

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

Modernizing Electricity Market Design

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Docket No. AD21-10-

REPLY COMMENTS OF THE RETAIL ENERGY SUPPLY ASSOCIATION

Pursuant to the Federal Energy Regulatory Commission’s (“Commission’s”) Notice Inviting Post-Technical Conference Comments dated April 5, 2021 (“Notice Inviting Comments”), the Retail Energy Supply Association (“RESA”)¹ hereby submits these Reply Comments in response to the Commission’s inquiry on the implications of retaining the expanded minimum offer price rule (“Expanded MOPR”) in the PJM capacity market as well as possible alternative approaches that could be applied on a prospective basis to replace the Expanded MOPR. RESA submits these Reply Comments to support fully the need for robust competitive wholesale capacity markets in order to permit competitive retail suppliers to provide their services in states that promote retail access. In support of this Reply, RESA submits as follows:

¹ The comments expressed in this filing represent the position of the Retail Energy Supply Association (RESA) as an organization but may not represent the views of any particular member of the Association. Founded in 1990, RESA is a broad and diverse group of more than twenty retail energy suppliers dedicated to promoting efficient, sustainable and customer-oriented competitive retail energy markets. RESA members operate throughout the United States delivering value-added electricity and natural gas service at retail to residential, commercial and industrial energy customers. More information on RESA can be found at www.resausa.org.

I. BACKGROUND

A. RESA

RESA is a non-profit trade association of independent corporations that are involved in the competitive supply of electricity. RESA and its members are actively involved in retail electricity markets throughout the United States, including retail markets in each of the Commission-approved RTO/ISOs. Many of RESA's members are active in PJM markets.

B. April 5, 2021 Request for Comments

On March 23, 2021, the Commission held the first of its planned technical conferences on the role of capacity market constructs in the Regional Transmission Organization/Independent System Operators ("RTO/ISOs") of PJM Interconnection, L.L.C., ISO New England, Inc. ("ISO-NE") and New York Independent System Operator, Inc. ("NYISO"). The March 23 technical conference largely addressed capacity issues in PJM, particularly the effects on capacity markets from the Expanded MOPR. In its April 5, 2021 Notice Inviting Comments, the Commission invited interested persons to file comments on the following topics: (1) the implications of the existing PJM Expanded MOPR; and (2) potential alternatives to the Expanded MOPR in PJM. A number of entities submitted initial comments. RESA files these Reply Comments to express support for capacity market mechanisms that retain and encourage workably competitive wholesale capacity markets which provide benefits retail consumers served by RESA members. RESA believes that it is possible to have workably competitive wholesale capacity markets that accommodate state policy objectives and RESA members look forward to participating in the PJM ongoing stakeholder process. Competitive wholesale capacity markets allow RESA members to

offer innovative and market-based services to retail, commercial and industrial customers in states where retail access is permitted.

II. REPLY COMMENTS

Many entities support prospective changes to the PJM capacity market that address deficiencies in the Expanded MOPR. In fact, PJM itself notes that the Expanded MOPR goes further than necessary and “has the potential to over-correct and frustrate legitimate state policy goals such as those designed to meet environmental or economic development objectives.”² PJM notes that it is in the midst of a stakeholder process to implement a number of capacity market design changes and anticipates that it will make a Federal Power Act (“FPA”) Section 205 filing to implement those changes by mid-July 2021.³ Many segments of the industry from industrial customers,⁴ to wholesale service providers,⁵ to the PJM Independent Market Monitor⁶ recognize the benefit of competitive wholesale markets. Those who call for residual capacity market constructs, including the election of the FRR option more broadly or bi-lateral capacity markets, would hurt competitive markets and impact adversely competitive retail markets that have been shown to benefit retail customers through innovation and reduced rates. In short, a robust competitive wholesale capacity market is necessary for RESA members to be able to provide a wide variety of innovative services to end use customers in states that provide retail choice by statute.

² See Post-Technical Conference Comments of PJM (“PJM Comments”), at p. 4.

³ See *Id.*, at p. 1.

⁴ See Initial Comments of the PJM Industrial Customer Coalition, at p. 4 (“[t]he capacity market reforms must not cause harm or otherwise hinder state rules and policies supporting retail access for retail customers”).

⁵ See, e.g., Initial Comments of Shell Energy North America (US), L.P. at p. 6-7.

⁶ See, Comments of the Independent Market Monitor for PJM at p.4.

A. RESA Supports A Robust and Competitive Wholesale Capacity Market that Can Accommodate State Policies and Opposes Creation of a Residual Capacity Market

If capacity and load can be removed from PJM's wholesale capacity market, either through an FRR-type alternative or by bi-lateral contracting, benefits associated with state statutes providing for retail electric competition will be revoked or marginalized, and retail suppliers and their customers will be harmed by this loss of competition and choice. Legislatures in multiple PJM states have adopted statutes to ensure that customers – wholesale *and retail* – benefit from competition. It is possible to design and implement changes to the RPM that maintains the competitive procurement of capacity and energy while also addressing the effects of out-of-market payments awarded by states and RESA members intend to work with other stakeholders and PJM in working to develop such a methodology.

In the PJM footprint, the majority of states that have implemented statutes and/or regulations allow competitive retail suppliers to provide not only the commodity products but also electricity capacity-related products and services to end-use customers, which may be commercial, industrial or residential customers. While each state program may have different features, all permit the load serving entity (“LSE”) to offer RTO capacity-related products and services as part of the package of service offerings. Removal of what could be a significant amount of capacity from the Forward Capacity Market (“FCM”) not only reduces the competitiveness of the wholesale capacity market, but it stifles the innovation, benefits and risk sharing that retail suppliers bring to retail markets in states that permit non-incumbent utilities to serve retail load.

Services provided by retail suppliers such as RESA members have reduced peak demand as well as consumption of energy, lowered prices, and provided other valuable services to consumers. Congress, the Commission and many states in the PJM footprint have spent years

developing a competitive wholesale capacity market. RESA believes that rather than retreat from competition, PJM and the Commission must continue to devise a framework that accommodates state subsidization of generation pursuant to state policies while at the same time promoting competitive capacity markets. Re-regulation, which is essentially what some commenters propose, will impose significant complexity, uncertainty and may require state law changes and significant implementation challenges that will ultimately competitive capacity markets. Rather than remove generation and load from competitive wholesale markets, the Commission, PJM and PJM's stakeholders should focus on accommodating *both* state policies that encourage generation resources by making out-of-market payments *and* maintaining a robust and competitive capacity market.

B. The Commission Should Not Retreat From A Forty Year Long-Standing Commitment to Competitive Wholesale Markets

Starting in 1978 with enactment of the Public Utility Regulatory Policies Act (“PURPA”),⁷ Congress has enacted legislation that moves wholesale electric markets toward competition. Each time the Commission or Congress recognized a need to further encourage development of competition, the Commission or Congress acted.

Starting with PURPA, public utilities, among others, were required to purchase power from third party and unaffiliated qualifying cogeneration and small power production facilities (“QFs”) at the utility’s avoided cost rate. In the Energy Policy Act of 1992,⁸ Congress expanded the universe of generators capable of selling energy without traditional regulatory oversight – creating Exempt Wholesale Generators (“EWGs”) that were exempt from the burdensome regulation by

⁷ Pub. L. 95-617, 92 Stat. 3117 (Nov. 19, 1978).

⁸ 106 Stat. 2776 (Oct. 24, 1992).

the Securities and Exchange Commission (“SEC”) under Public Utility Holding Company Act of 1935.

Next, in 1996, the Commission tackled greater access to transmission in issuance of Order Nos. 888⁹ and 889.¹⁰ The provision of open access transmission service led to the development of ISOs/RTOs.¹¹ The Commission next standardized interconnection procedures when it issued Order No. 2003 in 2003.¹²

The development of markets and access to transmission led to the Commission permitting sales for resale in interstate commerce at market-based rates.¹³ Around the same time, Congress enacted the Energy Policy Act of 2005,¹⁴ which, modernized the Federal Power Act’s jurisdictional requirements for mergers, required public utilities to study and implement standards on net metering, and repealed PUHCA 1935, transferring record-keeping jurisdiction over public utilities

⁹ *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 FR 21540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh’g*, Order No. 888-A, 62 FR 12274 (Mar. 14, 1997), FERC Stats. & Regs. ¶ 31,048, *order on reh’g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh’g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff’d in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff’d sub nom. New York v. FERC*, 535 U.S. 1 (2002).

¹⁰ *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, *order on reh’g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh’g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh’g*, Order No. 890-C, 126 FERC ¶ 61,228, *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

¹¹ *Regional Transmission Organizations*, Order No. 2000, 65 FR 809 (Jan. 6, 2000), FERC Stats. & Regs. ¶ 31,089 (1999), *order on reh’g*, Order No. 2000-A, 65 FR 12088 (Mar. 8, 2000), FERC Stats. & Regs. ¶ 31,092 (2000), *aff’d sub nom. Pub. Util. Dist. No. 1 of Snohomish County, Washington v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

¹² *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 68 FR 49846 (Aug. 18, 2003), FERC Stats. & Regs. ¶ 31,146, at P 676 (2003), *order on reh’g*, Order No. 2003-A, 69 FR 15932 (Mar. 26, 2004), FERC Stats. & Regs. ¶ 31,160, *order on reh’g*, Order No. 2003-B, 70 FR 265 (Jan. 4, 2005), FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh’g*, Order No. 2003-C, 70 FR 37661 (Jun. 30, 2005), FERC Stats. & Regs. ¶ 31,190 (2005), *aff’d sub nom. Nat’l Ass’n of Regulatory Util. Comm’rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1230 (2008).

¹³ *Conditions for Public Utility Market-Based Rate Authorization Holders*, Order No. 674, FERC Stats. & Regs. ¶ 31,208 (2006).

¹⁴ Pub. L. 109-58, 119 Stat. 594 (Aug. 8, 2005).

from the SEC to the Commission. Finally, the Commission issued Order No. 1000, which consolidated transmission planning on a regional basis.¹⁵

These Commission-led efforts resulted in what exists today in PJM – competitive capacity, energy and ancillary service markets, robust reliability standards, robust capacity performance standards and sophisticated real-time and day-ahead energy markets. When issues have arisen – such as a concern that capacity resources did not perform adequately when PJM’s bulk transmission system was in distress, PJM and its stakeholders developed a response -- PJM’s Capacity Performance Program. In short, PJM and stakeholders have worked together to find solutions to issues, while retaining the fundamental competitive market paradigm.

As the Commission promoted competition in wholesale markets, many states in the PJM footprint enacted laws and implemented regulations to promote retail competition. Competition and innovation in retail markets is really just another step in the further development and viability of competitive wholesale markets. Retail suppliers such as RESA members, have stepped in and offered innovative services to retail customers by procuring wholesale services, including capacity, from PJM capacity, energy and ancillary services markets. Competitive retail suppliers may: (1) provide commodity retail energy based on fixed, indexed or variable prices; (2) offer RTO capacity-related products and services; (3) offer demand response services; (4) offer both capacity and commodity-based energy efficiency services; and/or (5) offer electricity with a certain component of renewable energy – or all renewable energy. Retail suppliers also offer non-commodity-based services, including market data and analytical analysis, and integrated home

¹⁵ *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 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). These are just a few of the efforts of the Commission to spur competition in wholesale markets.

solutions. Retail suppliers often serve customers under long-term contracts. Retail suppliers provide critical services to customer that allow them to efficiently procure their energy supplies in a way that traditional, vertically-integrated utilities cannot.

After forty years of commitment to and development of competitive wholesale markets, the Commission must not step back and retreat from markets that have provided benefits to wholesale and retail customers. The Commission must move forward and order PJM and its stakeholders to find a competitive solution to the latest issue – incorporating state-mandated subsidies to generators to support state policy goals into wholesale capacity markets. The Commission must remain committed to competitive wholesale capacity, energy and ancillary service markets and direct PJM to work with stakeholders to develop proposals that incorporate resources that receive state subsidies into the wholesale competitive capacity markets.

C. Re-Regulation of Capacity Markets Will Have Adverse Effects that Will Harm Customers

Retail suppliers such as RESA members bring innovation and provide services to commercial, industrial and residential consumers that provide benefits not replicated by incumbent utilities. Every retail supplier's load is different, and in order to offer competitive services, retail suppliers require both a capacity market and an energy market that provides liquidity and price transparency. Transparency in capacity, energy and ancillary service markets is crucial for retail suppliers to meet the individualized needs of their customers and in turn to build products and services that meet customer needs. Reducing competition in capacity markets and removing load from the capacity market and attempting to socialize the costs of wholesale market products and services will remove differentiation and innovation. This will harm innovative retail suppliers and shift risk from the market to their customers. The Commission must ensure that all wholesale products and services are just and reasonable and not unduly discriminatory.

A critical role that retail suppliers have taken on is market risk. Retail suppliers, in developing their innovative products and, in competing against each other to serve customers, have radically changed the traditional utility rate model. Vertically integrated investor owned utilities serve customers based on a particular customer's regulated rate class. In return, the utility recovers its cost of service from customers, receiving a regulated rate of return on investment. In contrast, retail suppliers meet the needs of their customers on an individual basis. A commercial customer operating 24 hours a day, 7 days a week may purchase a service tailored specifically to that need; a customer with needs that peak during the day may receive a service to meet its needs that is priced differently. Simply put, there is no one size fits all/standardized service, which is a great benefit to customers who are not one size fits all. Customers may lock in their pricing and terms and conditions of service for terms of up to 5 years.

Creating a residual capacity market by removing generation and commensurate load impedes what has become a vibrant competitive retail market to the detriment of customers. First, a portion of the capacity product will not be subject to competitive forces. Today, retail suppliers use tools developed to price and offer innovative services by hedging and absorbing risks in competitive wholesale markets to offer long-term, fixed price, all-in contracts to meet a customer's individual needs. A residual capacity market will balkanize competitive markets. The retail supplier may no longer be absorbing the full pricing risk, and customers will not see the benefits of innovative services and pricing.

A residual capacity construct increases risk to retail suppliers. Currently, retail suppliers make capacity commitments in the FCM three years in advance, but generally based on the load served today. This works because customers migrating to and from retail suppliers carry the same market-based capacity cost. In a residual capacity market, migration between/among suppliers

and even back to the utility will be more complicated because a certain amount of capacity may no longer be competitively and/or transparently priced. There could also be a mis-match in that the residual capacity would remain a forward market and the FRR-type may not. This increases the risk to retail suppliers, who must price services using capacity prices that are determined three years ahead of time. At a minimum, any capacity carved out of any residual capacity market should match characteristics, including the forward nature, of the existing capacity market design.

1. A Residual Capacity Construct will Create Regulatory Uncertainty

Removal of capacity from the PJM capacity market will create uncertainty in the market place to the detriment of wholesale and retail customers. While states that promote retail access have programs that vary, the common features are participation in PJM's competitive wholesale capacity markets. Removal of capacity and load from the PJM capacity market could create significant jurisdictional issues to the extent that any state-derived rate "affects" a wholesale rate. Moreover, each state may have to accommodate removal of capacity and load and, consistent with Commission policy, each may devise a different way to allocate these wholesale costs to LSEs or load.

In addition, additional complexity arises when the Commission's affiliate rules are applied pursuant to 18 C.F.R. §§ 35.43 and 35.44, which will apply to sales between a franchised public utility and its market-regulated power sales affiliate, which may own significant amounts of generation removed from the wholesale capacity market. The unpredictability becomes more problematic when retail suppliers are offering similar products and services to customers in different states, especially for customers with operations in more than one state.

This unpredictability also impacts the ability of customers to forecast pricing over the short- and long-term, limiting the ability of customers to lock-in predictable energy prices and the

retail supplier the ability to hedge this pricing risk. There will be customers who benefit and those who will pay more, not based on competitive market forces, but by individual state pricing schemes as applied. Similarly-situated customers may pay vastly different rates based solely on their location vis a vis the level of subsidized generation in a region. That is not a just and reasonable result.

Depending on how states address these issues, creating a residual capacity market could reduce competition and reduce transparency. Capacity purchases outside the PJM capacity market will become separated by state and further separated by barriers such as individual generator demands in locations throughout the PJM footprint. Capacity purchasers in the residual capacity market will face far less choices in resources and the market will be less robust. The residual capacity market will need to be monitored carefully to ensure that generators remaining in the capacity market do not have market power. These events, in turn, may adversely affect the products and services that retail suppliers can offer their commercial, industrial and residential customers that have received benefits from their access to competitive services over many years.

Third, a residual capacity market will stifle further innovation to the detriment of wholesale and retail markets. Retail markets continue to grow at a robust pace. Commercial and industrial customer participation in retail markets has grown substantially. In 2019, retail suppliers served more than 3 million commercial and industrial customer accounts.¹⁶ In addition, in 2019, approximately 72.0% of load eligible to switch in 14 customer choice markets was served by retail suppliers.¹⁷ Retail competition is widely accepted and supported across the electric utility industry.

¹⁶ See, O'Connor, Philip, Ph.D, *Restructuring Recharged*, The Superior Performance of Competitive Electricity Markets 2008-2016, April 2017, at 15, available at https://www.resausa.org/sites/default/files/RESA_Restructuring_Recharged_White%20Paper_0.pdf. The data contained in this Report has been updated with 2019 data and is available at [http://resausa.org/sites/default/files/Restructuring%20Recharged%20All%20Update_FINAL.pptx%20\(1\).pdf](http://resausa.org/sites/default/files/Restructuring%20Recharged%20All%20Update_FINAL.pptx%20(1).pdf)

¹⁷ *Id.*

In sum, the Commission should consider the benefits provided by retail suppliers that are supported by robust competitive wholesale capacity markets. As the electric markets continue to evolve and transition to one with majority renewable resources, retail suppliers must be able to evolve and do what they do best – design innovative retail products for consumers.

III. CONCLUSION

RESA members do not oppose states offering public policy-based subsidies to generators. RESA members believe, however, that competitive markets, including competitive capacity markets, are critical to further refinement of wholesale markets and continued development of competitive retail markets. Competitive markets benefit ultimate consumers. Congress and the Commission have spent 40 years developing and refining competitive markets and should not revert to cost-based ratemaking and balkanization of the PJM's integrated capacity marketplace. PJM must be directed by the Commission to work with stakeholders to develop a methodology that incorporates these resources into a workably competitive wholesale market.

WHEREFORE, RESA respectfully requests that the Commission consider these Reply Comments in its deliberation of these important issues.

Respectfully submitted,

Elizabeth W. Whittle

Elizabeth W. Whittle
Counsel for
The Retail Energy Supply Association

Of Counsel:
Nixon Peabody, LLP
799 9th Street, N.W.
Suite 500
Washington, DC 20001
202-585-8338
ewhittle@nixonpeabody.com

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Argument, via email, on each person listed on the Official Service List compiled by the Secretary in this proceeding.

Dated in Washington, DC this 10th day of May, 2021.

Elizabeth W. Whittle
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