

February 19, 2010

VIA E-MAIL AND FIRST CLASS MAIL

The Honorable Jon Wellinghoff
Chairman
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426

Re: RTO/ISO Performance Metrics, Docket No. AD10-5-000

Dear Chairman Wellinghoff:

The American Public Power Association, Electricity Consumers Resource Council (ELCON), National Consumer Law Center, on behalf of our low-income clients, PJM Industrial Customer Coalition, Portland Cement Association, and Public Citizen commend the Commission for issuing a notice in the above-noted docket soliciting public comment on proposed metrics to measure the performance of Regional Transmission Organizations (“RTOs”). Our respective organizations intend to file comments in this docket, and we very much appreciate the opportunity the Commission has provided us to do so.

We strongly urge you to consider fully all comments that will be submitted, and to develop a set of RTO metrics that meaningfully assess whether the centralized markets that RTOs operate in fact provide benefits to end-use consumers. As you know, the Commission has undertaken this effort in response to the Government Accountability Office’s Report No. GAO-08-987, issued in September of 2008.¹ As the GAO noted in its report:

It has been over 10 years since major federal electricity restructuring was introduced and some of the first RTOs were developed to facilitate it, yet there is little agreement about whether restructuring and RTOs have been good for consumers, how they have affected electricity prices, and whether they have produced the benefits FERC envisioned. Compounding this, rising electricity prices and diverse regional interests complicate an unbiased discussion of the merits of RTOs and restructuring. Although there are challenges to answering questions about the benefits of RTOs, a more structured and formalized approach to RTO oversight would be beneficial.[²]

The February 3 Notice in the above-noted docket states that “[a]s recommended by GAO, Commission staff has worked with a team comprised of staff from all the jurisdictional ISOs/RTOs to develop a set of performance metrics that the ISOs/RTOs will use to report annually to the Commission.” We understand, however, based on communications to certain of

¹ “Electric Restructuring—FERC Could Take Additional Steps to Analyze Regional Transmission Organizations’ Benefits and Performance” (“GAO Report”).

² *Id.* at 58 (emphasis supplied).

our organizations by the Commission staff, that the RTOs themselves developed the metrics attached to the February 3 Notice, with input from Staff. Even so, our organizations have remained hopeful that the Commission would fully consider consumer representatives' input into the development of the proposed metrics, based on our to-be-submitted comments.

Our hopes on this score, however, have been severely undercut by the discussion of RTO metrics held at the February 4 Technical Conference that the Commission held in various Order No. 719 implementation dockets. While the noticed subjects of that conference were RTO governance and stakeholder processes, some speakers on the first panel, including John Anderson of ELCON, mentioned the need for generator-specific metrics in their remarks. This led you to respond: "Now my colleagues may differ with me, but I will tell you today personally that I don't think that metric is one that I'm going to be advocating for unless you can somehow compellingly convince me that it is, and right now, today, I'm not convinced."³

Our organizations strongly believe that measurement of the revenues and production costs of the generators selling power into RTO markets is highly relevant to the questions the GAO posed, *i.e.*, whether "RTOs have been good for consumers, how they have affected electricity prices, and whether they have produced the benefits FERC envisioned." But even more important, we believe this information is legally required for the Commission to carry out its statutory mission under Sections 205 and 206 of the Federal Power Act: to ensure that "public utilities" (including both the selling generators and the RTOs themselves) charge "just and reasonable" rates. The Commission has the flexibility to depart from traditional cost-of-service regulation of "sales for resale" of electric power, in favor of a market-based rate regime, and it has done so. However, it still has the legal obligation to ensure that the resulting rates are "just and reasonable," which obligation includes (but is not necessarily limited to) ensuring that consumers are not subjected to the exercise of market power. As the United States Court of Appeals for the Ninth Circuit stated in *Lockyer ex rel State of California v. FERC*, 383 F.3d 1006, 1012-3 (9th Cir. 2004) (emphasis supplied):

The use of market-based tariffs was first approved in the natural gas context, *see Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 870 (D.C. Cir. 1993), then as to wholesale sellers of electricity, *see Louisiana Energy and Power Authority v. FERC*, 141 F.3d 364, 365 (D.C. Cir. 1998). However, approval of such tariffs was conditioned on the existence of a competitive market. *Id.* Thus, market-based applications were approved only if FERC made a finding that "the seller and its affiliates [did] not have, or adequately [had] mitigated, market power." *Id.* [Footnote omitted.] The principle justifying this approach as "just and reasonable" was that "[i]n a competitive market, where neither buyer nor seller has significant market power, it is rational to assume that the terms of their voluntary exchange

³ No court reporter was present at the conference, so it appears there will be no official transcript. This transcription was prepared by reviewing the posted video file of the conference. If there are any inaccuracies, the signatories to this letter would appreciate knowing them, as our best efforts were used to capture what was said.

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are reasonable, *and specifically to infer that the price is close to marginal cost, such that the seller makes only a normal return on its investment.*" *Tejas Power Corp. v. FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990).

The RTO metrics that our organizations seek to have the Commission require go to this very issue: whether the prices that the generators obtain in RTO-run centralized markets are close to their marginal costs, such that they make only a normal return on their investment. If RTO markets are not sufficiently disciplining prices, and generators are making supra-competitive profits from their sales into these markets or as a result of the existence of these markets, then this calls into serious question whether consumers are benefiting from them. In our view, this is the essence of the inquiry that the GAO report recommended the Commission undertake.

For these reasons, our organizations are extremely concerned that you do not believe that RTO metrics to assess generator costs and profits are relevant to the issue of RTO performance. We call upon you to keep an open mind and consider our views on this subject during the comment phase of this docket (as you said at the February 4 Technical Conference you would do), and to ensure that any RTO metrics that the Commission develops effectively measure generator costs and profits.

Our organizations stand ready to work with you, the other Commissioners, and Staff to develop, through a transparent process, a rigorous set of appropriate metrics to respond to the GAO Report.

Sincerely,

American Public Power Association
Electricity Consumers Resource Council
National Consumer Law Center, on behalf of our
low-income clients
PJM Industrial Customer Coalition
Portland Cement Association
Public Citizen

cc: Commissioner Philip Moeller
Commissioner Marc Spitzer
Commissioner John Norris
Michael McLaughlin
Sandra Waldstein
Michael Bardee
Jeffrey Hitchings
Lisa Luftig
Docket File in AD10-5-000