacity is due to upgrades of existing plants, withdrawn or canceled retirements, and capacity imports from other regions.⁸ Moreover, nowhere in these initial comments is there any evaluation of whether these constructs have achieved a mix of resources that meet environmental, resiliency and cost-minimization policy goals. Many commenters simply assert that the markets must be protected from state intervention without a justification that these constructs have been shown to produce greater benefits than the alternative – namely, a residual construct with active state, public power and cooperative resource procurements.⁹

Each of the RTOs/ISOs has undertaken efforts to address the interaction of state policies and wholesale markets. However, each is substantively different from the other and the RTOs differ in the level of progress made to date. Additionally, the sectors of market participants (including generators, load-serving entities, market monitors) have offered differing opinions on

⁶ See Initial Post-Technical Conference Comments of PJM Interconnection, L.L.C. at 10 (“PJM Initial Comments”), Post-Technical Conference Comments of the New England Power Generators Association, Inc., at 3.

⁷ See, e.g., *Money for Nothing in the Supply Business*, APPA Issue Brief, March, 2012, available at <http://www.publicpower.org/Media/daily/ArticleDetail.cfm?ItemNumber=34276>.

⁸ *Id.*

⁹ See, e.g., Initial Comments submitted by the Electric Power Supply Association (“EPSA”); NEPGA, Vitrol, Natural Gas Supply Association, Monitoring Analytics, LS Power, Dynegy and Calpine.

the right path, level of urgency and recommended next steps. Given the absence of clear justification for the current capacity constructs and the diversity of positions on how best to address the impact of state policies on wholesale markets, the Commission should act quickly to adopt a set of principles which will guide its review of proposals, and specifically to carefully evaluate the stated goal of market preservation.

Several commenters have recommended that the Commission first adopt principles and/or provide guidance for how the eastern RTOs should address state policies which can impact wholesale markets.¹⁰ APPA agrees that as an initial matter, the Commission should adopt principles against which all proposals for addressing state policies which can impact wholesale markets in the eastern RTOs would be measured in order to determine whether they meet the just and reasonable mandate of the Federal Power Act. As discussed in APPA's Initial Comments, APPA recommends using as a basis for such Commission principles, the principles proposed by ODEC and Brian Forshaw in their respective pre-technical conference comments, with the additions suggested in the AMP Comments.¹¹

It is noteworthy that the additional principles proposed by AMP include specific beneficial features that are not present in the existing capacity constructs. For example, AMP recommends the principle that any alternative constructs must "be consistent with the needs of wholesale customers and consumer preferences (and operate within the constraints) as reflected

¹⁰ See APPA Initial Comments at 12-13; PJM Initial Comments at 2-3; PJM Comments at 2-3; Initial Post-Technical Conference Comments of the National Rural Electric Cooperative Association at 4-10 ("NRECA Comments"); Initial Comments of Old Dominion Electric Cooperative at 2-4 ("ODEC Comments"); Post-Technical Conference Comments of American Municipal Power, Inc. at 12-13 ("AMP Comments"); Post-Conference Comments of Cliff Hamal at 2; Post-Technical Conference Comments of Multiple Intervenors at 6-7; Post-Technical Conference Comments of DirectEnergy Business, LLC at 5-8; Post-Technical Conference Comments of Connecticut at 15; Comments of the Edison Electric Institute at 4.

¹¹ AMP Comments at 12.

through applicable state environmental programs and all other jurisdictional policy objectives.” Any construct that is consistent with consumer needs and preferences must by design allow for state and local policies to take precedence over market designs that impede such resource decisions, and that does not distinguish between megawatts.

B. The Commission Must Revisit and Reinforce Alternatives to Capacity Markets

As APPA noted in its Initial Comments, the Commission must look outside of the capacity market paradigm for solutions.¹² A number of the commenters similarly recommend that an optimal solution would be for the capacity markets to play a residual rather than central role in resource development and retention, with bilateral contracts and ownership by load-serving entities (“LSEs”) as the primary means to procuring capacity.¹³ While some commenters may have downplayed the significance of such self-supply, LSEs who have a primary responsibility to serve customers share the Commission’s acknowledgement that bilateral contracts and other self-supply mechanisms are fundamental aspects of long-standing, traditional business models which must be encouraged and accommodated. This acknowledgement of the need to preserve established, non-market procurement mechanisms also was specifically included in the recommended principles of at least one RTO. In its Initial Comments, PJM included the following in its proposed principles: “[r]ecognize that established business models (such as the public power business model) . . . should continue to be respected and accommodated.”¹⁴

¹² APPA Initial Comments at 6-7.

¹³ See, e.g., Comments of American Municipal Power, Inc., National Rural Electric Cooperative Association, Old Dominion Electric Cooperative, Transmission Access Policy Study Group, New England Public Power Association, Xcel Energy Services, American Electric Power & Dayton Power and Light.

¹⁴ PJM Comments at 11.

Notably, concerns over the impact of this proceeding and the need to encourage and accommodate bilateral contracts has been expressed even by entities outside of the three eastern RTOs. In its comments, Xcel Energy Services, Inc. (“XES”), the service company for several entities providing power and transmission service within SPP, MISO and non-RTO regions within the Western Interconnection, stated as follows:

XES believes the Commission should avoid merely tweaking existing forward capacity markets around the edges but rather undertake a full-scale review of whether capacity needs in the eastern RTO and ISOs could be better met through bilateral market structures, which are functioning well in states where utilities remain vertically integrated. XES recognizes that reliance on bilateral markets in areas where restructuring has occurred may present challenges, but we believe those challenges are surmountable and that a bilateral approach to procurement of capacity in these markets will better serve both end use customers and generators than the current forward RTO/ISO capacity markets.¹⁵

APPA urges the Commission to consider the perspective of these commenters in the development of principles.

Consistent with the need for the Commission to adopt principles which will allow RTOs to respond to state policies in a manner that will encourage and accommodate bilateral contracts and other non-market self-supply (*i.e.*, owned generation), APPA notes that several parties share APPA’s preferred approach of Path 1, removal of the Minimum Offer Price Rule (“MOPR”) altogether.¹⁶ For the reasons discussed in APPA’s Initial Comments, the MOPR has been unreasonably expanded beyond its original purpose of mitigating buyer side market power and would be unnecessary in a residual capacity market. In this regard, APPA notes that the recent

¹⁵ Xcel Energy Services Comments at 2-3.

¹⁶ *See, e.g.*, Comments of the New York Power Authority at 3-4; Post-Technical Conference Comments of the Maryland Public Service Commission at 10-11; Post-Technical Conference Comments of the Nuclear Energy Institute at 2; Post-Technical Conference Comments of Michael Panfil, Senior Attorney and Director of Federal Policy, Environmental Defense Fund at 13-14; Post-Technical Conference Comments of Connecticut at 7-8; Post-Technical Conference Comments of Transmission Access Policy Study Group at 12-14.

opinion issued by the U.S. Court of Appeals for the District of Columbia Circuit in *NRG Power Marketing, LLC, et al. v. FERC*, Case No. 15-1452, opinion issued July 7, 2017, creates additional uncertainty regarding the ability of LSEs to rely on exemptions from the MOPR as a means to ensure that their resources procured outside of the capacity market can be used to meet their capacity obligations. In the case, the court vacated and remanded to FERC orders wherein, among other things, FERC approved the self-supply exemption and the competitive entry exemption from PJM's MOPR. It is too early to know how FERC or PJM will react to the opinion. However, it at least creates additional, unreasonable uncertainty over threats to the very long-standing business models which, in the creation of the self-supply exemption, were agreed to not pose a threat of artificial price suppression and, therefore, not be subject to the MOPR.

C. APPA's Preference for Path 1 or 2 is Not Mutually Exclusive with Path 4

APPA's preferred path is Path 1 – elimination of the MOPR as consistent with a return to residual capacity markets, with Path 2 as an alternative. As opposed to explicitly supporting capacity markets, several commenters recommended the pricing of state policy attributes under Path 4 and/or broadly recommend the Commission continue its focus on improving price formation in the energy and ancillary services markets.¹⁷ APPA emphasizes here the point made in ¹⁸its Initial Comments, that the pricing of state policy goals must be done “*along with* and not as a replacement to an accommodation of state policies or a move to a voluntary residual capacity market.”

¹⁷ See, e.g., Post-Technical Conference Comments of Exelon at 3-4; Post-Technical Conference Comments of Andrew G. Place, Vice Chairman Pennsylvania Public Utility Commission at 2; Comments of Vitol, Inc. at 9; Initial Post-Technical Conference Comments of Independent Power Producers of New York, Inc. at 9-10; Post-Technical Conference Comments of the New Jersey Board of Public Utilities.

¹⁸ APPA Comments at 11.

APPA does not support the use of Path 4 or further changes to energy and ancillary services markets if accompanied with a continued or expanded MOPR or Buyer-Side Mitigation. Instead, were the RTOs and the Commission to determine that the optimal path is to seek to price state policies in the energy markets, then there will be no need for an attempt to simultaneously prop up prices in the capacity markets. Moreover, simply adjusting prices may further but not necessarily lead to the desired policy goals. Public power, cooperative utilities and the states may need to procure specific resources to achieve their policy objectives, and must retain the right to do so.¹⁹ As the Maryland PSC noted, “any federal policy to value non-price attributes such as through the pricing of carbon should not be viewed as preempting other complementary state policies. That type of top-down, one-size-fits-all approach would inflict great harm on state sovereignty.”²⁰ APPA notes that the U.S. Court of Appeals for the Second Circuit recently rejected the appeal of orders that dismissed complaints challenging the Connecticut Renewable Portfolio Standards as well as legislation promoting renewable generation in the ISO-NE footprint. In an opinion issued on June 28, 2017, the court rejected claims that the Connecticut legislation was preempted by the FPA²¹ and PURPA.²² The court distinguished the Connecticut program from the Maryland legislation at issue in *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288 (2016)(“*Hughes*”) stating among other things that the limited holding in *Hughes* does not apply to “the kind of traditional bilateral contracts between utilities and generators that are subject to FERC review for justness and reasonableness.”

¹⁹ In this regard, APPA notes that in its Order No. 1000, the Commission specifically acknowledged state laws or regulations by including them as Public Policy Requirements which must be considered in transmission planning. *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000 at PP 2, 203-224, FERC Stats. & Regs. ¶ 31,323 (2011); *order on reh’g*, Order No. 1000-A, 139 FERC ¶ 61,132; *order on reh’g and clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *aff’d sub nom. S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014).

²⁰ Maryland PSC Comments at 13.

²¹ 16 U.S.C. § 824 et seq.

²² *Public Utility Regulatory Policies Act of 1978*, 43 U.S.C. § 824c.

III. CONCLUSION

APPA urges the Commission to initially adopt principles to evaluate future proposals for further capacity market reforms. In developing such principles, the Commission should look beyond simply preserving market constructs that have not been shown to produce tangible benefits and recognize instead the benefits of allowing for greater state and local resource decision-making.

Respectfully submitted,

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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/